CIVIL RIGHTS

1965

HEARINGS

BEFORE THE

SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

EIGHTY-NINTH CONGRESS

SECOND SESSION

ON

S. 3296, Amendment 561 to S. 3296, S. 1497, S. 1654, S. 2845, S. 2846, S. 2923 and S. 3170

H.R. 14765

JUNE 6, 7, 8, 9, 10, 13, 14, 15, 16, 21, 22, 24, AND 28, 1966

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CIVIL RIGHTS

MONDAY, JUNE 6, 1966

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:35 a.m., in room 2228, New Senate Office Building, Senator Samuel J. Ervin, Jr., presiding.

Present: Senators Ervin, Kennedy of Massachusetts, Bayh, Dirksen, Hruska, Scott, and Javits.

Also present: George Autry, chief counsel; H. Houston Groome, Jr., Lawrence M. Baskir, and Lewis W. Evans, counsel; and John Baker, minority counsel.

Senator ERVIN. The subcommittee will come to order. I have a statement which I propose to read. It is somewhat long, but since George Washington fought for 7 years to gain freedom for the Americans, I think the least I can do is to try to do what I can for about 45 minutes to preserve the freedom of the people and I hope to do so.

It will probably take me about 40 minutes to read my statement. I regret that I didn't have the statement completed in time to give you advance notice so you wouldn't have to be here quite as early as you came.

Today the Subcommittee on Constitutional Rights begins hearings on S. 3296, the administration's proposed Civil Rights Act of 1966, and six other civil rights bills: S. 1497, S. 1654, S. 2845, S. 2846, S. 2923, and S. 3170; and an amendment I have introduced on behalf of myself and Senator Fulbright in the nature of an additional title to S. 3296. The amendment is designed to define title VI of the Civil Rights Act of 1964 according to the intent of Congress and Federal court decisions. The texts of these bills, an analysis of S. 2923, S. 2845, and S. 3296, the text of my amendment and an analysis of it, will be printed at this point in the record.

(The documents referred to follow:)

ANALYSIS OF AMENDMENT NO. 561 TO S. 3296

The amendment would redesignate Title VI of S. 3296 as Title VII thereof, and redesignate Sections 601 and 602 thereof as Sections 701 and 702, respectively. Immediately after Title V the following new Title is inserted: Title VI—Civil Rights Act amendment.

This amendment amends Title VI of the Civil Rights Act of 1964 by adding a new section. Section 606(a) provides that no funds can be withheld under any Federal program until a constitutional or statutory violation has been committed by the recipient of the benefits of such programs. Such violation must be established by substantial evidence.

Subsection (b) provides that in making a determination with respect to alleged violations, the particular Federal agency must follow the same procedural require-

ments as in the case of all other administrative adjudications. The recipient of such benefits, therefore, must be accorded not only notice of the intention to withhold funds but also the opportunity to be heard and to present evidence in its own behalf.

Subsection (c) provides that in order to support a determination of discrimination it must be shown that there has been an affirmative intent to exclude or the necessary effect of exclusion of individuals from benefits on the basis of race, color or national origin.

Subsection (d) prohibits any Federal agency from exercising control over any school, hospital or other institution under the provisions of Title VI for any purpose other than to provide equal opportunity for access thereto by individuals without regard to race, color or national origin. Secondly, this subsection provides that no class of individuals shall be deprived of the privilege of determining voluntarily whether or not to avail themselves of any benefit provided by any program or activity financed or partially financed by the Federal Government.

[From the Library of Congress Legislative Reference Service, May 3, 1966]

Section-by-Section Analysis of S. 2923; H.R. 12845

(By Raymond J. Celada, legislative attorney, American Law Division)

This bill, an omnibus measure, contains various proposals designed to deal with several problems relating to civil rights and the impartial administration of justice: specifically, discrimination in jury selection and the failure to adequately protect Negroes and civil rights workers. Generally, the provisions intended to improve jury selection procedures would set up jury commissions in each federal district court, which would effectuate a sampling plan approved by the Administrative Office of U.S. Courts which would furnish a representative cross-section of the district without regard to race, color, sex, political or religious affiliation, or economic or social status. Provision also is made for improving jury selection procedures in those states that have practiced discrimination on account of race or color.

The provisions of the bill intended to protect Negroes and civil rights workers establish or strengthen several avenues of remedial relief. First, the bill would vest jurisdiction in the federal courts (or allow removal of prosecutions commenced in state courts) of certain crimes when necessary to secure the equal protection of the laws. Second, it would broaden the scope of the existing law relating to conspiracies to interfere with civil rights (18 U.S.C. 241). Third, it would authorize injunctive relief where necessary to safeguard persons in the exercise of their constitutional rights. Fourth, it would authorize the removal of civil and criminal cases to the federal courts in order to protect the defendant's constitutional rights. Fifth, it would provide for indemnifying persons suffering injuries to their persons or property for exercising rights protected by the Constitution. Sixth, it would extend the Equal Employment Opportunity provisions to cover state and local governments.

The bill is short titled "The Civil Rights Protection Act of 1966."

TITLE I—JURY SELECTION IN FEDERAL AND STATE COURTS

Section 101(a) of the bill rewrites 28 U.S.C. 1864, relating to the manner of drawing federal juries, to establish in each judicial district a jury commission consisting of the clerk of court or a qualified deputy clerk and one or more commissioners to be appointed by the court. Persons designated jury commissioners must be U.S. citizens and residents of the district in which they are to serve. In addition, they must be of a different political party than the clerk or deputy clerk who is serving on the commission. If several commissioners are appointed, individual commissioners may be required to serve at each place within the district where the court is authorized to try cases. Temporary commissioners may be appointed to serve during the absence of regular commissioners.

(b) Subparagraph (i) of section 101(b) provides that the chief judge of the district shall supervise the jury commission in the performance of its duties.

Subparagraph (ii) requires the jury commission to effectuate a "sampling plan" approved by the chief judge and the Administrative Office of U.S. Courts which would furnish a representative cross-section of the population of the district without regard to race, color, sex, political or religious affiliation, or economic or social status. The Director of the Administrative Office of U.S. Courts is authorized to consult with the Census Bureau.

Subparagraph (iii) requires the names of three hundred qualified persons to be placed in the repository ("jury box, wheel or similar device") from which grand and petit juries are drawn. These names would be selected by public drawing from the pool of names obtained under a qualified plan.

Subparagraph (iv) requires jurors to be selected at a public drawing by chance from such repository.

Subparagraph (v) authorizes the jury commission to employ all appropriate means, including questionnaires and the administration of oaths, to determine the qualifications of jurors. The means adopted to determine whether persons are qualified to serve as jurors are subject to the approval of the Administrative Office of U.S. Courts. Questionnaires may be filled out by the prospective juror or by some other person in his behalf. Personnel of the clerk's office may be utilized to assist the jury commission in the performance of its duties.

(c) The jury commission is required to retain all records for four years. The bill specifically requires the retention of records of the names obtained pursuant to an approved sampling plan, the names of persons placed in the repository from which jurors are drawn, completed questionnaires, the names and race of persons drawn for jury service, the names of persons performing jury services and the dates thereof, and any other records which may be requested by the chief judge.

(d) Any citizen residing in, or any litigant in a judicial district, or the Attorney General of the United States, may obtain judicial review of the jury selection procedures or recordkeeping requirements imposed by this bill by applying to the court of appeals for the judicial circuit in which the district court concerned is located. If it is shown that the challenged district court's jury selection procedures or recordkeeping are not in conformity with the requirements of this bill, the court of appeals may appoint and supervise jury commissioners in order to secure compliance therewith. Either the court or a master may take evidence in connection with any action pursuant to this subsection.

(e) The court of appeals, on its own motion or upon application of the Chief judge of the affected judicial district, may reinstate the latter's control over jury selection procedures when there is reasonable cause to believe that they will be administered in accordance with the requirements of this bill.

(f) Jury commissioners who are appointed to serve on a part-time basis are to be paid $25 per day. Payment is to be made upon presentation of a certificate of the chief judge of the district.

Jury commissioners who are appointed on a full-time basis are to be paid a salary fixed by the Judicial Conference at a rate which corresponds to that provided by the Classification Act for comparable positions in the executive branch of the government.

Travel and subsistence expenses are authorized when the conduct of official business requires a jury commissioner to be away from his designated post of duty.

(g) The chief judge may assign any of the powers and duties conferred on him by this bill to another judge in the district. For purposes of this bill, any judge who, by agreement or court order, customarily holds court in one particular part of a district shall exercise the powers and duties of chief judge in such part of the judicial district.

Section 102 amends 28 U.S.C. 1861 (2) to eliminate the literacy qualifications for federal jurors.

Section 103 amends 28 U.S.C. 1863, relating to exclusion or excuse from jury service, to authorize federal judges to exclude illiterate jurors from particular cases where the ability to read or write English is a significant factor. However, no person is to be excluded on grounds of illiteracy if he has completed the sixth grade in an English language school.

Section 104 amends 28 U.S.C. 1871, relating to juror's fees, to increase the fee for attendance from $10 to $15 per day or loss of pay, whichever is greater, and where jurors are required to serve in one case for more than 30 days to increase the allowable attendance fee from $14 to $20 per day or loss of pay, whichever is greater. The bill also increases the amount authorized for subsistence from $10 to the "subsistence allowance given to federal employees." (i.e., reasonable value of quarters and facilities—as authorized by 5 U.S.C. 3123).

JURY SELECTION IN STATE COURTS

Section 105 requires state and local courts to maintain the following records for four years: (1) names of all persons on the jury list; (2) names of persons placed in the repository from which jurors are drawn; (3) questionnaires, applications, or documents of any sort used in jury selection; (4) names and race of persons drawn for jury service; (5) names of persons performing jury service and the dates of such service; (6) such additional records as the judges of the court may direct.

Section 106(a) provides that any citizen residing in, or any litigant in a state or local court, or the Attorney General of the United States, may obtain judicial review of jury selection procedures or record keeping by applying to the federal district court for the district in which the state or local court concerned is located. If the federal court finds that there has been discrimination on the ground of race or color, it is to direct the Director of the Administrative Office of the U.S. Courts to select juries in accordance with the provisions of this bill. Where practical, the Director may use the Federal jury list. Applicable state and local law shall be disregarded and all judges in the affected area shall apply the federal law governing jury selection and service. All appointments of personnel to assist the Director in the performance of duties authorized by this bill are subject to the civil service laws. The Director may consult with the Bureau of the Census for purposes of preparing representative cross section lists.

(b) A judicial determination of discrimination in jury selection within five years of the filing of an application for judicial review establishes the fact of discrimination unless the affected court demonstrates that it no longer exists. For purposes of this section, the initial finding of discrimination may have been made either before or since passage of this bill.

(c) In addition to (b) above, the fact of discrimination may be established by showing that over a period of two years, persons of a particular race or color have been under-represented on juries by at least one-third in terms of their relative size to the total population of the area. It is provided, however, that if any part of the two-year period that enters into the computation antedates the effective date of this bill, the affected court will be given an opportunity to demonstrate that the presumed discrimination no longer exists.

Section 107 provides for reinstatement of state procedures. Upon application of the affected court, the United States District Court for the District of Columbia may reinstate state procedures if it finds that there is no reasonable cause to believe that there will be discrimination in jury service or defalcation in record keeping.

Section 108 authorizes the Attorney General of the United States to petition the appropriate district court to enjoin any new or changed jury requirements (different from those in effect on January 1, 1966) which he believes are intended or will have the effect of circumventing the provisions of this bill.

GENERAL

Section 109 provides that the provisions of section 106(c) and 202(f)(ii), relating to the automatic establishment of jury discrimination through service-population ratios, are inapplicable where a racial or color minority comprises less than 10 percent of the total population of the area.

Section 110 makes willful failure to comply with the record-keeping requirements of this title punishable by a fine of not more than $1000 or by imprisonment for not more than one year, or both.

Section 111 subjects the jury record keeping provisions of this bill to some of the requirements of existing law (42 U.S.C. 1974 a, b, c, d) governing the retention and preservation of federal election records.

42 U.S.C. 1974a provides that any person who, whether or not an officer of election or custodian, willfully steals, destroys, conceals, mutilates, or alters any of the records required to be retained and preserved shall be fined not less than $1,000 or imprisoned not more than one year or both.

42 U.S.C. 1974b provides that records required to be preserved by this title shall, upon the written demand of the Attorney General or his representative, be made available for inspection, reproduction and copying. Demand, however, must contain a statement of the basis and purpose therefore.

42 U.S.C. 1974c provides that unless ordered by a Court of the United States, neither the Attorney General nor his representative nor any employee of the Department of Justice, shall disclose any record or paper produced pursuant to this title except to the Congress and any of the committees, governmental agencies, or in a court proceeding.

42 U.S.C. 1974d vests jurisdiction to compel the production of the record or paper in the federal district courts.

Section 112 provides that this title shall become effective 90 days after its enactment.

TITLE II—PROSECUTION IN AND REMOVAL TO FEDERAL COURTS

Federal trial of State offenses

Section 201 gives the federal district courts jurisdiction of certain felonies and misdemeanors "or other offenses, where federal prosecution is necessary to assure the equal protection of the laws."

Section 202(a) provides that any objection to the extension of federal jurisdiction pursuant to section 201 must be made before the trial and in accordance with the Federal Rules of Criminal Procedure. The failure to make timely objection precludes raising the jurisdictional question thereafter.

(b) When timely objection is made, the court must promptly decide the question whether the prosecution of the offense in a federal court is necessary and proper to assure the equal protection of the laws. An appeal from the district courts's decision on the objection must be filed in the court of appeals within 10 days of the entry of the order.

(c) The federal district court is authorized to prosecute an offense when one of the circumstances spelled out in both paragraphs (d) and (e), immediately following, are established by a preponderance of the evidence.

(d) In order to exercise the jurisdiction conferred by section 201, the federal court must find that the victim of the offense is either (i) a member of a racial or color group subject to one of the kinds of discrimination described in paragraph (e), or (ii) a person who, by word or deed, at or near the time the offense was committed, was supporting the exercise of the equal protection of the laws by any member of a racial or color group.

(e) In addition to one of the above, the federal court is required to find that the local political unit having jurisdiction of the offense has systematically discriminated against a member of any racial or color group with respect to one of the following: (1) jury service; (2) voting; (3) law enforcement services or facilities; (4) punishment upon conviction of crime; (5) conditions of bail or terms of conditional release.

(f)(i) A judicial determination of systematic jury or voting discrimination within five years of commencement of the prosecution for the offense charged establishes the conditions specified in paragraph (e) (i) or (ii), whichever is relevant, unless the defendant satisfies the court that such discrimination no longer exists.

(f)(ii) The fact of discrimination, for purposes of subparagraph (e)(1) [jury service], may be established by showing that over a period of two years persons of a particular race or color have been under-represented on juries by at least one-third in terms of their relative size to the total population of the area. A similar disparity in voter registration among such persons satisfies the requirements of subparagraph (e)(2) [voting]. In either case, however, it is provided that if any part of the two year period which enters into the computation antedates the effective date of this bill, the defendant shall be given ample opportunity to demonstrate that such discrimination no longer exists. By virtue of section 109, the provisions of this subsection are inapplicable to an area where a racial minority constitutes less than 10 percent of the population.

Section 203 (a) provides that federal prosecutions authorized by this title shall be by indictment in the case of capital or infamous crimes [U.S. Const., Amendment 5]; in other cases, prosecution may be by indictment or by information.

(b) Before the district court may prosecute an offense pursuant to this title, the Attorney General of the United States must certify that federal prosecution will fulfill the responsibility of the government to assure the equal protection of the laws. The filing of the certificate, which is not subject to judicial review, operates to divest the state court of any vestige of jurisdiction in the matter and vests exclusive jurisdiction for prosecuting the offense in the federal authorities.

(c) If the Attorney General fails to file the required certificate prior to final arraignment the district will dismiss the prosecution without prejudice.

(d) Federal authorities, including judicial, executive, administrative and law enforcement officers, are authorized to exercise their lawful powers to prevent and investigate any offense cognizable by this title and to prosecute those persons responsible for such an offense notwithstanding the absence of certification and a final determination of the jurisdictional issues. Moreover, these powers may be exercised with respect to all offenses covered by this bill regardless of restrictions thereon in existing law. Although subject to the general direction of the Attorney General, these officials may operate without awaiting specific instructions from him where prompt action is required to prevent or investigate an offense covered by this title or to apprehend or prosecute offenders. The Attorney General may implement this subsection by issuing rules and regulations.

Removal by the Attorney General

Section 204 (a) authorizes the Attorney General to remove to a federal court any offense covered by this title which has been commenced in a state court. Removal may be exercised at any time before jeopardy attaches [i.e., before the jury is empaneled]. Removal would be to the district court for the district embracing the place where the prosecution is pending.

(b) In order to remove a prosecution to the federal courts, the Attorney General must certify that such action is necessary to assure the equal protection of the laws. The filing of the certificate together with a copy thereof, to the court in which the prosecution is pending, effects removal of the case and terminates all state proceedings in this matter.

Upon removal, the state courts would be divested of all jurisdiction in the case. The certificate of the Attorney General is not subject to judicial review.

(c) If the prosecution involves a capital offense and the state has not indicated the defendant prior to removal, a federal grand jury would be required to return an indictment within a reasonable time. The failure to indict within a reasonable time operates to remand the proceeding to the state court.

Section 205(a) provides that proceedings under this title shall be subject to the Federal Rules of Criminal Procedure.

(b) The punishment prescribed by state law would apply in the case of a conviction in the federal courts. For all other purposes, including payment of fine, custody, probation, parole and pardon, federal criminal law shall apply.

(c) The foregoing provisions expire on January 1, 1975.

Investigation of jury exclusion

Section 206(a) directs the Commission on Civil Rights to investigate jury selection procedures wherever it believes racial or color discrimination exists.

(b) In advance of publishing any report of the investigation, the Commission is required to submit its findings to the appropriate local officials who shall be given an opportunity to rebut them. The Commission may revise its proposed findings in light of these rebuttals. Any unsettled issues of fact are to be considered at a public hearing. The hearing may be conducted by either the Commission or its designees who are authorized to exercise Commission powers. Hearing officers are to make a report to the Commission, including statements of local authorities and a record of the proceedings. Thereafter, the Commission is to publish its report together with data on which its findings are based. The courts would take judicial notice of the Commission's reports.

(c) Federal courts conducting proceedings authorized by this bill shall accept all uncontroverted findings and data of the Commission and make their findings in accordance therewith.

(d) The powers conferred on the Commission by this bill are in addition to those authorized by existing law.

Federal offenses

Section 207 amends 18 U.S.C. 241, relating to conspiracies against the federal rights of citizens. Paragraph (a) makes it a crime for any person:

(1) to willfully injure, oppress, threaten or intimidate any person in the free exercise or enjoyment of any right, privilege, or immunity protected by the Constitution or law of the United States, or because he exercised such right, etc.;

(2) to intentionally commit an assault or battery upon any person exercising, attempting to exercise, or advocating the exercise of any right, etc., protected against discrimination on account of race or color by the Constitution or laws of the United States; or

(3) to intentionally commit an assault or battery upon any person, when he or his assailant are using any facility in interstate commerce or where the assailant uses anything that has moved in commerce, in order to prevent the victim or victims from exercising or advocating equal rights or opportunities free from discrimination on account of race or color, or to intimidate same.

Violators shall be fined not more than $1,000 or imprisoned not more than one year or both. Violations of these provisions which result in death or grave bodily injury shall be fined not more than $10,000 or imprisoned for not more than 20 years or both.

(b) Similar penalties are authorized in the case of two or more persons who go in disguise on the highway or on the premises of another with intent to prevent or hinder the free exercise or enjoyment of any right, etc., covered by paragraph (a).

TITLE III—CIVIL PREVENTIVE RELIEF

Section 301 authorizes the Attorney General to institute a civil action for preventive relief, for the United States or in the name of the United States, whenever a person has engaged or is about to engage in any act or practice which would deprive any other person because of race or color of any right, privilege, or immunity protected by the Constitution or laws of the United States.

Section 302 provides that the Attorney General may institute a civil action for preventive relief, for the United States or in the name of the United States, whenever a person has engaged or is about to engage in any act or practice which would deprive any other person, or hinder him in the exercise of, the right to speak, assemble, petition, or otherwise express himself for the purpose of advocating equality of persons or opportunity free from discrimination because of race or color. A private individual may institute similar proceedings in his own right if he is one of the two types of persons described in section 202(d) and if a preponderance of the evidence establishes that the threatened or actual harm occurs in an area that has systematically discriminated against a member of any racial or color group with respect to one of the following: (1) jury service; (2) voting; (3) law enforcement services or facilities; (4) punishment upon conviction of crime; (5) conditions of bail or terms of conditional release. The persons described by section 202(d) include (i) a member of a racial or color group subject to one of the above mentioned kinds of discrimination or (ii) a person who, by word or deed, supported the exercise of any member of such group of the equal protection of the laws.

Section 303 provides that the United States shall be liable for court costs the same as a private litigant in any proceeding under this title. Actions authorized by this title shall be filed in the district courts without regard to the exhaustion of remedies requirement.

TITLE IV.—REMOVAL BY CERTAIN DEFENDANTS

Section 401 provides for the removal of certain civil or criminal cases from state to federal district courts at the request of the defendant. In order to remove his case, the defendant must meet the requirements set forth in section 202 (d) and (e). Conditions described in section 202(f), establishing a rebuttable presumption of discrimination in jury service and voting, apply to proceedings authorized by this section.

Section 402 stipulates the kinds of cases appropriate for removal under this title. These include any action on account of any act or omission in the exercise of the freedoms of speech, press, assembly, or petition, for purposes of supporting racial equality or of protesting the denial of racial equality, or any act or omission protected by the Constitution or laws of the United States against abridgment or interference because of race or color.

Section 403 provides that provisions of existing law governing the procedures for and after removal (28 U.S.C. 1446, 1447) shall apply to removals authorized by this title, save that any order remanding a case to the state courts shall be subject to review.

TITLE V.—CIVIL INDEMNIFICATION

Section 501(a) creates a three-member bi-partisan Board within the Civil Rights Commission. Board members are appointed by the President and confirmed by the Senate. The Chairman is to be designated by the President.

(b) Although initial appointees are to serve one, two, and three years, respectively, all subsequent appointments will be for five year terms. A person appointed to fill a vacancy is to serve for the balance of his predecessor's terms.

(c) The rate of compensation for the Chairman and Board members is fixed at $25,000 and $24,000 a year, respectively.

(d) For purposes of transacting business, a quorum is fixed as two members.

Section 502 authorizes the Board to employ such officers and employees and to make such expenditures as may be necessary to carry out its functions. Employment must be in accordance with civil service laws.

Section 503 authorizes the Board to make all necessary and proper rules and regulations.

Section 504 contains the investigative duties of the Board. It is empowered to investigate complaints from or on behalf of any person receiving an injury to his person (including death) or property (i) because of race or color while (or for having) lawfully exercising or assisting another in the exercise of any right, privilege or immunity protected by the Constitution or laws of the United States,

or (ii) by any act the purpose and design of which is to intimidate him or any other person from seeking or advocating equality or freedom from discrimination on account of race or color.

Section 505(a) directs the Justice Department to furnish the Commission with any reports it may have relevant to the complaint and investigation.

(b) The Attorney General at the request of the Commission shall direct the conduct of such additional investigation as may be necessary.

(c) The Commission is required to supply the Attorney General with copies of all of its investigative reports.

Section 506 provides that the Commission shall order the Board to conduct a hearing if, after investigation, it finds probable cause to believe the matter alleged in the complaint. Otherwise, it is to dismiss the complaint.

Section 507(a) provides that hearings may be conducted either by the entire Board or by any member designated by the Chairman.

(b) When it serves the best interest of justice, the Board may designate another person to conduct a hearing. Such a person, whether an agent, employee, or "other person," must be a member of the bar of the highest court of a state.

(c) The rate of compensation for such individuals shall be determined by the Board, subject to the approval of the Civil Service Commission.

(d) The Board or any member or the hearing officer, as the case may be, shall have authority to administer oaths.

(e) The Board's investigative and subpoena powers are coextensive with those conferred on the National Labor Relations Board as authorized by 29 U.S.C. 161 (1) and (2). Paragraphs (1) and (2) of section 161 confer on the Board the usual investigative powers vested in administrative agencies with respect to documentary evidence, summoning witnesses and taking testimony, and obtaining court aid in enforcing compliance with these requirements.

(f) The Board is required to keep a full record of a hearing.

Section 508(a) requires the Board to base its findings upon the hearing record.

(b) If the Board finds that a person has been injured in his person or property or has been deprived of his life while in the lawful exercise of rights protected by the Constitution, it shall make an indemnification award to such person.

(c) Where the hearing has been conducted by an individual acting as hearing officer, a recommendation granting an award shall be reviewed by the Board.

(d) Awards are to include reasonable amounts for attorney's fees.

Section 509(a) provides that any person who is implicated or who becomes suspect as a result of an investigation authorized by this title shall be given notice and an opportunity to intervene in proceedings conducted by the Board.

(b) Similarly, a state or local subdivision is to be notified and given an opportunity to be heard when officials thereof are implicated in the activities surrounding the complainant's injury.

(c) Notice may be by personal service or registered mail.

(d) In the case of a state or political subdivision, notice may be given to the chief executive or principal legal officer.

Section 510 permits the Attorney General to intervene at any stage of the hearing or appeal.

Section 511 (a) provides that Board decisions may be appealed to the Court of Appeals for the District of Columbia or the court of appeals for the judicial circuit in which this injury occurred or in which appellant resides.

(b) Judicial review shall be on the record before the Board, and the Board's findings, to the extent that they are supported by substantial evidence of the whole record, are deemed to be conclusive.

Section 512 provides for recovery actions by the United States. Paragraph (a) authorizes recovery actions against private persons, whether acting under color of law or otherwise, who are responsible for the indemnified injury.

Paragraph (b) permits recovery from a state or political subdivision where the award made results wholly or partly from action under color of law. In such cases, the political unit shall be jointly and severally liable with the persons responsible for the injury.

(c) In recovery proceedings brought pursuant to these provisions, the Board's findings shall constitute prima facie evidence of the facts therein contained. Similarly, the award is admissable into evidence and shall constitute prima facie evidence of the damages.

(d) Recovery actions shall be brought in the federal district courts.

Section 513 provides that in the event of the death or incapacity of the injured party, the complaint may be filed by members of the immediate family.

Section 514 specifies that complaints must be filed within six months of the injury, or within twelve months of death.

Section 515 provides that the remedy authorized by this title is not exclusive, and gives the United States a lien to the extent of the award on any amounts realized in any other proceedings. The amount of any judgment entered in favor of the injured party prior to an award of indemnification shall be considered by the Board in determining whether any additional award is necessary and, if so, how much.

TITLE VI—AMENDMENT TO TITLE VII OF 1964

Section 601 amends the Equal Employment Opportunity provisions of the Civil Rights Act of 1964, (42 U.S.C. 2000e–2000e-(15)) to bring state and local governmental units within its coverage.

Paragraph (a)) adds a new paragraph to the definition of "person" in that Act (42 U.S.C. 2000e–(a)). The term "governmental unit" is defined as a state or a political subdivision of a state or an agency of one or more states or political subdivisions.

Paragraph (b) amends the definition of "employer" to include a governmental unit and any agent of such governmental unit (42 U.S.C. 2000e(b)).

Paragraph (c) amends the definition of "employment agency" to include governmental units (42 U.S.C. 2000e(c)).

Paragraph (d) deletes the present exclusionary language exempting governmental units from the definition of "employment agency" (42 U.S.C. 2000e(c)).

Paragraph (e) amends the provisions of existing law authorizing a civil action for prevention of unlawful practices to exclude private suits against the states (42 U.S.C. 2000e–5(e)).

Paragraph (f) amends the provisions of existing law authorizing the Attorney General to institute civil actions for prevention of unlawful practices resulting from a pattern or practice of discrimination to make governmental units amenable to such suits (42 U.S.C. 2000e–6(a)).

Paragraph (g) makes clear that the suits authorized in paragraph (f) would be "for or in the name of the United States" (42 U.S.C. 2000 e–2(a)).

Paragraph (h) adds to the Equal Employment Opportunity Commission's investigating powers the power to investigate charges of alleged unlawful employment practices by governmental units (42 U.S.C. 2000 e–8(a), 2000 e–9(c)).

TITLE VII—MISCELLANEOUS

Section 701 defines various terms in the bill.

Paragraph (a) defines "State" to include the District of Columbia.

Paragraph (b) defines "because of race or color" to mean hostility not only to the race or color of any person, but also because of association with persons of a different race or color and advocacy of racial equality.

Paragraph (c) defines hearing officer to mean any person designated by the Indemnification Board to conduct a hearing.

Paragraph (d) defines "action taken under color of law" to include knowing refusals or failures to act.

Paragraph (e) defines "injury to property" to include any financial loss.

Paragraph (f) defines "judicial district" to mean a subdivision of a judicial district.

Section 702 (a) authorizes the appropriation of such sums as are needed to carry out the purposes of this bill.

(b) The constitutionality of the remainder of the bill or the validity of its application to other persons not similarly situated or to other circumstances is not to be affected by a holding that a particular provision or application is unconstitutional or invalid.

[From the Library of Congress Legislative Reference Service, May 3, 1966]

SECTION-BY-SECTION ANALYSIS OF S. 2845

(By Raymond J. Celada, Legislative Attorney, American Law Division)

This bill would amend ch. 121 of the Judicial Code, 28 U.S.C. 1864, relating to grand and petit juries in the federal courts, to provide a uniform method of jury selection. This would be accomplished by selecting persons for jury service from a list of names provided by the United States Census, and by allowing a United States Attorney to seek relief in the court of appeals where discrimination in the selection of jurors persists.

Under the terms of the bill, if enacted, persons responsible for selecting jurors, that is, the clerk of the district court or his deputy and the jury commissioner, will be required to draw jury panels from lists of names furnished by the Director of the Census. The Director of the Census is charged with maintaining and supplying lists containing the names of at least 300 qualified persons, selected at random, in order to assure a continuing, adequate supply of jurors. Existing law (28 U.S.C. 1861) provides that persons convicted of a felony without pardon or amnesty, persons unable to read, write, speak, or understand the English language, and persons having physical or mental infirmities, are ineligible for jury service. Otherwise, any citizen of 21 years or over who has resided in the judicial district for more than one year is qualified to serve as a grand or petit juror in the federal courts.

The Judicial Code (38 U.S.C. 1865) allows the district courts to select jurors from separate parts of the district when such selection procedure will be most favorable to an impartial trial, reduce unnecessary expense, or offset an otherwise burdensome duty on the citizens of a particular area within the district. Where this type of apportionment selection prevails, the Director of the Census is required to prepare lists containing names of qualified persons residing in those parts of the district designated by the court.

The bill authorizes United States attorneys to seek relief in the courts of appeals if they have probable cause for believing that responsible officials are excluding persons whose names appear on the census lists from jury service because of their race, color, sex, political affiliation, religion, national origin, or economic or social status. The petition for judicial review of the alleged illegalities must contain a recital of the facts upon which such belief is based. The clerk of the court of appeals in which the petition is filed is required to forward a copy thereof to the chief judge and clerk of the district court concerned and to each jury commissioner in such district.

The courts of appeals are authorized to employ masters in connection with proceedings under the bill. Masters are to take evidence and to make findings with respect to the allegations contained in the petition. All matters relating to the appointment of and proceedings conducted by masters are to be governed by rule 53 of the Federal Rules of Civil Procedure. They are to be paid out of federal monies at rates fixed by the court making the appointments.

Upon receipt of the master's report, the clerk of the court is to furnish copies thereof, together with an order to show cause within 10 days why a judgment should not be entered thereon, to the chief judge and the clerk of the district court concerned, each jury commissioner and the United States attorney. If exceptions to this report are not filed by the close of the 10 day period, the court is required to make a determination respecting the validity of the jury selection procedures in question. If timely exceptions are filed and served on all interested parties, the court is required to examine the grounds of the exception before passing upon the broader issues raised by the master's report.

If the court determines that there has been an unlawful discrimination, it may enter any order necessary and proper to enforce the right of citizens to serve on juries without discrimination. Among other things, the court may order responsible officials to adhere to lawful standards in jury selection or strike any jury panel unlawfully drawn.

Appeals from a final judgment of a court of appeals shall be by writ of certiorari to the United States Supreme Court. Applications for Supreme Court review must be filed within 90 days of the entry of final judgment.

[From the Library of Congress Legislative Reference Service, May 12, 1966]

Section-by-Section Analysis of the Administration's Proposed Civil Rights Act of 1966.—S. 3296; H.R. 14765

(By Raymond J. Celada, Legislative Attorney, American Law Division)

This bill contains six titles embodying the major points of the President's civil rights message including reform of the federal jury system, elimination of discrimination in state juries, improved procedures for desegregating public schools and public facilities, judicial relief from discrimination in housing, and provision for certain acts of violence or intimidation.

Title I is intended to insure that each federal judicial district or division is fulfilling its constitutional and statutory obligations in the selection and assignment of jurors. It directs the sources from which jurors are to be drawn and

provides procedures for selecting persons for jury service and testing their qualifications.

Title II is designed to eliminate discrimination in the selection of grand and petit juries in state courts. This would be accomplished in two principal ways. First, the Attorney General is authorized to bring civil action in the federal courts for injunctive relief against discriminatory practices in selecting juries in State courts. Second, it provides procedures for discovery of information relevant to the question whether discrimination results from the system used to select jurors.

Title III authorized the Attorney General to bring a civil action for injunctive relief whenever he has reasonable cause to believe that a person is being denied his right to the equal protection of the laws with respect to a public school or other public facility. At present, the Attorney General is limited to acting on complaints of aggrieved persons.

Title IV is designed to eliminate discrimination in housing on account of race, color, religion, or national origin. It would prohibit discrimination by property owners, real estate brokers, and others engaged in the sale, rental or financing of housing.

Title V provides new and strengthened criminal penalties designed to protect Negroes and civil rights workers.

Title VI authorizes the necessary appropriations to carry out the provisions of the bill.

The bill is short-titled the "Civil Rights Act of 1966."

TITLE I

Section 101 of the bill rewrites chapter 121 of the Judicial Code (28 U.S.C. 1861–1870), relating to the federal jury system.

Section 1861 declares it to be the policy of the United States that all qualified persons shall have the opportunity to serve on grand and petit juries in federal courts and shall have an obligation to serve when summoned.

Section 1862 prohibits discrimination in the selection of federal jurors on account of race, color, religion, sex, national origin, or economic status.

Section 1863 (a) establishes in each district court a bipartisan jury commission consisting of the clerk of court and a court-appointed jury commissioner. Separate jury commissions may be established for the various divisions within the district. Jury commissioners are to belong to a different political party than the clerk of court and must reside during their term of service in the district or division for which they are appointed. Compensation for jury commissioners is fixed at $16 per day for each day of actual service.

(b) The chief judge of the district is required to supervise the work of the jury commission.

Section 1864(a) requires each jury commission to maintain a master jury wheel containing the names of prospective jurors. The names are to be taken at random from the voter registration list of the district or division it serves. However, where the judicial council of the circuit determines that exclusive use of voter lists would not carry out the mandate of non-discriminatory selection of section 1862, it would be required to prescribe other sources of names in addition to the voter rolls.

(b) The names of one percent of the total registered voters in the district or division, as the case may be, are to be placed in the jury wheel. Where recourse is had to other sources in addition to voter rolls as authorized in paragraph (a), the names of one percent of the total number of persons of voting age residing in the district or division are to be placed in the jury wheel. The most recent decennial census is to be used to determine the number of residents of voting age. The jury wheel, in any event, shall contain at least 2,000 names.

(c) The manner of random selection is to be established by the chief judge of the district.

(d) Voting records maintained by State, local, and federal officials, are to be made available for inspection, reproduction, or copying by the jury commission. The provisions of this section may be enforced by the district court upon application of the Attorney General.

(e) The names of voters residing in all the political subdivisions encompassed by a district or division are to be placed in the master jury wheel.

(f) Additional names are to be placed in the master wheel as needed. The commission is directed to empty and refill the wheel during the last 45 days of every even numbered year.

Section 1865(a) requires jurors to be selected from the master wheel by public drawing. The jury commission then prepares an alphabetical list of the names thus drawn and advises every prospective juror by certified mail. Disclosure of the names appearing on the commission's list is prohibited except as authorized by sections 1867 and 1868. Unless exempt from jury service by section 1872, prospective jurors are to fill out a juror qualification form which will be prescribed by the Administrative Office of the U.S. Courts in consultation with the Attorney General. The prospective juror is required to give his name, address, age, sex, education, race, religion, occupation, and citizenship and whether he has any physical or mental infirmity, is able to read, write, speak, and understand the English language, and has been convicted of a felony without pardon or amnesty. The clerk of court is responsible for seeing that the form is filled out correctly and is required to fill out the form for a prospective juror who is unable to do it himself. Any prospective juror who fails to appear before the clerk to execute the form will be ordered to explain his failure to the court. If he cannot show good cause for his noncompliance, he may be fined not more than $100 or imprisoned not more than three days or both.

(b) Persons entitled to an exemption from jury service pursuant to section 1872 are to enter this information on the summons. Willful misrepresentation of an exemption is punishable by a fine of not more than $100 or imprisonment for not more than three days or both.

Section 1866 prescribes the qualifications for jury service. Paragraph (a) requires the jury commission to pass upon each person's qualifications for jury service solely on the information contained in the form. Where, however, other objective evidence indicates that a person is not qualified by reason of noncitizenship, mental or physical incapacity, or prior conviction of a felony without pardon or amnesty, the court is required to pass upon the question of qualification. The final determination is entered on both the juror qualification form and the Commission's alphabetical list. The failure to appear in response to a summons as well as the inability to qualify and the ground therefor also are to be noted on the qualification form.

(b) In the absence of noncitizenship, illiteracy, mental or physical infirmity, or prior conviction of felony without pardon or amnesty, all persons 21 years of age or older are deemed qualified to serve on federal juries.

(c) Persons found to be qualified for jury service are placed in the qualified juror wheel from which grand and petit jury panels are selected. The jury commission is required to maintain a list of those names selected for jury service.

Section 1867 provides a means for challenging jury selection in criminal and civil cases on grounds that the procedures established by this bill have not been followed.

(a) The defendant in a criminal case may at any time prior to the submission of evidence at trial move to dismiss an indictment or to stay the proceedings for alleged non-compliance with the requirements of the bill. The defendant has the right to submit in support of his motion testimony of the jury commission together with other evidence. In addition, if there is any evidence of non-compliance with sections 1864, 1865 or 1866, the defendant may present any relevant public or private record or paper of the commission. If the court finds in favor of the motion, it is required to dismiss the indictment or stay the proceedings pending selection of a lawful jury.

(b) Either party to a civil suit may move to challenge jury selection procedures. The provisions governing the presentation of evidence in support of the motion and the effect of a finding in favor of the motion are the same as those in criminal cases.

(c) The procedures for challenging jury selection on grounds of non-compliance with sections 1864, 1865, or 1866 pursuant to paragraphs (a) and (b) of this section are exclusive. However, the pursuit of other authorized forms of remedial relief from jury discrimination is not precluded by this section.

(d) Disclosure of the contents of any record or paper produced pursuant to paragraphs (a) and (b) prior to the biennial change of the names in the master wheel and completion of jury service by all persons whose names were taken from such wheel is prohibited except where disclosure is needed for preparation and presentation of a challenge. Provision is made for inspection, reproduction, and copying of such records by a party during the pendency of a case.

Section 1868 provides for the maintenance and inspection of all records and papers used by the jury commission in the performance of its functions under this title. The commission is to preserve all such records and papers for at least four years following the biennial emptying and refilling of the master wheel pursuant to

section 1864(f), and the completion of jury service by all persons drawn therefrom. The records and papers required to be retained by this section are available for public inspection.

Section 1869 contains provisions dealing with the exclusion of persons from jury service. Paragraph (a) provides that no person or class of persons are to be excluded, excused, or exempted from jury service except as authorized by section 1872. Section 1872, which is existing section 1862 as renumbered by this bill, automatically exempts members of the armed forces on active duty, members of police and fire departments, and public officials in the executive, legislative and judicial branches of government. It is provided, however, that a person summoned to perform jury service may be (1) excused by the court for six months if he shows that the performance of such service would entail severe hardship or (2) excluded by the court upon (i) a lawful peremptory challenge or (ii) a finding that he cannot perform impartially or that his service would disrupt the proceedings. Excuse or exclusion from jury service and the grounds therefor are to be noted on the person's juror qualification form.

(b) No person is required to serve on more than one grand jury or on both a grand and petit jury during any two-year period. Similarly, no person is to serve as a petit juror more than 30 days during any two-year period unless extended service is required in connection with consideration of a particular case.

Section 1870 of the bill is a definitions section.

(a) "Clerk" and "clerk of court" mean the clerk of the federal district court or his deputy.

(b) "Voter registration list" means the official state or local election records of persons registered to vote in the most recent general election for federal office, or, if registration is not a condition to voting, such other official list of persons who are qualified to vote in federal elections. The term also includes persons listed by federal examiners as authorized by the Voting Rights Act of 1965 (79 Stat. 437) but who have yet to be listed by state or local officials.

(c) "Division" means either one or more lawfully authorized divisions within a federal judicial district or such local political subdivisions surrounding the place where the court is authorized to try cases as are designated by the chief judge.

(d) "District court of the United States" and "court" mean the federal district courts specified in chapter 5 of Title 28, U.S. Code. For purposes of sections 1861, 1862, 1867, and 1869, the term includes the District of Columbia Court of General Sessions and the Juvenile Court of the District of Columbia.

Section 102(a) of the bill amends 28 U.S.C. 1871, relating to juror's fees, to increase the fee for attendance from $10 to $20 a day, and where jurors are required to serve in one case for more than 30 days to increase the allowable attendance fee from $14 to $25 a day. The bill also increases the amount authorized for subsistence from $10 to $16 a day. Payment of jury fees in excess of $20 a day shall be made upon presentation of the trial judge's certificate.

(b) 28 U.S.C. 1821 is amended to increase the amounts authorized witnesses and deponents from $4 to $20 a day; to increase mileage fees from 8 cents to 10 cents; to increase the amount authorized for subsistence from $8 to $16 a day.

Section 103 amends or repeals portions of the Judicial Code, United States Code, and the District of Columbia Code.

Paragraph (a) renumbers 28 U.S.C. 1862, 1870, 1872, 1873, and 1874 as 1872, 1873, 1874, 1875 and 1876, respectively.

Paragraph (b) repeals the following provisions of the D.C. Code: (i) 13-701 [Special juries in District Court]; (ii) 11-2301 [Qualifications of jurors], 11-2301 [Exemptions from jury service] except the last paragraph which states that all other qualified persons, whether in government service (U.S. or D.C.), military or civilian, active, inactive, or retired, are qualified to serve as jurors in the District of Columbia, 11-2303 [Jury commission], 11-2304 [Jury box], 11-2305 [Selection of jurors]; (iii) 11-2307 [Substitution in case of vacancies], 11-2308 [Disposition of box after drawing], 11-2309 [Filling vacancies], 11-2310 [Talesmen from bystanders] 11-2311 [Summoning jurors], 11-2312 [Length of service]; (iv) 7-213 a [Compensation of jurors in eminent domain cases].

Paragraph (c) amends 11-2306 of the D.C. Code, relating to the manner of drawing grand and petit jurors in the District, to strike all but the provisions of subparagraph (a). A new subparagraph (b) is added authorizing the jury commission for the District Court for the District of Columbia to draw persons' names from the qualified juror wheel for service in the District of Columbia Court of General Sessions and the District of Columbia Juvenile Court.

Paragraph (d) subjects the provision of the D.C. Code (16-1312) relating to special juries in eminent domain cases to the qualifications for jurors set forth in

28 U.S.C. § 1866 and to the other procedures of Title 28, chapter 121 as amended by this bill.

Paragraph (e) amends the D.C. Code (22–1414) to extend the penalty authorized for fraudulently tampering with the jury box to similar activities in connection with a jury "wheel".

Section 104 provides that sections 101 and 103 of this bill are to be effective 120 days after enactment except with respect to indictments which are returned or to petit juries which are impanelled prior to that date.

TITLE II

Section 201 provides that no person shall be denied the right to serve on state grand or petit juries on account of race, color, religion, sex, national origin, or economic status.

Section 202 (a) authorizes the Attorney General to bring civil actions in the federal courts for injunctive relief against discriminatory practices in state court jury selection. The United States is liable for costs the same as a private person in any proceeding authorized by this section.

(b) Jurisdiction over proceedings to eliminate discrimination in the selection of state juries is vested in the federal district courts which are directed to disregard the "exhaustion of remedies" requirement. The courts are ordered to expedite "in every way" lawsuits brought by the Attorney General.

Section 203 provides that upon a finding of discrimination, the court may grant specified kinds of effective relief, including an order which (a) prohibits or suspends the use of any qualification or ground of excuse, exemption or exclusion from jury service (1) that discriminates or has been administered in a discriminatory manner or (2) that lends itself to such abuse by giving jury officials wide discretion to determine qualifications, excuses, exemptions, or exclusions; (b) requires the use of objective criteria in determining qualifications, excuses, exemptions or exclusions; (c) requires maintenance of such records as may be necessary in the future to show whether discrimination is being practiced; or (d) appoints a master to perform the duties of state jury officials. Additionally, the court may grant any other appropriate relief it deems necessary.

Section 204 provides for the disclosure and development of information relevant to the question whether discrimination results from the jury selection system. This objective is accomplished by authorizing a challenge procedure which is available to the Attorney General in a suit under this title, to a private litigant residing in the area who seeks to enforce the prohibition against discrimination by a civil action pursuant to 42 U.S.C. 1983, or in a criminal case (prior to the submission of evidence at trial), or to a convicted person attacking collaterally a criminal conviction.

(a) Upon the filing of an allegation of discrimination, appropriate state and local officials are required to furnish "a written statement of jury selection information." This statement, subscribed to under oath, is to describe in detail the procedures followed by jury officials in selecting jurors, including:

(1) the sources of names of prospective jurors;

(2) the methods and procedures involved in selecting names from these sources for inclusion in the repository from which jury panels are drawn;

(3) the methods used for drawing names from the repository;

(4) the criteria used in determining qualifications for jury service; and

(5) the methods used for summoning jurors and assigning them to jury panels.

(b) The statement is to be filed with the clerk of the court in which the case is pending. A copy of the statement also is served on the complainant's attorney. The statement is to constitute evidence on the question of jury discrimination. The complaining party may cross-examine jury officials and introduce any other relevant evidence that may be available in support of the challenge. If, at this point, there is some evidence of discrimination, the complaining party is given access to any other relevant jury selection records which are not otherwise publicly available and these may be introduced in support of the challenge.

(c) If the court determines that there is probable cause to believe that discrimination has occurred and that relevant state records and papers arenot sufficiently probative of the issue, it is the responsibility of the state to produce additional evidence demonstrating that the alleged discrimination did not occur. The state may request the federal court to subpoena evidence and witnesses in order to produce additional evidence not obtainable by other means.

(d) The court is required to take steps to insure that records are kept confidential except as needed in any legal proceeding. Unauthorized disclosure of the

contents of any record or paper is punishable by a fine of not more than $1,000, or imprisonment for not more than one year or both.

Section 205(a) requires state jury officials to preserve all jury records and papers for at least four years after completion of jury service by all persons who were the subjects of such records and papers. Any person who, whether or not a jury official, willfully steals, destroys, conceals, mutilates, or alters any of the records required to be preserved shall be fined not more than $1,000 or imprisoned for not more than one year or both.

(b) Records required to be preserved by this title shall, upon the written demand of the Attorney General or his representative, be made available for inspection, reproduction and copying. Unless otherwise ordered by a court of the United States, neither the Attorney General nor his representative nor any employee of the Department of Justice shall disclose any record or paper produced pursuant to this title except to the Congress and any of its committees, governmental agencies, or in a court proceeding. Jurisdiction to compel the production of records or papers is vested in the federal district court.

Section 206 contains the definition of various terms used in this title.

(a) "State court" means any court of any state or any political subdivision thereof.

(b) "Jury official" means any person or group of persons who select, summon or empanel grand or petit juries.

(c) "Wheel, box, or similar device" includes a file, list or other compilation of names of persons prepared by a jury official.

(d) "Political subdivision" means any county, parish, city, town, municipality or other subdivision of a state.

Section 207 provides that the remedies authorized by this title are not a bar to other remedies established by federal law or by state law.

Section 208 states that this title is to become effective 120 days following its enactment except in any case where an indictment has been handed down or a petit jury empanelled prior to that date.

TITLE III

Title III of the bill amends Title III of the Civil Rights Act of 1964 (42 U.S.C. 2000b–2000b–3) and repeals sections 407–410 of that Act (47 U.S.C. 2000c–6–2000c–9). Title III of the 1964 Act authorizes the Attorney General to bring lawsuits to desegregate public facilities, other than public schools, on written complaint of an aggrieved person who alleges that he is being deprived of the use of such facilities on account of his race, color, religion, or nationa origin. In addition, before the Attorney General may sue, he must determine that the complainant is unable to institute and maintain a suit. Sections 407–410 of the 1964 Act give the Attorney General similar authority with respect to desegregation of public schools and colleges. As revised by this title, Title III would authorize the Attorney General to bring suits to desegregate public schools and colleges, as well as other public facilities, on his own initiative (i.e., without awaiting the filing of a complaint by a party aggrieved or determining that he is unable to institute and maintain the action himself). The kinds of discrimination covered by Title III as revised by this bill are limited to race and color. Titles III and IV of the 1964 Act apply to discrimination on account of race, color, religion or national origin.

Section 301 of the earlier act as amended by this bill would give the Attorney General direct authorization to bring a civil action, in the name of the United States, for injunctive relief when he has reasonable grounds to believe that—

(a) Any person is being denied his right to the equal protection of the laws with respect to a public school or college or public facility. A public facility is any facility that is owned, operated, or managed by or on behalf of any state or any of its political subdivisions.

(b) Any pesron who, whether a public official or a private individual, has interfered or threatens to interfere with another for exercising, or for having exercised, or for supporting the exercise of any right to the equal protection of the laws with respect to any public school or college or public facility.

Revised section 302 would retain the provision of existing law making the United States liable for costs the same as a private party in any proceeding pursuant to this title.

Revised section 303 would incorporate the definition of "public school" and "public college" contained in title IV of the earlier act (42 U.S.C. 2000c (c)). The latter defines "public school" to mean any elementary or secondary educa-

tional institution, and "public college" to mean any institution of higher education or any technical or vocational school above the secondary school level, "provided that such public school or public college is operated by a state, subdivision of a state, or governmental agency within a state, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source."

Revised section 304 would retain jurisdiction to try cases authorized by this title in the federal district courts.

Revised section 305 would continue the existing clarifying provision that nothing in this title is intended to affect the right of any person aggrieved to obtain judicial relief from discrimination in public education or any public facility.

Section 302 of the bill repeals provisions of the 1964 Civil Rights Act (42 U.S.C. 2000c–6–2000c–9) relating to actions by the Attorney General to eliminate discrimination in public education.

TITLE IV

Section 401 declares it to be the policy of the United States to prevent discrimination in residential housing on account of race, color, religion or national origin, and the right of every person to be protected against such discrimination.

Section 402 contains the definitions of various terms used in this title.

(a) The term "person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries.

(b) The term "dwelling" includes (1) any building or structure, or part thereof, whether in existence or under construction, which is designed, intended or arranged for residential use by one or more individuals or families and (2) any vacant land that is offered for sale or lease for the construction or location of any such building or structure.

(c) The term "discriminatory housing practices" means an act prohibited by sections 403 or 404.

Section 403 specifies the various categories of persons coming under the bill. These include (i) owners, lessees, sublessees, assignees, or managers of dwellings; (ii) persons having authority to sell, rent, lease, or manage dwellings; (iii) real estate brokers or salesmen or employees or agents of real estate brokers or salesmen.

Paragraphs (a)–(e) of section 403 set forth the various discriminatory acts declared to be unlawful. The acts made unlawful are:

(a) Discrimination with regard to the sale, rental, or lease of a residential dwelling.

(b) Discrimination with regard to terms, conditions, or privileges of such sale, rental, or lease, or in the provision of services or facilities connected therewith.

(c) Printing or publishing any notice, statement or advertisement that indicates discrimination or any intention to discriminate with regard to the sale, rental or lease of such residential dwellings.

(d) Misrepresenting the availability for inspection, sale, rental, or lease of such residential dwellings.

(e) Discrimination with regard to access to or participation in any multiple listing service or other service or facilities related to the business of selling or renting such housing. This last act is unlawful whether directed at the person seeking such services or the person he represents in the quest for such services.

Section 404 prohibits discrimination in the financing of housing. "Persons" covered by section 404 include banks, savings and loan institutions, credit unions, insurance companies, or other persons who make mortgages or other loans for the purchase, construction, improvement, or repair or maintenance of residential dwellings. The acts made unlawful by this section include, in addition to discriminatory denial of loans, discrimination with regard to the fixing of the down payment, interest rates, duration, or other terms or conditions of such loans. For purposes of this section, it makes no difference whether the discrimination is on account of the race, color, religion, or national origin of the person applying for the loan, or because of the race, color, religion or national origin of any member, stockholder, director, officer, or employee of such person, or of the prospective occupants, lessees, or tenants of the housing for which the loan is sought.

Section 405 prohibits coercion, intimidation or interference with the right of a person to obtain housing and its financing or to aid others in exercising such rights.

Section 406 provides for enforcement by private persons.

(a) A private person aggrieved by a violation of sections 403 or 404 or 405 405 may institute a proceeding for civil relief in either the appropriate federal district court or local court. For purposes of this section, the federal courts shall disregard the normal requirement (28 U.S.C. 1331) that the matter in controversy exceed $10,000. The aggrieved party must institute the action within six months of the alleged violation.

(b) If petitioned by complainant, the federal court may provide him with appointed counsel and allow him to commence his action without payment of fees, costs, or security. State and local courts are authorized to do likewise where consistent with applicable law and procedures.

(c) The court may grant such injunctive relief as it deems appropriate. Also, the court may award monetary damages, including damages for humiliation and mental pain and suffering, and up to $500 punitive damages.

(d) The prevailing party may recover reasonable attorney's fees as part of the costs.

Section 407 (a) authorizes the Attorney General to institute proceedings for injunctive relief when he has reasonable cause to believe that a person or a group or persons is engaged in a "pattern or practice" of resistance to the "full enjoyment" of the right to be protected against discrimination in the purchase, rental, lease, financing, use and occupancy of residential housing. The lawsuit would be commenced in a federal district court with the filing of a complaint which sets forth the facts of a pattern or practice of discrimination and requests appropriate relief to eliminate it.

(b) The Attorney General is authorized to intervene in a private suit brought in a federal court pursuant to section 406. The United States is entitled to the same relief as if it had initiated the suit.

Section 408 prescribes additional functions for the Secretary of Housing and Urban Development for the purpose of fully implementing the policy of this title. These functions include:

(a) The study of the problems of discrimination in representative communities, urban, suburban, and rural, throughout the United States;

(b) The preparation and dissemination of reports, recommendations, and information obtained from such studies;

(c) The giving of technical assistance to public and private institutions and agencies concerned with housing discrimination;

(d) The giving of such technical assistance to the Community Relations Service as it may need in mediating disputes arising out of housing discrimination;

(e) The administration of federal housing programs and activities in a nondiscriminatory manner.

Section 409 provides that nothing in this title shall be construed to invalidate or limit any state or local laws which guarantee or protect the same rights as are granted by it. However, any law which purports to require or permit action which would be a discriminatory housing practice under this title shall to that extent be invalid.

Section 410 makes the jury trial provisions of the Civil Rights Act of 1957, 42 U.S.C. 1995, available in voting rights suits, applicable to contempts arising under the bill. As a result, jury trials are required in any proceedings for criminal contempt where the aggregate fine exceeds $300 or the cumulative imprisonment exceeds 45 days In other cases of criminal contempt the accused may be tried with or without a jury at the discretion of the judge. In any case of criminal contempt involving a natural person, the fine is not to exceed $1,000 nor imprisonment exceed the term of six months.

Section 411 provides that nothing in this title shall be construed to affect the authority of the federal government and its agencies or officers, to institute or intervene in any civil action or to bring any criminal prosecution.

TITLE V

Title V is a criminal statute directed at interference by force or threat of force with certain specified activities.

Section 501 subjects to criminal prosecution any person, who by force or threat of force—

(a) injures or interferes with, or attempts to injure or interfere with any person because of his race, color, religion or national origin, while engaged or seeking

to engage in activities in one of the following areas: (1) voting; (2) public education, (3) public services and facilities, (4) employment, (5) housing, (6) jury service, (7) use of common carriers, (8) participation in federally assisted programs, or (9) public accommodations:

(b) injures or interferes with, or attempts to injure or interfere with any person either (1) to discourage him or another person from engaging in protected activities or (2) because he urged or aided participation in protected activities, or engaged in any form of speech or peaceful assembly opposing the denial of the opportunity to participate in such activities;

(c) injures or interferes with, or attempts to injure or interfere with any person, whether a public official or private person, because he has afforded, or to discourage him from affording, other persons equal treatment with respect to protected activities.

Any person who, whether a public official or a private individual, violates these provisions shall be fined not more than $1,000 or imprisoned for not more than one year or both. A violation that results in bodily injury is punishable by a fine of not more than $10,000 or imprisonment for not more than ten years or both. A violation that results in death is punishable by any term of years or life.

Section 502(a) amends 18 U.S.C. 241, relating to conspiracies against the rights of citizens by private individuals, to prescribe a similar system of graduated penalties.

Section 502(b) amends 18 U.S.C. 242, relating to interference with the rights of citizens by public officials, to authorize imprisonment for any term of years or life for violations that result in the death of the victim. That section presently prescribes punishment by fine of not more than $1,000 or imprisonment for not more than one year or both.

Section 502(c) amends section 12 (a) and (c) of the Voting Rights Act of 1965 (79 Stat. 443, 444) to eliminate references contained therein to section 11(b) of the same Act. Section 11(b) provides that no person, whether a public official or a private individual, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person (i) who votes or attempts to vote, (ii) who urges or aids another to vote or attempt to vote, or (iii) who is a federal voting examiner or voting observer performing duties authorized by the 1965 Act. Section 12 (a) and (c) provides that any person who violates various specified provisions of the 1965 Act, including section 11(b), or who conspires to violate various specified provisions of the 1965 Act, including section 11(b), respectively, may be punished by a fine of not more than $5,000 or imprisonment for not more than 5 years or both. The exclusion of any reference to section 11(b) in the penalty provisions of section 12 (a) and (c) proposed by section 502(c) of this bill suggests that the authors of the bill intend to punish similar violations in accordance with the graduated scheme of penalties authorized by Title V. It should be noted however, that section 11(b) of the 1965 Act and the various provisions of Title V of this bill are not identical with respect to the kinds of activities covered. For example, section 11(b) reaches interferences unrelated to the question of race or color whereas section 501 of the bill is limited to interferences, etc., because of race, color, religion or national origin.

TITLE VI

Section 601 authorizes the necessary appropriations to carry out this bill.

Section 602 provides that the constitutionality of the remainder of the bill or the validity of its application to other persons not similarly situated or to other circumstances is not to be affected by a holding that a particular provision or application is unconstitutional or invalid.

[S. 3296, 89th Cong., 2d sess.]

A BILL To assure nondiscrimination in Federal and State jury selection and service, to facilitate the desegregation of public education and other public facilities, to provide judicial relief against discriminatory housing practices, to prescribe penalties for certain acts of violence or intimidation, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1966".

TITLE I

SEC. 101. The analysis and sections 1861 and 1863 through 1869 of chapter 121 of title 28, United States Code, are amended to read as follows:

"CHAPTER 121—JURIES; TRIAL BY JURY

"Sec.
"1861. Declaration of policy.
"1862. Discrimination prohibited.
"1863. Jury commission.
"1864. Master jury wheel.
"1865. Drawing of names from the master jury wheel.
"1866. Qualifications for jury service.
"1867. Challenging compliance with selection procedures.
"1868. Maintenance and inspection of records.
"1869. Exclusion from jury service.
"1870. Definitions.
"1871. Fees.
"1872. Exemptions.
"1873. Challenges.
"1874. Issues of fact in Supreme Court.
"1875. Admiralty and maritime cases.
"1876. Actions on bonds and specialties.

"§ 1861. Declaration of policy

"It is the policy of the United States that all qualified persons shall have the opportunity to serve on grand and petit juries in the district courts of the United States and shall have an obligation to serve as jurors when summoned for that purpose.

"§ 1862. Discrimination prohibited

"No person or class of persons shall be denied the right to serve on grand and petit juries in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status.

"§ 1863. Jury commission

"(a) There shall be a jury commission for each district court of the United States composed of the clerk of the court and a citizen appointed by the court as a jury commissioner: *Provided,* That the court may establish a separate jury commission for one or more divisions of the judicial district by appointing an additional citizen as a jury commissioner to serve with the clerk for such division or divisions. The jury commissioner shall during his tenure in office reside in the judicial district or division for which appointed, shall not belong to the same political party as the clerk serving with him, and shall receive $16 per day for each day necessarily employed in the performance of his duties.

"(b) In the performance of its duties, the jury commission shall act under the direction and supervision of the chief judge of the district.

§1864. Master jury wheel

"(a) Each jury commission shall maintain a master jury wheel and shall place in the master wheel names selected at random from the voter registration lists of persons residing in the judicial district or division it serves: *Provided,* That the judicial council of the circuit, with such advice as the chief judge of the district may offer, shall prescribe some other source or sources of names for the master wheel in addition to the voter registration lists where necessary, in the judgment of the council, to protect the rights secured by section 1862 of this title.

"(b) The jury commission shall place in the master wheel the names of at least 1 per centum of the total number of persons listed on the voter registration lists for the district or division (or, if sources in addition to voter registration lists have been prescribed pursuant to subsection (a), at least 1 per centum of the total number of persons of voting age residing in the district or division according to the most recent decennial census): *Provided,* That in no event shall the jury commission place in the master wheel the names of fewer than two thousand persons.

"(c) The chief judge of the district shall prescribe, by rule, definite and certain procedures to be followed by the jury commission in making the random selection of names required by subsections (a) and (b) of this section.

"(d) State, local, and Federal officials having custody, possession, or control of control of voter registration lists or other appropriate records shall make such lists and records available to the jury commission for inspection, reproduction, and copying at all reasonable times as the commission may deem necessary and proper for the performance of its duties under this title. The district courts shall have jurisdiction upon application by the Attorney General to compel compliance with this subsection by appropriate process.

"(e) The master jury wheel shall contain names of persons residing in all counties, parishes, or similar political subdivisions within the judicial district or division.

"(f) The jury commission shall in accordance with this section (1) from time to time, as necessary, place additional names in the master wheel and (2) between November 15 and December 31 of each even-numbered year empty and refill the master wheel.

"§ 1865. Drawing of names from the master jury wheel

"(a) From time to time as necessary the jury commission shall publicly draw from the master jury wheel the names of as many persons as may be required for jury service, prepare an alphabetical list of the names drawn, which list shall not be disclosed to any person except pursuant to sections 1867 and 1868 of this title and summon by certified mail the persons whose names are drawn. Each person whose name is drawn, unless he claims exemption from jury service pursuant to section 1872 of this title and subsection (b) of this section, shall appear before the clerk and fill out a juror qualification form to be prescribed by the Administrative Office of the United States Courts in consultation with the Attorney General. The form shall elicit his name, address, age, sex, education, race, religion, occupation, and citizenship and whether he has any physical or mental infirmity, is able to read, write, speak, and understand the English language, and has been convicted in any State or Federal court of record of a crime punishable by imprisonment for more than one year and has not had his civil rights restored by pardon or amnesty. The clerk shall examine the form to determine whether it is filled out completely and responsively and shall call any omissions or apparent errors to the attention of such person who shall make such corrections or additions as may be necessary. If any person summoned is unable to fill out the form, the clerk shall do it for him and indicate on the form the fact that he has done so and the reason. Except as provided in subsection (b) of this section, any persons ummoned who fails to appear as directed shall be ordered by the court forthwith to appear and show cause for his failure to comply with the summons. Any person who fails to appear pursuant to such order or who fails to show good cause for noncompliance with the summons may be fined not more than $100 or imprisoned not more than three days, or both.

"(b) Any person summoned who is exempt from jury service pursuant to section 1872 of this title may state the basis for his exemption in the space provided on the summons and return the summons duly signed to the clerk by mail. Any person who willfully misrepresents his exemption from jury service on a summons may be fined not more than $100 or imprisoned not more than three days, or both.

"§ 1866. Qualifications for jury service

"(a) The jury commission shall determine solely on the basis of information provided on the juror qualification form or the returned summons whether a person is qualified for or exempt from jury service: *Provided*, That such determination shall be made by the court if other objective evidence obtained by the jury commission indicates that a person is not qualified pursuant to subparagraphs (1), (3), or (4) of subsection (b) hereof. The jury commission shall enter such determination in the space provided on the juror qualification form and the alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list. Whenever a person is determined to be not qualified for jury service, the jury commission shall note on the space provided on the juror qualification form the specific ground of disqualification.

"(b) In making such determination the jury commission shall deem any person qualified to serve on grand and petit juries in the district court unless he—

"(1) is not a citizen of the United States twenty-one years old who has resided for a period of one year within the judicial district;

"(2) is unable to read, write, speak, and understand the English language;
"(3) is incapable, by reason of mental or physical infirmity, to render efficient jury service; or
"(4) has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

"(c) The jury commission shall maintain a qualified juror wheel and shall place in such wheel names of persons determined to be qualified as jurors. From time to time, the jury commission shall publicly draw from the qualified juror wheel such number of names of persons as may be required for assignment to grand and petit jury panels. The jury commission or the clerk shall prepare a separate list of names of persons assigned to each grand and petit jury panel.

"§ 1867. Challenging compliance with selection procedures

"(a) In criminal cases, prior to the introduction of evidence at trial, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of failure to comply with sections 1864, 1865, or 1866 of this title. The defendant shall be entitled to present in support of such motion the testimony of the jury commission together with other evidence and, where there is some evidence that there has been a failure to comply with sections 1864, 1865, or 1866, any relevant records and papers used by the jury commission in the performance of its duties which are not public or otherwise available. If the court determines that there has been a failure to comply with sections 1864, 1865, or 1866, the court shall dismiss the indictment or stay the proceedings pending the selection of a petit jury in conformity with this title.

"(b) In civil cases, prior to the introduction of evidence at trial, any party may move to stay the proceedings on the ground of failure to comply with sections 1864, 1865, or 1866 of this title. The moving party shall be entitled to present in support of such motion the testimony of the jury commission together with other evidence and, where there is some evidence that there has been a failure to comply with sections 1864, 1865, or 1866, any relevant records and papers used by the jury commission in the performance of its duties which are not public or otherwise available. If the court determines that there has been a failure to comply with sections 1864, 1865, or 1866, the court shall stay the proceedings pending the selection of a jury in conformity with this title.

"(c) The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime or a party in a civil case may challenge any jury in his case on the ground that such jury was not selected in conformity with sections 1864, 1865, or 1866 of this title. Nothing in this section shall preclude any persons or the United States from pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin, or economic status in the selection of persons for service on grand or petit juries.

"(d) The contents of any records or papers produced pursuant to subsections (a) or (b) of this section shall not be disclosed, except as may be necessary in the preparation or presentation of the case, until after the master jury wheel has been emptied and refilled pursuant to section 1864(f) of this title and all persons selected to serve as jurors before the master wheel was emptied have completed such service: *Provided*, That the parties in a case shall be allowed to inspect, reproduce and copy such records or papers at all reasonable times during the pendency of the case. Any person who discloses the contents of any record or paper in violation of this subsection may be fined not more than $1,000 or imprisoned not more than one year, or both.

"§ 1868. Maintenance and inspection of records

"After the master jury wheel is emptied and refilled pursuant to section 1864(f) of this title, and after all persons selected to serve as jurors before the master wheel was emptied have completed such service, all of the records and papers compiled and maintained by the jury commission before the master wheel was emptied shall be preserved by the commission in the custody of the clerk for four years or for such longer period as may be ordered by a court and shall be available for public inspection.

"§ 1869. Exclusion from jury service

"(a) Except as provided in section 1872 of this title, no person or class of persons shall be excluded, excused or exempt from service as jurors: *Provided*, That any person summoned for jury service may be (1) excused by the court for not more than six months at a time upon a showing of unusually severe hardship or (2)

excluded by the court upon (i) peremptory challenge as provided by law or (ii) a finding that such person may be unable to render impartial jury service or that his service as a juror would disrupt the proceedings. Whenever a person is excused or excluded from jury service, the jury commission shall note in the space provided on his juror qualification form the specific ground of excuse or exclusion.

"(b) In any two-year period, no person shall be required to (1) serve as a petit juror for more than thirty calendar days, except when necessary to complete service in a particular case, or (2) serve on more than one grand jury, or (3) serve as both a grand and petit juror.

"§ 1870. Definitions

"For purposes of this chapter—

"(a) 'clerk' and 'clerk of the court' shall mean the clerk of the United States district court or any deputy clerk.

"(b) 'voter registration lists' shall mean the official records maintained by State or local election officials of persons registered to vote in the most recent general election for candidates for Federal Office or, in the case of a State which does not require registration as a prerequisite to voting, such other official lists of persons qualified to vote in such election. The term shall also include the list of eligible voters maintained by any Federal examiner pursuant to the Voting Rights Act of 1965 where the names on such list have not been included on the lists maintained by the appropriate State or local officials.

"(c) 'division' shall mean one or more divisions of a judicial district established by statute, and, in judicial districts where no divisions are established by statute, shall mean such counties, parishes, or similar political subdivisions surrounding the places where court is held as the chief judge of the district shall determine.

"(d) 'district court of the United States', 'district court', and 'court' shall mean courts constituted under chapter 5 of title 28, United States Code: *Provided*, That for purposes of sections 1861, 1862, 1867, and 1869 of this chapter, these terms shall include the District of Columbia Court of General Sessions and the Juvenile Court of the District of Columbia."

FEES

SEC. 102. (a) Section 1871 of title 28, United States Code, is amended by substituting "$20" for "$10" and "$25" for "$14" in the second paragraph, "$16" for "$10" in the third paragraph and "$20" for "$10" in the fourth paragraph.

(b) Section 1821 of title 28, United States Code, is amended by substituting "$20" for "$4", "10 cents" for "8 cents" and "$16" for "$8".

AMENDMENT AND REPEAL

SEC. 103. (a) Sections 1862, 1870, 1872, 1873, and 1874 of title 28, United States Code, are renumbered as sections 1872, 1873, 1874, 1875, and 1876, respectively, of that title.

(b) Sections 13–701, 11–2301 through 2305 (except the last paragraph of section 11–2302), 11–2307 through 2312 and 7–213a of the District of Columbia Code are repealed.

(c) Except for the last paragraph of subsection (a), section 11–2306 of the District of Columbia Code is repealed and a new subsection (b) is added to the section as follows: "(b) The jury commission for the district court for the District of Columbia shall draw from the qualified jury wheel from time to time as may be required the names of persons to serve as jurors in the District of Columbia Court of General Sessions and the Juvenile Court of the District of Columbia and such persons shall be assigned to jury panels in the General Sessions and Juvenile courts as those courts shall direct."

(d) Section 16–1312 of the District of Columbia Code is amended by substituting "section 1866 of title 28, United States Code" for "section 11–2301" in subsection (a)(1) and by substituting "chapter 121 of title 28, United States Code," for "chapter 23 of title 11" in subsection (c).

(e) Section 22–1414 of the District of Columbia Code is amended by inserting the words "or wheel" immediately following the word "box" each time it appears therein.

EFFECTIVE DATE

SEC. 104. Sections 101 and 103 of this title shall become effective one hundred and twenty days after the date of enactment: *Provided*, That such sections shall

not apply in any case in which an indictment has been returned or petit jury impaneled prior to such effective date.

TITLE II

DISCRIMINATION PROHIBITED

SEC. 201. No person or class of persons shall be denied the right to serve on grand and petit juries in any State court on account of race, color, religion, sex, national origin, or economic status.

SUITS BY THE ATTORNEY GENERAL

SEC. 202. (a) Whenever there are reasonable grounds to believe that any person has engaged or is about to engage in any act or practice which would deny or abridge any right secured by section 201 of this title, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for an injunction, restraining order, or other order against a State, any political subdivision thereof, or any official of such State or political subdivision. In any proceeding hereunder, the United States shall be liable for costs the same as a private person.

(b) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title and shall exercise the same without regard to whether any aggrieved party shall have exhausted any administrative or other remedies that may be provided by law. Any action pursuant to this section shall be in every way expedited.

APPROPRIATE RELIEF

SEC. 203. If in any proceeding instituted pursuant to this title or any other law authorizing proceedings for injunctive relief, the district court finds that any right secured by section 201 has been denied or abridged, it may, in addition to any other relief, enter an order, effective for such period of time as may be appropriate—

(a) Prohibiting or suspending the use of any qualification for jury service or any basis for excuse, exemption, or exclusion from jury service which—

(1) violates or has been applied in violation of section 201 of this title, or

(2) is susceptible to being applied in violation of section 201 of this title because it vests in jury officials undue discretion to determine whether any person has satisfied such qualification or whether a basis exists for excusing, exempting, or excluding any person from jury service;

(b) Requiring the use of objective criteria to determine whether any person has satisfied any qualification for jury service or whether a basis exists for excusing, exempting, or excluding any person from jury service;

(c) Requiring maintenance of such records or additional records as may be necessary to permit a determination thereafter whether any right secured by section 201 has been denied or abridged; or

(d) Appointing a master to perform such duties of the jury officials as may be necessary to assure that the rights secured by section 201 of this title are not denied or abridged.

DISCOVERY OF EVIDENCE

SEC. 204. In any proceeding instituted pursuant to section 202 of this title or section 1983 of title 42 of the United States Code, or in any criminal proceeding in any State court prior to the introduction of any evidence at trial, or in any habeas corpus, coram nobis, or other collateral proceeding in any court with respect to a judgment of conviction entered after the effective date of this title, wherein it is asserted that any right secured by section 201 of this title has been denied or abridged—

(a) The appropriate State or local officials shall furnish a written statement of jury selection information subscribed to under oath which shall contain a detailed description of the following:

(1) the nature and location of the sources from which names were obtained for inclusion in the wheel, box, or similar device;

(2) the methods used and the procedures followed in selecting names from the sources referred to in subdivision (1) of this subsection for inclusion in the wheel, box, or similar device;

(3) the methods used for selecting names of prospective jurors from the wheel, box, or similar device for testing or otherwise demonstrating their qualifications for jury service;

(4) the qualifications, tests, standards, criteria, and procedures used in determining whether prospective jurors are qualified to serve as jurors; and

(5) the methods used for summoning or otherwise calling persons for jury service and assigning such persons to grand and petit jury panels.

(b) The statement of jury selection information shall be filed with the clerk of the court in which the proceeding is pending, and a copy thereof shall be served upon the attorney for the complaining party. The statement of jury selection information shall constitute evidence on the question whether any right secured by section 201 of this title has been denied or abridged: *Provided*, that the complaining party shall be entitled to cross-examine any person having knowledge of relevant facts concerning the information to be contained in such statement and to present in addition the testimony of the jury officials, together with any other evidence, and, where there is some evidence of a denial or abridgment of a right secured by section 201 of this title, any relevant records and papers used by jury officials in the performance of their duties which are not public or otherwise available.

(c) If the court determines (1) that there is probable cause to believe that any right secured by section 201 of this title has been denied or abridged and (2) that the records and papers maintained by the State are not sufficient to permit a determination whether such denial or abridgment has occurred, it shall be the responsibility of the appropriate State or local officials to produce additional evidence demonstrating that such denial or abridgment did not occur. When such evidence is not otherwise available, the State shall use such process of the court as may be necessary in order to produce the evidence, including the right to subpena witnesses.

(d) The court may direct that the contents of any records or papers produced pursuant to subsection (b) of this section shall not be disclosed (except as may be necessary in the preparation and presentation of the case) during such period of time as such records and papers are not available for public inspection under State law: *Provided*, That parties to the proceeding shall be allowed to inspect, reproduce, and copy such records and papers at all reasonable times during the pendency of the case, and that disclosure of the contents of such records and papers by the Attorney General and his representatives shall be governed by subsection (b) of section 205 of this title. Any person who discloses the contents of any records or papers in violation of this subsection may be fined not more than $1,000, or imprisoned not more than one year, or both.

PRESERVATION AND INSPECTION OF RECORDS

SEC. 205. (a) The jury officials in all State courts shall preserve the records and papers prepared or obtained in the performance of their duties for four years after the completion of service by all persons whose consideration for service as jurors was the subject of such records and papers. Any person, whether or not a jury official, who willfully steals, destroys, conceals, mutilates, or alters any record or paper required by this subsection to be preserved shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(b) Any record or paper required by subsection (a) of this section to be preserved shall, upon demand in writing by the Attorney General or his representative directed to the person having custody, possession, or control of such record or paper, be made available for inspection, reproduction, and copying by the Attorney General or his representative. During such period of time as such records and papers are not available for public inspection under State law, unless otherwise ordered by a court of the United States, neither the Attorney General nor any employee of the Department of Justice, nor any other representative of the Attorney General, shall disclose the contents of any record or paper produced pursuant to this title except to Congress and any committee thereof, governmental agencies, and in the preparation and presentation of any case or proceeding before any court or grand jury. The United States district court for the district in which a record or paper so demanded is located, shall have jurisdiction by appropriate process to compel the production of such record or paper.

DEFINITIONS

SEC. 206. For purposes of this title—

(a) "State court" shall mean any court of any State, county, parish, city, town, municipality or other political subdivision of any State;

(b) "jury official" shall mean any person or group of persons, including judicial officers, who select, summon, or impanel persons to serve as grand or petit jurors in any State court;

(c) "wheel, box, or similar device" shall include a file, list, or other compilation of names of persons prepared by a jury official;

(d) "political subdivision" shall mean any county, parish, city, town, municipality, or other territorial subdivision of a State.

EFFECT ON EXISTING LAWS

SEC. 207. The remedies provided in this title shall not preclude any person, the United States, or any State or local agency from pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin, or economic status in the selection of persons for service on grand or petit juries in any State court.

EFFECTIVE DATE

SEC. 208. This title shall become effective one hundred and twenty days after the date of its enactment: *Provided*, That the provisions of this title shall not apply in any case in which an indictment has been returned or a petit jury impaneled prior to such effective date.

TITLE III

SEC. 301. Title III of the Civil Rights Act of 1964 (78 Stat. 246; 42 U.S.C. 2000b—2000b-3), is amended to read as follows:

"TITLE III—NONDISCRIMINATION IN PUBLIC EDUCATION AND OTHER PUBLIC FACILITIES

"SEC. 301. The Attorney General may institute, in the name of the United States, a civil action or other proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, whenever he has reasonable grounds to beleive that—

"(a) Any person acting under color of law has denied, or attempted or threatened to deny, any other person, on account of his race or color, the equal protection of the laws with respect to any public school or public college, or any public facility which is owned, operated, or managed by or on behalf of any State or subdivision thereof, or

"(b) Any person, whether acting under color of law or otherwise, has intimidated, threatened, coerced or interfered with, or has attempted or threatens to intimidate, threaten, coerce, or interfere with any other person in the exercise or enjoyment of any right to, or on account of his having exercised or enjoyed any right to, or on account of his having aided or encouraged any other person in the exercise or enjoyment of any right to equal protection of the laws with respect to any public school or public college, or any public facility which is owned, operated, or managed by or on behalf of any State or subdivision thereof.

"SEC. 302. In any proceeding under section 301 the United States shall be liable for costs the same as a private citizen.

"SEC. 303. As used in this title, 'public school' and 'public college' shall have the same meanings as in section 401(c) of title IV of this Act.

"SEC. 304. The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this title.

"SEC. 305. Nothing in this title shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education or any public facility."

SEC. 302. Sections 407 through 410 of the Civil Rights Act of 1964 (78 Stat. 248-249; 42 U.S.C. 2000c-6—2000c-9) are hereby repealed.

TITLE IV

POLICY

SEC. 401. It is the policy of the United States to prevent, and the right of every person to be protected against, discrimination on account of race, color, religion, or national origin in the purchase, rental, lease, financing, use and occupancy of housing throughout the Nation.

DEFINITIONS

SEC. 402. For purposes of this title—

(a) "person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries.

(b) "dwelling" includes (1) any building or structure, or portion thereof, whether in existence or under construction, which is in, or is designed, intended, or arranged for, residential use by one or more individuals or families and (2) any vacant land that is offered for sale or lease for the construction or location of any such building, structure, or portion thereof.

(c) "discriminatory housing practice" means an act that is unlawful under section 403 or 404.

PREVENTION OF DISCRIMINATION IN THE SALE OR RENTAL OF HOUSING

SEC. 403. It shall be unlawful for the owner, lessee, sublessee, assignee, or manager of, or other person having the authority to sell, rent, lease, or manage, a dwelling, or for any person who is a real lestate broker or salesman, or employee or agent of a real estate broker or salesman—

(a) To refuse to sell, rent, or lease, refuse to negotiate for the sale, rental, or lease of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale, rental, or lease of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin.

(c) To print or publish or cause to be printed or published any notice, statement, or advertisement, with respect to the sale, rental, or lease of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, rental, or lease when such dwelling is in fact so available.

(e) To deny to any person because of race, color, religion, or national origin, or because of the race, color, religion, or national origin of the person he represents or may represent, access to or participation in any multiple-listing service or other service or facilities related to the business of selling or renting dwellings.

PREVENTION OF DISCRIMINATION IN THE FINANCING OF HOUSING

SEC. 404. It shall be unlawful for any bank, savings and loan institution, credit union, insurance company, or other person that makes mortgage or other loans for the purchase, construction, improvement, or repair or maintenance of dwellings to deny such a loan to a person applying therefor, or discriminate against him in the fixing of the downpayment, interest rate, duration, or other terms or conditions of such a loan, because of the race, color, religion, or national origin of such person, or of any member, stockholder, director, officer, or employee of such person, or of the prospective occupants, lessees, or tenants of the dwelling or dwellings in relation to which the application for a loan is made.

INTERFERENCE, COERCION, OR INTIMIDATION

SEC. 405. No person shall intimidate, threaten, coerce, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of any right granted by section 403 or 404.

ENFORCEMENT BY PRIVATE PERSONS

SEC. 406. (a) The rights granted by sections 403, 404, and 405 may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within six months after the alleged discriminatory housing practice or violation of section 405 occurred.

(b) Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of a civil action without the payment of fees, costs, or security. A court of a State or subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision.

(c) The court may grant such relief as it deems appropriate, including a permanent or temporary injunction, restraining order, or other order, and may award damages to the plaintiff, including damages for humiliation and mental pain and suffering, and up to $500 punitive damages.

(d) The court may allow a prevailing plaintiff a reasonable attorney's fee as part of the costs.

ENFORCEMENT BY THE ATTORNEY GENERAL

SEC. 407. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this title he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts pertaining to such pattern or practice and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights granted by this title.

(b) Whenever an action under section 406 has been commenced in any court of the United States, the Attorney General may intervene for or in the name of the United States if he certifies that the action is of general public importance. In such action the United States shall be entitled to the same relief as if it had instituted the action.

ASSISTANCE BY THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT

SEC. 408. The Secretary of Housing and Urban Development shall—

(a) make studies with respect to the nature and extent of discriminatory housing practices in representative communities, urban, suburban, and rural, throughout the United States;

(b) publish and disseminate reports, recommendations, and information derived from such studies;

(c) cooperate with and render technical assistance to Federal, State, local, and other public or private agencies, organizations, and institutions which are formulating or carrying on programs to prevent or eliminate discriminatory housing practices;

(d) cooperate with and render such technical and other assistance to the Community Relations Service as may be appropriate to further its activities in preventing or eliminating discriminatory housing practices; and

(e) administer the programs and activities relating to housing and urban development in a manner affimatively to further the policies of this title.

EFFECT ON STATE LAWS

SEC. 409. Nothing in this title shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this title shall be effective, that grants, guarantees, or protects the same rights as are granted by this title; but any law that purports to require or permit any action that would be a discriminatory housing practice under this title shall to that extent be invalid.

CONTEMPT OF COURT

SEC. 410. All cases of criminal contempt arising under the provisions of this title shall be governed by section 151 of the Civil Rights Act of 1957 (42 U.S.C. 1995).

EXISTING AUTHORITY

SEC. 411. Nothing in this title shall be construed to deny, impair, or otherwise affect any right or authority of the United States or any agency or officer thereof under existing law to institute or intervene in any civil action or to bring any criminal prosecution.

TITLE V

INTERFERENCE WITH RIGHTS

SEC. 501. Whoever, whether or not acting under color of law, by force or threat of force—

(a) injures, intimidates, or interferes with, or attempts to injure, intimidate, or interfere with any person because of his race, color, religion, or national origin while he is engaging or seeking to engage in—

(1) voting or qualifying to vote in any primary, special, or general election;

(2) enrolling in or attending any public school or public college;

(3) participating in or enjoying any benefit, service privilege, program, facility, or activity provided or administered by the United States or by any State or subdivision thereof;

(4) applying for or enjoying employment, or any prerequisites thereof, by any private employer or agency of the United States or any State of subdivision thereof, or of joining or using the services or advantages of any labor organization or using the services of any employment agency;

(5) selling, purchasing, renting, leasing, occupying, or contracting or negotiating for the sale, rental, lease or occupation of any dwelling;

(6) serving, or attending upon any court in connection with possible service, as a grand or petit juror in any court of the United States or of any State;

(7) using any vehicle, terminal, or facility of any common carrier by motor, rail, water or air;

(8) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance; or

(9) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment, or of any other establishment which serves the public and which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments; or

(b) injures, intimidates, or interferes with, or attempts to injure, intimidate, or interfere with any person (1) to discourage such person or any other person or any class of persons from participating or seeking to participate in any such benefits or activities without discrimination on account of race, color, religion, or national origin, or (2) because he has so participated or sought to so participate, or urged or aided others to so participate, or engaged in speech or peaceful assembly opposing any denial of the opportunity to so participate; or

(c) injures, intimidates, interferes with, or attempts to injure, intimidate, or interfere with any public official or other person to discourage him from affording another person or any class of persons equal treatment in participating or seeking to participate in any of such benefits or activities without discrimination on account or race, color, religion, or national origin, or because he has afforded another person or class of persons equal treatment in so participating or seeking to so participate—

Shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

AMENDMENTS

SEC. 502. (a) Section 241 of title 18, United States Code, is amended by striking out the final paragraph thereof and substituting the following:

"They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life."

(b) Section 242 of title 18, United States Code, is amended by striking out the period at the end thereof and adding the following: "; and if death results shall be subject to imprisonment for any term of years or for life."

(c) Subsections (a) and (c) of section 12 of the Voting Rights Act of 1965 (79 Stat. 443, 444) are amended by striking out the words "or (b)" following the words "11 (a)."

TITLE VI—MISCELLANEOUS

AUTHORIZATION FOR APPROPRIATIONS

SEC. 601. There are hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act.

SEPARABILITY

SEC. 602. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other prsons not similarly situated or to other circumstancs shall not be affected thereby.

[S. 3296, 89th Cong., 2d sess.]

AMENDMENTS Intended to be proposed by Mr. Ervin to S. 3296, a bill to assure nondiscrimination in Federal and State jury selection and service, to facilitate the desegregation of public education and other public facilities, to provide judicial relief against discriminatory housing practices, to prescribe penalties for certain acts of violence or intimidation, and for other purposes, viz:

On page 35, between lines 16 and 17, insert the following new title:

"TITLE VI—CIVIL RIGHTS ACT AMENDMENT

"SEC. 601. Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) is amended by adding at the end thereof the following new section:

" 'SEC. 606. (a) Nothing contained in this title shall be construed to authorize the termination of, or the refusal to grant or continue, any Federal financial assistance for any cause other than a violation of a provision of the Constitution, or an affirmative provision of a statute of the United States, which has been established by substantial evidence.

" '(b) No rule, regulation, or order which may result in the termination of, or the failure to grant or continue, any Federal assistance shall be placed in effect unless it has been adopted after proceedings taken in compliance with the requirements of sections 4–10, inclusive, of the Administrative Procedure Act (5 U.S.C. 1003–1009).

" '(c) A determination under this title to the effect that discrimination on the ground of race, color, or national origin exists, has existed, or in the future may exist, in the administration of any program or activity shall require a showing by substantial evidence that in the administration or operation thereof conditions or requirements are, have been, or may be imposed with affirmative intent to exclude, or with the necessary effect of excluding, individuals from participation in the benefits of such program or activity solely upon the ground of race, color, or national origin.

" '(d) Nothing contained in this title shall be construed to authorize any Federal department, agency, or officer to issue any rule, regulation, or order for the purpose or with the effect of—

" '(1) controlling or regulating the administration or operation of any school, hospital, or other institution for any purpose other than to provide equal opportunity for access thereto by individuals without regard to race, color, or national origin; or

" '(2) depriving any class of individuals of the privilege of determining voluntarily whether or not to avail themselves of any benefit provided by any program or activity, or of the facilities of any school, hospital, or other institution.' "

On page 35, line 17, strike out "TITLE VI", and insert in lieu thereof "TITLE VII".

On page 35, line 19, strike out "SEC. 601", and insert in lieu thereof "SEC. 701".

On page 36, line 2, strike out "SEC. 602", and insert in lieu thereof "SEC. 702".

[S. 1497, 89th Cong., 1st sess.]

A BILL To protect civil rights by providing criminal and civil remedies for unlawful official violence, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Protection Against Unlawful Official Violence Act."

PROTECTION AGAINST VIOLENCE UNDER COLOR OF LAW

SEC. 2. (a) Section 242 of title 18, United States Code, is amended by inserting "(a)" immediately before "Whoever", and by adding at the end thereof the following:

"(b) Whoever, under color of any law, statute, ordinance, or regulation or custom knowingly performs any of the following acts depriving another person of any of the rights, privileges, or immunities secured by the Constitution and laws of the United States shall be fined not more than $1,000 or imprisoned not more than one year, or both:

"(1) Subjecting any person to physical injury for an unlawful purpose;

"(2) Subjecting any person to unnecessary force during the course of an arrest or while the person is being held in custody;

"(3) Subjecting any person to violence or maliciously subjecting such person to unlawful restraint in the course of eliciting a confession to a crime or any other information;

"(4) Subjecting any person to violence or unlawful restraint for the purpose of obtaining anything of value;

"(5) Refusing to provide protection to any person from unlawful violence at the hands of private persons, knowing that such violence was planned or was then taking place; or

"(6) Aiding or assisting private persons in any way to carry out acts of unlawful violence."

(b) The enactment of this section shall not beconstrued as indicating an intent on the part of the Congress to prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which they would have jurisdiction in the absence of the enactment of this section.

FEDERAL CIVIL REMEDIES FOR UNLAWFUL OFFICIAL VIOLENCE

SEC. 3. Section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) is amended by inserting "(a)" immediately after "SEC. 1979.", and by adding at the end thereof the following:

"(b) Every city, county, or political subdivision of a State or territory which has in its employ a person who, under color of any statute, ordinance, regulation, custom, or usage of such State, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress to the same extent as the person employed is liable to the party injured."

PROTECTION OF FEDERAL OFFICERS AND UNIFORMED MEMBERS OF THE ARMED SERVICES FROM INJURY AND THREATS

SEC. 4. (a) Chapter 73 of title 18 of the United States Code is amended by adding at the end of such chapter the following new section:

"§ 1510. Injuring or threatening to injure officers of the United States

"Whoever, by force, intimidation, or threat, prevents or attempts to prevent any person from accepting or holding any office, trust, or place of confidence under the United States, or attempts to induce by like means any officer of the United States to leave the place where his duties as an officer are required to be performed;

or whoever injures or attempts to injure or threatens to injure any such person or the property of such person on account of the lawful discharge of the duties of his office, or while such person is engaged in the lawful discharge thereof; or whoever injures or attempts to injure or threatens to injure the property of any such person so as to molest, interrupt, hinder, or impede such person in the discharge of his official duties shall be fined not more than $5,000 or imprisoned not more than six years, or both."

(b) The analysis of chapter 73, immediately preceding section 1501 of title 18 of the United States Code, is amended by adding at the end thereof the following:

"1510. Injuring or threatening to injure officers of the United States."

(c) Section 1114 of title 18 of the United States Code is amended by striking out "officer or enlisted man of the Coast Guard" and inserting in lieu thereof "uniformed member of the Army, Navy, Air Force, Marine Corps, or Coast Guard".

[S. 1654, 89th Cong., 1st sess.]

A BILL To amend sections 241 and 242 of title 18, United States Code, to specify the punishment if personal injury or death results from a violation of such sections

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 241 of title 18, United States Code, is amended by deleting the period at the end thereof and inserting the following: "; and if personal injury results they shall be fined not more than $10,000 or imprisoned not more than twenty years, or both; and if death results they shall be subject to imprisonment for any term of years or for life."

SEC. 2. Section 242 of title 18, United States Code, is amended by deleting the period at the end thereof and inserting the following: "; and if personal injury results shall be subject to imprisonment for not more than twenty years or a fine of not more than $10,000, or both; and if death results shall be subject to imprisonment for any term of years or for life."

[S. 2845, 89th Cong., 2d sess.]

A BILL To provide for the selection of qualified persons to serve as jurors in each United States district court without regard to their race or color

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1864 of title 28, United States Code, is amended—

(1) by inserting "(a)" immediately before "The" in the first paragraph thereof;

(2) by adding after the fourth paragraph thereof the following:

"In selecting the names of qualified persons to be placed in any jury box for any district, the clerk of court or his deputy and the jury commissioner for the place for holding court where such jury box is maintained shall use a list submitted to them by the Director of the Census. For purposes of this section, the Director of the Census shall, from time to time as necessary to refill any such jury box, prepare and submit to the clerk of court or his deputy and the jury commissioner for the place for holding court where such jury box is maintained a list containing the names of persons selected at random who are qualified under section 1861 of this title to serve as jurors in the district concerned. If the court has directed that jurors shall be selected from separate parts of any district pursuant to section 1865 of this title, such lists for such district shall contain the names of qualified persons selected by the Director of the Census from such parts of such district as the court has so directed. Each such list shall contain at least three hundred names or such larger number as the court of such district has determined shall be placed in such jury box."; and

(3) by adding at the end thereof the following new subsection:

"(b)(1) Whenever the United States attorney for any judicial district has probable cause for belief that the procedures, or the administration of the procedures, employed by the clerk of court or his deputy or any jury commissioner in selecting the names of persons to be placed in any jury box for such district, in determining whether persons are qualified as jurors in such district under section 1861 of this title, or in drawing the names of jurors in such district systematically or deliberately exclude any group from any jury panel in such district on account

of race, color, sex, political affiliation, religion, national origin, or economic or social status, the United States attorney may file, in the United States court of appeals for the circuit embracing such district, a petition to review the validity of such procedures or of the manner in which such procedures are administered. Each petition of any United States attorney shall contain a concise statement of the facts upon which his belief is based. The clerk of such court of appeals shall transmit a true copy of the petition to the chief judge of the district concerned and to the clerk of the district court and each jury commissioner in such district.

"(2) Each court of appeals may appoint one or more masters, who shall subscribe to the oath of office required by section 1757 of the Revised Statutes (5 U.S.C. 16) and serve for such period as the court of appeals shall determine. Upon receipt of a petition under paragraph (1), the court of appeals may enter an order of reference to a master directing him to take evidence and report to the court of appeals findings as to whether or not the facts and charge specified in such petition are true. Any master appointed pursuant to this subsection shall to the extent not inconsistent herewith have all the powers conferred upon a master by rule 53 of the Federal Rules of Civil Procedure; and except as inconsistent with this subsection, all proceedings before a master shall be conducted in conformity with procedures prescribed by such rule. The compensation to be allowed to any persons appointed as masters shall be fixed by the court of appeals and shall be payable by the United States.

"(3) After any such proceeding, the master shall report his findings, and the entire record, to the court of appeals, together with any recommendations as to any order which should be entered by the court of appeals. Upon receipt of any such report, the court of appeals shall cause the clerk of the court to transmit a copy thereof to the chief judge of the district concerned, the clerk of the district court, each jury commissioner in such district, and the United States attorney for such district, together with an order to show cause within ten days why a final determination of the court of appeals should not be made upon the basis of the findings or recommendations contained in such report. Upon the expiration of such period, the court of appeals shall make a determination affirming or rejecting the validity of the procedures employed in selecting persons for grand or petit jury service in such district, or of the manner in which such procedures are administered, unless, prior to that time, exceptions have been presented to any finding or recommendation contained in such report. If any such exception has been filed with the court of appeals and served upon all interested parties prior to the expiration of that time, the court of appeals shall review any finding or recommendation of the master to which such exception is taken before it makes any determination concerning the validity of such procedures or of the administration of such procedures.

"(4) In any case in which the court of appeals determines that any of the procedures employed in selecting persons for grand or petit jury service in the judicial district concerned, or the manner in which such procedures are administered, are not in conformity with the standards and requirements prescribed by section 1861 or 1863 of this title or by the other provisions of this section, the court of appeals may enter such an order as it may deem necessary and appropriate to enforce the right of citizens of the United States to serve as members of grand or petit juries without discrimination on account of race, color, sex, political affiliation, religion, national origin, or economic or social status, including, but not limited to, an order (A) directing the clerk of court or his deputy or any jury commissioner in the district concerned to adhere to the standards and requirements prescribed by section 1861 or 1863 of this title or by the other provisions of this section and to modify or terminate any procedures used for the selection of grand or petit jurors in such district which are not in conformity with such standards and requirements, or (B) striking out any jury panel unlawfully constituted.

"(5) The final judgment of the court of appeals shall be subject to review by the Supreme Court of the United States upon a writ of certiorari in accordance with the provisions of section 1254 (1) of this title, except that application therefor shall be made within ninety days after the entry of such judgment."

[S. 2846, 89th Cong., 2d sess.]

A BILL To protect civil rights by providing that it shall be a Federal offense to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any of his civil rights; by providing criminal and civil remedies for unlawful official violence; and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Protection Against Unlawful Violence Act".

INTERFERENCE WITH FREE EXERCISE OR ENJOYMENT OF CIVIL RIGHTS

SEC. 2. (a) Section 241 of title 18, United States Code, is amended to read as follows:

"§ 241. Conspiracy against rights of citizens

"(a) If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right, privilege, or immunity secured or protected by the Constitution or laws of the United States, or because of his having so exercised the same; or

"If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right, privilege, or immunity so secured or protected—

"They shall be fined not more than $5,000 or imprisoned not more than ten years, or both; and if personal injury results they shall be fined not more than $10,000 or imprisoned not more than twenty years, or both; and if death results they shall be imprisoned for any term of years or for life.

"(b) Any person who, under color of law or otherwise, willfully injures, oppresses, threatens, intimidates, or willfully attempts to injure, oppress, threaten, or intimidate any citizen—

"(1) in the free exercise or enjoyment of any right, privilege, or immunity secured or protected by the Constitution or laws of the United States against deprivation by such persons, or

"(2) because of his having so exercised or enjoyed any such right, privilege, or immunity,

shall be fined not more than $5,000 or imprisoned not more than ten years, or both; and if personal injury results shall be fined not more than $10,000 or imprisoned not more than twenty years, or both; and if death results shall be imprisoned for any term of years or for life."

(b) The enactment of this section shall not be construed as indicating an intent on the part of the Congress to prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which they would have jurisdiction in the absence of the enactment of this section.

PROTECTION AGAINST VIOLENCE UNDER COLOR OF LAW

SEC. 3. (a) Section 242 of title 18, United States Code, is amended to read as follows:

"§ 242. Deprivation of rights under color of law

"(a) Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties; on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if personal injury results shall be fined not more than $10,000 or imprisoned not more than twenty years, or both; and if death results shall be imprisoned for any term of years or for life.

"(b) Whoever, under color of any law, statute, ordinance, or regulation or custom, knowingly performs any of the following acts depriving another person of any of the rights, privileges, or immunities secured or protected by the Constitution or laws of the United States shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if personal injury results shall be fined not more than $10,000 or imprisoned not more than twenty years, or both; and if death results shall be imprisoned for any term of years or for life:

"(1) Subjecting any person to physical injury for an unlawful purpose;

"(2) Subjecting any person to unnecessary force during the course of an arrest or while the person is being held in custody;

"(3) Subjecting any person to violence or maliciously subjecting such person to unlawful restraint in the course of eliciting a confession to a crime or any other information;

"(4) Subjecting any person to violence or unlawful restraint for the purpose of obtaining anything of value;

"(5) Refusing to provide protection to any person from unlawful violence at the hands of private persons, knowing that such violence was planned or was then taking place; or

"(6) Aiding or assisting private persons in any way to carry out acts of unlawful violence."

(b) The enactment of this section shall not be construed as indicating an intent on the part of the Congress to prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which they would have jurisdiction in the absence of the enactment of this section.

FEDERAL CIVIL REMEDIES FOR UNLAWFUL OFFICIAL VIOLENCE

SEC. 4. Section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) is amended by inserting "(a)" immediately after "SEC. 1979.", and by adding at the end thereof the following:

"(b) Every city, county, or political subdivision of a State which has in its employ a person who, under color of any statute, ordinance, regulation, custom, or usage of such State, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress to the same extent as the person employed is liable to the party injured. As used in this subsection, the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa."

PROTECTION OF FEDERAL OFFICERS AND UNIFORMED MEMBERS OF THE ARMED SERVICES FROM INJURY AND THREATS

SEC. 5. (a) Chapter 73 of title 18 of the United States Code is amended by adding at the end of such chapter the following new section:

"§ 1510. Injuring or threatening to injure officers of the United States

"Whoever, by force, intimidation, or threat, prevents or attempts to prevent any person from accepting or holding any office, trust, or place of confidence under the United States, or attempts to induce by like means any officer of the United States to leave the place where his duties as an officer are required to be performed; or whoever injures or attempts to injure or threatens to injure any such person or the property of such person on account of the lawful discharge of the duties of his office, or while such person is engaged in the lawful discharge thereof; or whoever injures or attempts to injure or threatens to injure the property of any such person so as to molest, interrupt, hinder, or impede such person in the discharge of his official duties shall be subject to imprisonment for not more than six years, or a fine of not more than $5,000, or both; and if personal injury results shall be subject to imprisonment for not more than twenty years or a fine of not more than $10,000, or both; and if death results shall be subject to imprisonment for any term of years or for life."

(b) The analysis of chapter 73, immediately preceding section 1501 of title 18 of the United States Code, is amended by adding at the end thereof the following:

"1510. Injuring or threatening to injure officers of the United States."

(c) Section 1114 of title 18 of the United States Code is amended by striking out "officer or enlisted man of the Coast Guard" and inserting in lieu thereof "uniformed member of the Army, Navy, Air Force, Marine Corps, or Coast Guard".

AMENDMENT TO SECTION 372 OF TITLE 18, UNITED STATES CODE, TO SPECIFY THE PUNISHMENT IF PERSONAL INJURY OR DEATH RESULTS FROM A VIOLATION OF SUCH SECTION

SEC. 6. Section 372 of title 18, United States Code, is amended by inserting, before the period at the end thereof, a semicolon and the following: "and if personal injury results each of such persons shall be fined not more than $10,000 or imprisoned not more than twenty years, or both; and if death results each of such persons shall be imprisoned for any term of years or for life".

[S. 2923, 89th Cong., 2d sess.]

A BILL Providing for jury selection in Federal and State courts, prosecution and removal to Federal courts, civil preventive relief, civil indemnification, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "The Civil Rights Protection Act of 1966."

TITLE I—JURY SELECTION IN FEDERAL AND STATE COURTS

JURY SELECTION IN FEDERAL COURTS

SECTION 101. Section 1864 of title 28, United States Code, is amended to read as follows:

"§ 1864. Duties, compensation and methods of selecting and drawing jurors

"(a) JURY COMMISSION.—A jury commission shall be established in each judicial district, consisting of the clerk of the court or a duly qualified deputy clerk acting for the clerk, and one or more jury commissioners, appointed by the district court. The jury commissioner shall be a citizen of the United States of good standing, a resident of the district, and, at the time of his appointment, shall not be a member of the same political party as the clerk of the court or a duly qualified deputy clerk acting for the clerk. If more than one jury commissioner is appointed, each may be designated to serve in one or more of the places where court is held, and the clerk and the jury commissioner so designated shall constitute the jury commission for that part of the district. In the event that a jury commissioner is unable for any reason to perform his duties, another jury commissioner may be appointed, as provided herein, to act in his place until he is able to resume his duties.

"(b) JURY SELECTION.—

"(i) In the performance of its duties, the jury commission shall act under the direction and supervision of the chief judge of the district.

"(ii) The names of persons who may be called for grand or petit jury service shall be obtained under a sampling plan prepared by the jury commission with the approval of the chief judge and designed to provide a representative cross-section of the population of the judicial district without exclusion on the basis of race, color, sex, political or religious affiliation or economic or social status. The plan for obtaining such names and the method for carrying out such plan shall be prepared in consultation with and approved by the Director of the Administrative Office of the United States Courts, who may call upon the Director of the Bureau of the Census for advice and assistance.

"(iii) From the names obtained under subsection (ii) of this subsection, the names of not less than three hundred qualified persons, publicly drawn by chance, shall be placed in the jury box, wheel, or similar device.

"(iv) The names of jurors for service on grand and petit juries shall be publicly drawn by chance from the jury box, wheel, or similar device.

"(v) In determining whether persons whose names are to be placed in the jury box, wheel, or similar device are qualified as jurors under section 1861 of title 28, as amended, the jury commission may use such questionnaires and other means as the chief judge, with the approval of the Director of the Administrative Office of the United States Courts, may deem appropriate, including the administration of oaths. The questionnaires may be filled out by the individual or by another on his behalf. With the approval of the chief judge, the jury commission may designate deputy clerks and other employees in the office of the clerk of the court to assist the commission in the performance of its duties, and to perform under its direction such of the detailed duties of the commission as in the opinion of the chief judge could be assigned to them.

"(c) RECORDS.—The jury commission shall keep records of the names obtained under subsection (b)(ii) of this section, the names of persons placed in the jury box, wheel, or similar device, the questionnaires, if any, returned by said persons, the names and race of the persons drawn from the jury box, wheel, or similar device, the names of those performing jury service and the dates thereof, and such additional appropriate records as the chief judge may direct. Such records shall be retained for a period of not less than four years.

"(d) ENFORCEMENT BY COURT OF APPEALS.—On application of any citizen residing in, or litigant in, any judicial district or of the Attorney General of the United States, alleging that the jury selection procedures or recordkeeping

requirements set forth in subsections (b) and (c) of this section are not being fully implemented, the United States court of appeals for the judicial circuit in which said judicial district is located shall, upon a showing thereof, appoint jury commissioners responsible to said court of appeals and direct such jury commissioners in the selection of juries and the keeping of records in accordance with such subsections (b) and (c) of this section. Where evidence is required for a determination by the court of appeals, the court may hear the evidence itself or appoint a master to act for it in accordance with law.

"(e) RETURN OF JURY SUPERVISION.—The court of appeals may, on its own motion or on application of the chief judge of the judicial district, direct the return of supervision and control of the jury selection procedures to the chief judge and to the jury commission for said judicial district at any time when the court of appeals finds that there is reasonable cause to believe that the jury selection procedures and recordkeeping requirements prescribed in subsections (b) and (c) of this section will be fully implemented.

"(f) COMPENSATION.—Each jury commissioner appointed on a part-time basis shall be compensated for his services at the rate of $25 per day for each day in which he actually and necessarily is engaged in the performance of his official duties, to be paid upon certificate of the chief judge of the district.

"Each jury commissioner appointed on a full-time basis shall receive a salary to be fixed from time to time by the Judicial Conference of the United States at a rate which, in the opinion of the Judicial Conference, corresponds to that provided by the Classification Act of 1949, as amended, for positions in the executive branch with comparable responsibilities.

"Each jury commissioner shall receive his traveling and subsistence expenses within the limitations prescribed for clerks of district courts while absent from his designated post of duty on official business.

"(g) DELEGATION.—Any of the powers or duties conferred upon the chief judge under this section may be delegated by him to another judge of the district: *Provided, however,* That where part of a district by agreement or order of court is assigned to one particular judge and he customarily holds court there, as to such part of the district he shall perform the functions and fulfill the duties conferred upon the chief judge in this section."

SEC. 102. Section 1861(2) setting forth qualifications of Federal jurors is amended by striking out the words "read" and "write."

SEC. 103. Section 1863 is amended by adding the following sentence to subsection (b): "If the district judge determines that the ability to read or write English is reasonably required in order for jurors to perform their duties in any particular case or cases, he shall be empowered to exclude those who cannot read or write English, except that no person shall be excluded on this ground who has completed the sixth grade in an English language school."

SEC. 104. Section 1871 is amended by striking the words "$10 per day" and inserting in their place "$15 per day or loss of pay, whichever is greater"; and by striking the words "$14 for each day" and inserting in their place "$20 per day or loss of pay, whichever is greater for each day"; and by striking the words "subsistence of $10 per day shall be allowed" and inserting in their place "subsistence allowance given to Federal employees shall be allowed"; and by striking the words "jury fees in excess of $10 per diem" and inserting in their place "jury fees in excess of $15 per diem."

JURY SELECTION IN STATE COURTS

SEC. 105. RECORDS.—Each State or local court shall keep records of the names of all persons on the jury list for said court, names of those persons placed in the jury box, wheel or similar device, questionnaires, applications, or documents of any sort used in the selection of jurors, the names and race of the persons drawn from the jury box, wheel or similar device, the names of those performing jury service and the dates thereof, and such additional appropriate records as the judge or judges of said court may direct. Such records shall be retained for a period of not less than four years.

SEC. 106. JURY DISCRIMINATION.—(a) On application of any citizen residing within the area of, or any litigant in, any State or local court, or of the Attorney General of the United States, alleging that persons have been systematically excluded from grand or petit juries on grounds of race or color in such State or local court or that the recordkeeping requirements of section 105 are not being fully implemented, the Federal district court for the district in which said State or local court is located shall, upon a showing thereof, direct the Director of the Administrative Office of the United States Courts, directly or through subordinate

officials, to assume responsibility for the selection and administration of juries in that State or local court, and the Director shall administer and supervise the selection of juries in accordance with the procedures set forth in subsections (b) and (c) of section 101. The Director may, if practical, use the Federal list or part thereof of jurors for the area in which said State or local court is located. The Director shall act without regard to State and local laws and regulations applicable to jury selection and service in said State or local court and all judges therein shall apply Federal law governing jury selection and service. The Director may, in accordance with civil service laws, appoint and fix the compensation of such officers, attorneys and employees, and make such expenditures, as may be necessary to carry out his duties under this section. The Director may call upon the Director of the Bureau of the Census for advice and assistance in carrying out his duties.

(b) Any final judgment of any Federal or State court within five years prior to the filing of the application in the district court and whether prior to or after the effective date of this Act, determining that there has been systematic exclusion from jury service on grounds of race or color in any State or local court, shall establish such exclusion unless the State or local court, through its clerk or other appropriate official, satisfies the district court that such exclusion no longer exists.

(c) Whenever it is shown that over a period of two years the ratio which the number of persons of any race or color within the area of any State or local court bears to the total population of that area exceeds by one-third or more the ratio which the number of persons of that race or color serving on grand and petit juries bears to the total number of persons serving on such juries, this shall be deemed to establish systematic exclusion on grounds of race or color: *Provided, however*, That in case all or part of the two-year period antedates the effective date of this Act, the State or local court, through its clerk or other appropriate official, shall be given the opportunity to demonstrate that such exclusion no longer exists.

SEC. 107. The State or local court may make application for reinstatement of State procedures to the United States District Court for the District of Columbia which may approve the reinstatement of said procedures if it finds that there is no longer reasonable cause to believe that persons will be excluded from jury service by reason of race or color, or that there will be continued failure to keep records.

SEC. 108. Whenever the Attorney General has reasonable cause to believe that any change in the qualifications, standards, or limitations on the right to a jury trial, operation of the jury system, or the selection of, or challenges to, individual jury members or panel, for any case or class of cases in any State or local court different from those in force and effect on January 1, 1966, will have the purpose or effect of circumventing this title, he may bring an action in the Federal district court for the district in which such State or local court is located to enjoin such change in qualifications, standards, limitations, operation, selection, or challenge and the district court may grant such temporary or final relief as may be necessary to prevent such circumvention of this title.

GENERAL

SEC. 109. Sections 106(c) and 202(f)(ii) shall not apply in any area unless a racial or color minority constitutes at least 10 per centum of the total population of the area.

SEC. 110. Any person who willfully fails to comply with the recordkeeping requirements of this title shall be fined not more than $1,000 or imprisoned not more than one year, or both.

SEC. 111. The provisions of title 42, United States Code, sections 1974 (a), (b), (c), and (d) shall apply with respect to jury records required to be maintained under this title.

SEC. 112. This title shall become effective ninety days after the date of its enactment.

TITLE II—PROSECUTION IN AND REMOVAL TO FEDERAL COURTS

FEDERAL TRIAL OF STATE OFFENSES

SEC. 201. The district courts of the United States shall have original jurisdiction, concurrent with the courts of the States, of all prosecutions for offenses (whether felonies, misdemeanors or other offenses) defined by the laws of the State or of any subdivision of the State where acts or omissions constituting the charged offense occur, whenever prosecution of such offenses in a Federal district court is necessary and proper to assure equal protection of the laws.

SEC. 202. (a) Objection to the jurisdiction of the district court conferred by section 201 shall be entertained only if made before trial and in the manner authorized by the Federal Rules of Criminal Procedure in effect at the time of the objection. If such objection is not made before trial, the jurisdiction of the district court shall not thereafter be questioned in any manner or by any court.

(b) In the event of a properly presented objection to the jurisdiction of the district court under section 201, the question whether the prosecution of the charged offense in a Federal district is necessary and proper to assure equal protection of the laws shall be promptly decided by the district court sitting without jury, and its decision sustaining or overruling the objection shall be reviewable by interlocutory appeal to the court of appeals within ten days after the entry of the order.

(c) If any one of the circumstances specified in subsection (d) of this section and any one of the circumstances specified in subsection (e) of this section are established by a preponderance of the evidence, the district court shall find that prosecution of the charged offense in a Federal district court is necessary and proper to assure equal protection of the laws.

(d) The circumstances first referred to in subsection (c) of this section are that the victim of the offense is:

(i) A member of a racial or color group subject to the discrimination set forth in subsection (e) of this section; or

(ii) A person who, by words or action, was advocating or supporting at or near the time of the offense the exercise or enjoyment by any member or members of such group of equal protection of the laws.

(e) The circumstances second referred to in subsection (c) of this section are: that in any county or other political subdivision, where, under applicable State law the offense might be tried, the members of any racial or color group are—

(i) systematically excluded from actual service on grand or petit juries in the State or local courts, whether their absence be caused by exclusion from the venires, or by excuses or challenges peremptory or for cause, or otherwise;

(ii) systematically denied in any manner the franchise in elections at which any prosecuting official or judge in the county or other political subdivision, or any official who appoints any such prosecuting official or judge, is elected;

(iii) systematically segregated in, or discriminated against in any manner in connection with the services or facilities of, State or local jails, prisons, police stations, courts or other public buildings related to the administration of justice;

(iv) systematically subjected to harsher punishment upon conviction of crime than those to which persons generally convicted of crime are subjected; or

(v) systematically subjected to more onerous terms or conditions of bail or conditional release than those to which defendants generally are subjected.

(f)(i) Any final judgment of any Federal or State court within five years prior to the commencement of the prosecution under section 201 determining that there has been, on grounds of race or color, systematic exclusion from jury service in the State or local courts of the county or other political subdivision, or systematic denial of the franchise in any election in the county or other State political subdivision shall establish the circumstance described in subsection 202(e) (i) or (ii), as the case may be, unless the defendant satisfies the court that the circumstances described in said subsection (i) or (ii) no longer exist.

(ii) Whenever it is shown that over a period of two years the ratio which the number of persons of any race or color within the county or other political subdivision bears to the total population of said county or other political subdivision exceeds by one-third or more the ratio which the number of persons of that race or color serving on grand and petit juries bears to the total number of persons serving on such juries, or the ratio which the number of persons of that race or color registered to vote bears to the total number of persons registered to vote, this shall be deemed to establish the circumstances described in subsection 202(e) (i) or (ii): *Provided however*, That in case all or part of the two-year period antedates the effective date of this Act, the defendant shall be given the opportunity to demonstrate that such exclusion from juries or franchise no longer exists.

SEC. 203. (a) Prosecutions under the jurisdiction conferred by section 201 shall be commenced by indictment by a Federal grand jury in all cases in which the Constitution requires that prosecution be by indictment; in other cases, prosecution may be by indictment or by information.

(b) The district court shall not proceed in the exercise of jurisdiction conferred by section 201 unless, at or prior to final arraignment in the district court, there is filed with the district court a certificate of the Attorney General of the United States that prosecution of the cause by the United States in a Federal district court would fulfill the responsibility of the United States Government to assure equal protection of the laws. Upon the filing of such a certificate, the jurisdiction given by section 201 shall become exclusive of the courts of any State, and the prosecution shall thereafter be conducted exclusively by the Attorney General of the United States or his designate. Upon the filing of the certificate, no State court shall have or retain jurisdiction of any offense charged against the defendant prosecution for which would constitute jeopardy in respect of the offense described in the certificate. The certificate of the Attorney General shall not be subject to review by any court.

(c) If the certificate of the Attorney General described in subsection (b) of this section is not filed at or prior to final arraignment in the district court, the district court shall dismiss the prosecution without prejudice.

(d) Notwithstanding the certificate of the Attorney General described in subsection (b) of this section has not yet been filed and no judicial finding has yet been made sustaining the jurisdiction of a Federal court under section 201 of this Act, Federal judicial, executive, administrative and law enforcement officers and agencies, including but not limited to Federal judges, commissioners, marshals, grand juries, prosecuting attorneys, and the Federal Bureau of Investigation may exercise all powers given them by the laws of the United States in order to prevent and investigate any offense within the jurisdiction conferred by section 201 and to apprehend and prosecute the offender or offenders. In any case where such powers by the general laws of the United States are restricted to felonies, the same powers may be exercised in cases involving misdemeanors or other offenses within the jurisdiction conferred by section 201. The authority given Federal executive, administrative and law enforcement officers and agencies under this subsection shall be exercised subject to the direction of the Attorney General of the United States, but if the delay of their exercise until a direction of the Attorney General is received is impracticable in order effectively to prevent or investigate any offense within the jurisdiction given by section 201 of this Act or to apprehend or prosecute the offender or offenders, they may be exercised without direction of the Attorney General. The Attorney General is authorized to issue rules and regulations for the implementation of this subsection.

REMOVAL BY THE ATTORNEY GENERAL

SEC. 204. (a) Where a prosecution has been commenced in any court of a State in respect of any offense within the jurisdiction conferred by section 201 of this Act, the United States may at any time before jeopardy attaches remove the prosecution for trial to the district court for the district embracing the place wherein the prosecution is pending.

(b) Such removal shall be instituted by the filing in the district court of the certificate of the Attorney General described in section 203(b) of this Act, which certificate shall identify the prosecution to be removed. The filing of this certificate, together with the filing of a copy thereof with the judge or clerk of the State court in which the prosecution is pending (which filing may precede or follow or be contemporaneous with the filing of the certificate in the district court) shall effect the removal, and the jurisdiction of the State court shall thereupon terminate and all State court proceedings thereafter shall be null and void for all purposes unless and until the case is remanded. Following removal under this section:

(i) the jurisdiction conferred by subsection (a) of this section shall be exclusive of the courts of any State, and the prosecution shall be conducted exclusively by the Attorney General or his designate; and

(ii) no State court shall have or retain jurisdiction of any offense charged against the defendant, prosecution for which would constitute jeopardy in respect of the offense described in the certificate.

(iii) the certificate of the Attorney General shall not be subject to review by any court.

(c) Where the offense charged is one required by the Constitution to be prosecuted by indictment and no such indictment was returned prior to removal, indictment by a Federal grand jury shall be required within a reasonable time or the proceeding shall be remanded to the State court.

SEC. 205. (a) The Federal Rules of Criminal Procedure shall apply to proceedings under sections 201 through 204.

(b) Any person convicted in proceedings under sections 201 through 204 shall be sentenced to the fine, term or imprisonment, or both, prescribed by the State law applicable to the offense of which he is convicted. For all other purposes of imposition or execution of sentence, including but not limited to the payment of fine, custody, probation, parole, and pardon, he shall be treated as a person convicted and sentenced under the criminal laws of the United States.

(c) Sections 201 through 205, inclusive, shall become inoperative on and after January 1, 1975.

INVESTIGATION OF JURY EXCLUSION

SEC. 206. (a) The United States Commission on Civil Rights shall investigate the service on grand and petit juries by members of racial or color groups in the State and local courts of any county or other political subdivision in which it believes that there may be disparate treatment of members of different racial or color groups.

(b) Before publishing the results of any such investigation, the Commission shall furnish a copy of its proposed findings to the State or local court, the jury commissioners and any other officials responsible for jury selection in the county or other political subdivision concerned and shall give them an opportunity to controvert any of the proposed findings. Upon consideration of their responses and such consultation with the affected commissioners and officials as may be indicated, the Commission may revise its proposed findings. If any of those proposed findings remain controverted, the Commission shall cause a public hearing to be held in the county or other political subdivision concerned to consider the remaining issues of fact. Such hearing may be held by the Commission or by a person or persons designated by it who may but need not be a member or members of the Commission or its staff; the person or persons thus designated shall have all the powers the Commission would have in regard to the conduct of such a hearing. If any such hearing is not held by the Commission itself, the person or persons conducting it shall prepare a report which shall be forwarded to the Commission together with such comments thereon as local officials may make and with the record of the hearing. The Commission shall thereafter publish its findings and a detailed summary of the data on which those findings are based. Judicial notice of the findings of the Commission and the data contained in its detailed summary shall be taken in any judicial proceeding in any court.

(c) In any action or proceeding under this Act, the Commission's findings and summary of data under subsection (b) of this section shall constitute evidence of the facts presented therein and, except to the extent that the party controverting those facts satisfies the court, by evidence on the record as a whole, that particular findings or data are not correct, the courts shall accept the Commission's findings and data as adequately probative of all the facts contained therein and shall make its findings in accordance therewith.

(d) In proceedings under this section, the Commission shall have all the powers granted it under all other statutes; and the powers conferred on it by this section are in addition to its powers under such other statutes.

FEDERAL OFFENSES

SEC. 207. 18 U.S.C. 241 is amended to read as follows:

"(a) Whoever, whether acting under color of law or otherwise—

"(1) willfully injures, oppresses, threatens, or intimidates any person in the free exercise or enjoyment of any right, privilege, or immunity granted, secured, or protected by the Constitution or laws of the United States, or because of his having so exercised the same; or

"(2) intentionally commits an assault or an assault and battery upon any person exercising, attempting to exercise, or advocating the exercise of, any right, privilege, or immunity secured or protected against discrimination on the grounds of race or color by the Constitution or laws of the United States; or

"(3) intentionally commits an assault or an assault and battery upon any person using directly or indirectly, the facilities of interstate commerce, or traveling therein, or upon any person where the assailant uses, directly or indirectly, any facility of interstate commerce, or anything that has moved in interstate commerce, in the commission of the assault or assault and battery, when the purpose or reasonably foreseeable effect of such assault or assault and battery is to prevent any person or class of persons from exercising or

advocating equal rights or opportunities free from discrimination on the grounds of race or color, or to intimidate any person or class of persons in the exercise or advocacy of such rights or opportunities; shall upon conviction thereof, be fined not more than $1,000 or imprisoned for not more than one year, or both; except that if in the course of the act or acts for which he is convicted he inflicts death or grave bodily injury, he shall be fined not more than $10,000 and imprisoned for not more than twenty years, or both.

"(b) If two or more persons go in disguise on the highway or on the premises of another, with intent to prevent or hinder the free exercise or enjoyment of any right, privilege, or immunity covered by subsection (a) of this section, they shall, upon conviction, be subject to the penalties in subsection (a) of this section."

TITLE III—CIVIL PREVENTIVE RELIEF

SEC. 301. Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person because of race or color, of any right, privilege, or immunity, granted, secured, or protected by the Constitution or laws of the United States, such other person in his own right or the Attorney General for or in the name of the United States, may institute a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, order requiring the posting of a bond to secure compliance with any order of the court, or other order.

SEC. 302. Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of, or hinder him in the exercise of, the right to speak, assemble, petition, or otherwise express himself for the purpose of advocating equality of persons or opportunity free from discrimination because of race or color, such other person in his own right, or the Attorney General for or in the name of the United States, may institute a civil action or other proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, order requiring the posting of bond to secure compliance with any order of the court, or other order; provided that such other person above mentioned is a person described in subsection 202(d) (i) or (ii) and any one of the circumstances specified in section 202(e) is established by a preponderance of the evidence. The provisions of section 202(f) shall be applicable in proceedings under this section.

SEC. 303. In any proceeding under this section the United States shall be liable for costs the same as a private person. The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

TITLE IV—REMOVAL BY CERTAIN DEFENDANTS

SEC. 401. Any defendant in a criminal action or in a civil or criminal contempt action in a State or local court may remove said action to the district court of the United States for the district embracing the place wherein it is pending if the defendant is a person described in either subsection (i) or (ii) of section 202(d) and if any one of the circumstances specified in section 202(e) is established by a preponderance of the evidence. The provisions of section 202(f) shall be applicable in proceedings under this section.

SEC. 402. Any defendant in any action or proceeding (civil, criminal, or otherwise) in a State or local court may remove said action or proceeding to the district court of the United States for the district embracing the place wherein it is pending if the action or proceeding is maintained for or on account of any act or omission in the exercise of the freedoms of speech, of the press, of assembly or of petition guaranteed by the Constitution or laws of the United States for the purpose of advocating or supporting racial equality or of protesting the denial of racial equality; or any act or omission protected by the Constitution or laws of the United States against abridgment or interference by reason of race or color.

SEC. 403. The procedures set forth in sections 1446 and 1447 of title 28 shall be applicable to removal and remand under this section, except that any order of remand shall be reviewable by appeal or otherwise.

TITLE V—CIVIL INDEMNIFICATION

SEC. 501. (a) There is hereby established within the United States Commission on Civil Rights an Indemnification Board, hereafter referred to as the Board. The Board shall be composed of three members, appointed by the President with the advice and consent of the Senate. The President shall designate one member as Chairman. No more than two members of the Board may be of the same political party.

(b) The term of office of each member of the Board shall be five years, beginning with the effective date of this Act, except of those members first appointed, one shall serve for five years, one for three years, and one for one year. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term.

(c) The Chairman shall be compensated at the rate of $25,000 per annum, and the other members at a rate of $24,000 per annum.

(d) Two members shall constitute a quorum for the transaction of business.

SEC. 502. The Board may, in accordance with civil service laws, appoint and fix the compensation of such officers, attorneys and employees, and make such expenditures, as may be necessary to carry out its functions.

SEC. 503. The Board shall make such rules and regulations as shall be necessary and proper to carry out its functions.

SEC. 504. The Commission on Civil Rights shall have the authority and duty to receive and investigate or have investigated written complaints from or on behalf of any person injured in his person or property or deprived of his life (i) because of race or color, while lawfully exercising, attempting to exercise, or advocating, or assisting another in the exercise of, any right, privilege or immunity granted, secured, or protected by the Constitution or laws of the United States, or for having so exercised, attempted, advocated or assisted or (ii) by any act, the purpose or design of which is to intimidate him or any other person from seeking or advocating equality of persons or opportunity free from discrimination based on race or color.

SEC. 505. (a) The Commission on Civil Rights may request and the Department of Justice shall make available any investigative reports that the Department of Justice has that are relevant to the complaint and investigation.

(b) The Commission may request and the Attorney General is authorized to direct that additional investigation of matters relevant to the complaint be conducted by the Federal Bureau of Investigation.

(c) The Commission shall supply copies of all of its investigative reports to the Attorney General.

SEC. 506. If, after such investigation, the Commission shall determine that probable cause exists for crediting the complaint, it shall direct the Board to conduct a hearing thereon as provided in section 507; if, however, the Commission shall determine that probable cause does not exist or that no substantial damage has occurred, it shall dismiss the complaint.

SEC. 507. (a) Any hearing may be conducted by the Board or any member of the Board designated by the Chairman.

(b) In the event the Board determines that because of the number of complaints or for other valid reasons it is not in the interest of justice for it or a member to conduct a hearing, it may designate an agent or employee of the Board or a person not associated with the Board to conduct the hearing provided any such agent, employee or other person so designated shall be a member of the bar of the highest court of one of the States of the United States.

(c) Any person not an agent or employee of the Board shall be reimbursed for services rendered in connection with such hearing as determined by the Board, subject to approval of the Civil Service Commission.

(d) The Board or any member of hearing officer may administer oaths or affirmations.

(e) The Board shall have the same powers of investigation and subpoena as those granted the National Labor Relations Board in 29 U.S.C. 161 (1) and (2).

(f) A full record shall be made and kept of all hearings conducted.

SEC. 508. (a) After hearing, the Board member or hearing officer conducting the hearing shall make findings of fact based upon the record.

(b) After a hearing conducted by the Board, it shall, if it finds that any complainant has suffered injury referred to in section 504, make a monetary award of indemnification to compensate such complainant for such injury.

(c) After a hearing conducted by a member of the Board or hearing officer, he shall, if he finds that any complainant has suffered injury referred to in section

504, make a recommendation of an award of indemnification. All such recommendations shall be reviewed by the Board. Upon review, the Board shall review the findings of fact and shall affirm, reject, or modify findings and such recommendations and enter or deny an award.

(d) All awards made hereunder shall include reasonable attorney's fees.

SEC. 509. (a) In the event that the investigation of the complaint or the hearing thereon indicates the person or persons responsible for the injury for which an award is sought, such person or persons shall be notified and shall have a reasonable opportunity to intervene in the hearing and to be fully heard.

(b) In the event that such investigation or learing indicates that the injury resulted in whole or in part from action taken under color of law, the political subdivision and/or the State under whose authority such action was taken shall be notified and shall have a reasonable opportunity to intervene in the hearing and to be fully heard.

(c) Notice under this section may be by personal service or by registered mail.

(d) Notice to a State or political subdivision may be given to the chief executive or principal legal officer of such State or political subdivision.

(e) The Board shall, if necessary to secure a full hearing for any intervenor, continue the hearing from time to time.

SEC. 510. The United States may, on the motion of the Attorney General, intervene at any state of the hearing or appeal.

SEC. 511. (a) The complainant or any intervenor may obtain a review of the final decision of the Board in the United States Court of Appeals for the District of Columbia or the court of appeals for the judicial circuit in which the injury occurred or the person seeking review resides.

(b) Such review shall be made on the basis of the record before the Board, and the findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

SEC. 512. (a) In any instance in which the injury or death for which an award is made results in whole or in part from action taken under color of law, or from action whether or not taken under color of law which in any way impedes or infringes upon the exercise or advocacy of any right, privilege, or immunity granted, secured, or protected by the Constitution or laws of the United States, the United States shall have a cause of action for recovery of the amount of such award against the person or persons responsible for the injury for which the award is made.

(b) If the injury for which an award is made resulted in whole or in part from action taken under color of law, the political subdivision and/or the State under whose authority such action was taken shall be jointly and severally liable with the person or persons responsible for such injury.

(c) In any case brought under this section against anyone notified under section 509, the findings of fact as made, modified, or approved, by the Board pursuant to section 508 shall be admissible and shall constitute prima facie evidence of the facts determined by the findings, and the award of indemnification shall be admissible and shall constitute prima facie evidence of the damages suffered by the complainant.

(d) The district courts of the United States shall have jurisdiction to hear cases brought under this section.

SEC. 513. (a) In the event the person injured dies, a complaint shall be filed by any representative of his estate, or by his or her spouse, child, or dependent and the Board shall determine to whom any award shall be made.

(b) In the event of the inability or incapacity of the person injured to file a complaint, it may be filed by his or her spouse, child, dependent, or counsel.

SEC. 514. All complaints must be filed within six months of the injury for which an award is sought, except that where the injury results in death, the complaint may be filed within twelve months of death.

SEC. 515. Nothing herein shall deny to any person the right to pursue any action or remedy granted him under any other law of the United States or any State, provided that in the event that any person receives in any other action an award of damages for which an award of indemnification has been made under this title, the United States shall have a lien against such award in the amount of the award of indemnification. In the event such other award is made prior to the award of indemnification, the amount of such other award shall be considered by the Board in determining whether to make an award and, if so, the amount of the award.

TITLE VI—AMENDMENT TO TITLE VII OF 1964 ACT

SEC. 601. Title VII of Public Law 88–352 (the Civil Rights Act of 1964) is amended as follows:

(a) Add a new paragraph to section 701(a) as follows: "The term 'governmental unit' means a State or a political subdivision thereof or an agency of one or more States or political subdivisions."

(b) Amend so much of section 701(b) as appears before the word "*Provided*" to read as follows: "The term 'employer' means: (1) a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (i) the United States, a corporation wholly owned by the Government of the United States, or an Indian tribe, (ii) a bona fide membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954; (2) a governmental unit and any agent of such governmental unit;"

(c) Add the words "or governmental unit" following the word "person" wherever it appears in section 701(c).

(d) Delete the phrase "or an agency of a State or political subdivision of a State," from section 701(c).

(e) Add a comma and the following language after the word "charge" on line 9 of section 706(e): "unless the respondent is a State."

(f) Insert the words "or governmental unit" in section 707(a) following the word "persons" on lines 2 and 12 of such subsection.

(g) Insert the words "for or in the name of the United States" following the word "action" on line 6 of section 707(a).

(h) Insert the words "or governmental unit" following the word "person" on line 4 of section 709(a), on lines 1 and (5) of section 710(c) and on lines 2 and 7 of section 713(b).

TITLE VII—MISCELLANEOUS

SEC. 701. (a) The term "State" as used herein shall include the District of Columbia.

(b) The term "because of race or color" shall mean because of hostility to the race or color of any person, or because of his association with persons of a different race or color or his advocacy of equality of persons of different races or colors.

(c) The term "hearing officer" shall mean an agent or employee of the Indemnification Board or a person not otherwise associated with the Board who is designated by the Board to conduct a hearing.

(d) The term "action taken under color of law" shall include the knowing refusal or failure to act where action could or may have prevented injury.

(e) Yhe term "injury to property" shall include any financial or economic loss.

(f) The term "judicial district" shall mean a division thereof where the judicial district is divided into divisions.

SEC. 702. (a) There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act, including payment of awards under title V.

(b) If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

[S. 3170, 89th Cong., 2d sess.]

A BILL To confer jurisdiction upon the district courts of the United States over certain classes of removed cases and to provide injunctive relief in certain cases, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Procedure Act".

FINDINGS AND PURPOSE

SEC. 2. (a) The Congress has over the last century adopted legislation declaring, protecting, and granting various civil rights to citizens. It is the sense of Congress that some citizens seeking to avail themselves of these declared rights have been subjected to lengthy and expensive criminal prosecutions instituted to deter them from attempting to obtain their civil rights. It is further

the sense of Congress that the proper means to correct this unlawful activity is to vest appropriate jurisdiction in the district courts of the United States.

(b) It is hereby declared to be the policy of Congress and the purpose of this legislation to promote the general welfare by preventing reprisals against those who seek to end discrimination on account of race, color, religion, or national origin prohibited by the Constitution or laws of the United States.

REMOVAL OF CAUSES

SEC. 3. (a) Section 1443 of title 28 of the United States Code is amended by substituting a semicolon for the period at the end of subsection (2) and by adding at the end thereof the following new subsections:

"(3) For any exercise, or attempted exercise, of any right granted, secured, or protected by the Civil Rights Act of 1964, or of any other right granted, secured, or protected by the Constitution or laws of the United States against the denial of equal protection of the laws on account of race, color, religion, or national origin; or

"(4) For any exercise, or attempted exercise, of any right to freedom of speech or of the press or of the people to peaceably assemble secured by the Constitution or laws of the United States when committed in furtherance of any right of the nature described in subsection (3) of this section."

(b) Subsection (d) of section 1447 of title 28 of the United States Code is amended to read as follows:

"(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be appealable as a final decision under section 1291 and an order denying remand of a case removed pursuant to section 1443 shall be appealable as an injunction of proceedings in the State court under paragraph (1) of subsection (a) of section 1292."

INJUNCTION OF STATE PROCEEDINGS

SEC. 4. Section 1979 of the Revised Statutes (42 U.S.C. 1983) is amended by inserting "(a)" at the beginning of the section and by adding at the end thereof the following new subsections:

"(b) Such redress shall include the grant of an injunction to stay a proceeding in a State court where such proceeding was instituted for—

"(1) any exercise, or attempted exercise, of any right granted, secured, or protected by the Civil Rights Act of 1964, or of any other right granted, secured, or protected by the Constitution or laws of the United States against the denial of equal protection of the laws on account of race, color, religion, or national origin; or

"(2) any exercise, or attempted exercise, of any right to freedom of speech or of the press or of the people to peaceably assemble secured by the Constitution or laws of the United States, when committed in furtherance of any right of the nature described in subparagraph (1) of this subsection;

and where—

"(i) An issue determinative of the proceeding in favor of the party seeking the injunction has been decided in favor of his contention in a final decision in another proceeding arising out of a like factual situation;

"(ii) The statute, ordinance, administrative regulation, or other authority for the proceeding has been declared unconstitutional in a final decision in another proceeding;

"(iii) The statute, ordinance, administrative regulation, or other authority for the proceeding is, on its face, an unconstitutional abridgment of the rights to freedom of speech or of the press or of the people to peaceably assemble; or

"(iv) The proceeding was instituted for the purpose of discouraging the parties or others from exercising rights of freedom of speech or of the press or of the people to peaceably assemble.

"(c) In an action seeking an injunction under subsection (b) the court shall not deny or defer relief on the ground that a defense or remedy in the State courts is available."

These hearings begin at the earliest possible date consonant with the preparations necessary for such an important investigation. As this legislation would affect the laws of all States and the lives of all citizens, the subcommittee has solicited the views of the Governors of the 50

States, seven professors of law representing a cross-section of scholarly opinion on the issues, and the chief education officer in each State to which integration guidelines of the U.S. Commissioner of Education have been applied.

The subcommittee has also invited the Attorney General to submit his views on these bills, and Mr. Katzenbach has consented to be the first witness.

Also scheduled to testify are Members of Congress and representatives of various organizations. Others, who will not be able to appear in person, have submitted statements which will be made a part of the record.

The subcommittee has endeavored to obtain the widest possible cross-section of opinion on these bills. It is anticipated that the record of these hearings will provide for the Senate a thorough source of information on all questions relevant to these bills.

And at the outset let the record be clear: There are many important questions to be resolved—questions of policy, questions of drafting, and questions of constitutionality. While addressing myself briefly to the administration's bill, it is my intention to point up a few of these problems and the testimony the subcommittee will require to resolve them.

At this point I will refrain from further reading of my statement and in the interests of conserving time I will give any member of the subcommittee who has a statement that he would like to read an opportunity to read it, and also after they have completed I will give my friend, the minority leader, who is a member of the full committee, though not of the subcommittee, opportunity to read his statement if he has one. Do you have a statement?

Senator KENNEDY of Massachusetts. I would. I would like to put it in the record at a later time, Mr. Chairman. I think we ought to proceed now with the Attorney General and I would like to add my statement at a later time to the record.

Senator ERVIN. Under these circumstances, with the indulgence of all concerned, I will proceed with my statement.

(At this point Senator Hruska entered the hearing room.)

Senator ERVIN. Jury trials: The first two titles of the bill, though not as well publicized as others, are equally as important. Although I may disagree with the propriety of Chief Justice Warren's remarks concerning pending legislation on jury reform, I do share his apprehension that these provisions deserve the most careful scrutiny before we tamper with two of the basic tenets of American Government: the right to trial by jury and the Federal system.

As those of us who serve on the Judicial Improvements Subcommittee know, any reform in the Federal judiciary usually is given a thorough analysis by the Judicial Conference of the United States, the American Law Institute, the American Bar Association, and others, as well as by the administratic nd by congressional committees.

I have profound regret that v nnot consider these jury selection proposals in the bright light of the usual judicious consideration rather than in the heat of the arena of controversy surrounding civil rights. Nevertheless, the subcommittee will do its best to see that the provisions are given as dispassionate consideration as is possible.

TITLE I

The purpose of title I is worthwhile and there is no doubt that Congress has both the authority and the obligation to provide for an effective and uniform Federal jury system. However, the subcommittee will hear from witnesses who are concerned with the administration of justice in the courts as to whether the provisions of this title are best designed to accomplish its purpose. Congress has plenary power over the Federal judicial machinery and our question here is not whether to act, but how.

Of particular interest in this connection is a bill passed by the House and approved by the Senate Subcommittee on Improvements in Judicial Machinery. This measure, H.R. 5460, which has also been endorsed by the administration, is a partial alternative to title I. Additionally, it is the product and the subject of careful consideration by the Judicial Conference of the United States, and has the Conference's backing.

The subcommittee will be interested to know what, if anything, has happened in past weeks which prompted the Justice Department to endorse two conflicting proposals. We also intend to learn why title I has not been and should not be submitted to the close scrutiny of the Judicial Conference of the United States and the American Law Institute as the Chief Justice has suggested. In this connection, I am submitting an excellent editorial from the Washington Post of May 22, 1966, which will be placed in the record at this point.

(The article referred to follows:)

[From the Washington Post, May 22, 1966]

WARREN AND THE JURY BILLS

Chief Justice Warren's comment on the bills designed to end discrimination in the selection of jurors was certainly unusual, and it may have been lacking in discretion. But we do not share Representative Celler's fear that the Chief Justice "may find himself in the position of prejudging" the constitutionality of the bill that Congress is expected to pass. He did not express any view as to the constitutionality of any bill. Rather, he was quoted as saying, in a departure from his text, that some of the 31 bills before Congress might produce ill-advised changes in Federal-state relations.

Apparently the Chief Justice is concerned about the so-called "automatic trigger bills." Some of these would set up a test to determine whether local and state courts exclude Negroes, women or other groups from jury service. If state courts failed to meet the test, they would automatically come under Federal supervision. The Administration's bill is much more guarded. It follows the pattern set by a three-judge Federal Court in Alabama in the *White* v. *Crook* case. After a specific finding of racial discrimination, the Federal court laid down jury-selection requirements that the state court would have to meet for a constitutional trial. The Administration bill would specifically authorize the Attorney General to bring suits of this kind.

Congressman Celler also thinks that the "automatic trigger" bills go too far. Likewise he and the Chief Justice share the conviction that this delicate problem of jury selection should be studied with great care before legislation is enacted. We surmise that this is a matter of much concern to the Chief Justice, for the Administration's bill was not referred to the Judicial Conference of the United States. The courts have a direct and immediate concern with the processes of selecting juries. Certainly the Judicial Conference should be heard from in the shaping of a new jury system.

It is no answer to say that the Administration and Congress are in a hurry. The problem has been with us for a very long time. Now that a solution is being earnestly sought, it is even more important that it be sound and workable than that it be enacted to meet a particular deadline. Instead of chiding the Chief

Justice for his concern about the matter, Mr. Celler could more appropriately call for a report from the Judicial Conference on the jury-selection bills that it deems worthy of study. If this should necessitate emergency sessions on the part of the judges of the Conference, we have no doubt that they would willingly respond.

Senator ERVIN. In fulfilling its responsibility, the subcommittee will consider the provisions of H.R. 5640, as well as those of title I. A copy of that measure will be printed at this point in the record.

(A copy of H.R. 5640 follows:)

(H.R. 5640, 89th Cong., 1st sess.)

AN ACT To provide for a jury commission for each United States district court, to regulate its compensation, to prescribe its duties, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1864 of title 28 of the United States Code is amended to read as follows:

"§ 1864. Jury commission: duties, compensation, and methods of selecting and drawing jurors

"(a) APPOINTMENT.—A jury commission shall be established in each judicial district, consisting of the clerk of the court and one or more jury commissioners, appointed by the district court. The jury commissioners shall be a citizen of the United States of good character residing in the district of appointment who, at the time of his appointment, shall not be a member of the same political party as the clerk of the court or a duly qualified deputy clerk acting for the clerk. If more than one jury commissioner is appointed, each may be designated to serve in one or more of the places where court is held, and the clerk and the jury commissioner so designated shall constitute the jury commission for that part of the district. In the event that a jury commissioner is unable for any reason to perform his duties, another jury commissioner may be appointed, as provided herein, to act in his place until he is able to resume his duties.

"Jury commissioners shall be appointed to serve on a part-time or full-time basis. If in the opinion of the court the efficient operation of the jury system requires the services of a full-time jury commissioner, the court may, with the approval of the Judicial Conference of the United States, appoint one or more full-time jury commissioners.

"(b) DUTIES.—In the performance of all its duties the jury commission shall act under the direction and supervision of the chief judge of the district.

"The sources of the names and the methods to be used by the jury commission in selecting the names of persons who may be called for grand or petit jury service shall be as directed by the chief judge. The procedures employed by the jury commission in selecting the names of qualified persons to be placed in the jury box, wheel, or similar device, shall not systematically or deliberately exclude any group from the jury panel on account of race, sex, political, or religious affiliation, or economic or social status. In determining whether persons are qualified as jurors under section 1861 of this title, the jury commission shall use questionnaires and such other means as the chief judge may deem appropriate, including the administering of oaths.

"The names of jurors shall be publicly drawn by chance from a jury box, wheel, or similar device, which contains at the commencement of each drawing the names of not less than three hundred qualified persons selected by the jury commission in accordance with the provisions of this subsection.

"The jury commission shall keep records of the names of persons placed in the jury box, wheel, or similar device, the questionnaires returned by said persons, the names of the persons who are selected for jury service, the dates of service, and such other appropriate records as the chief judge may direct, all for a period of not less than two years. With the approval of the chief judge, the jury commission may designate deputy clerks and other employees in the office of the clerk of the court to assist the commission in the performance of its duties and to perform under its direction such as the detailed duties of the commission as in the opinion of the chief judge can be assigned to them.

"(c) COMPENSATION.—Each jury commissioner appointed on a part-time basis shall be compensated for his services at the rate of $10 per day for each day in which he actually and necessarily is engaged in the performance of his official duties, to be paid upon certificate of the chief judge of the district.

"Each jury commissioner appointed on a full-time basis shall receive a salary to be fixed from time to time by the Judicial Conference of the United States at a rate which in the opinion of the Judicial Conference corresponds to that provided by the Classification Act of 1949, as amended, for positions in the executive branch with comparable responsibilities.

"Each jury commissioner shall receive his traveling and subsistence expenses within the limitations prescribed for clerks of districts courts while absent from his designated post of duty on official business.

"(d) Any of the powers or duties conferred upon the chief judge under this section may be delegated by him to another judge of the district: *Provided, however,* That where part of a district by agreement or order of court is assigned to one particular judge and he customariiy holds court there, as to such part of the district he shall perform the functions and fulfill the duties conferred upon the chief judge in this section.

"(e) This section shall not apply to the District of Columbia."

SEC. 2. Section 1865 of such title is amended by striking out the words "and may appoint a jury commissioner for each such place" in the second sentence of subsection (a) thereof and inserting a period after the word "district" in such sentence.

SEC. 3. Each jury commissioner holding office on the effective date of this Act shall continue in office until his successor is duly appointed and qualified.

SEC. 4. There are hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary to carry the provisions of this Act into effect.

SEC. 5. The provisions of this Act shall take effect ninety days after the date of approval thereof: *Provided, however,* That no grand or petit jury sworn prior to the effective date of this Act nor any person called or summoned for jury service, or whose name is on a jury list or has been placed in a box, wheel, or similar device, prior to that date, shall be ineligible to serve if the procedure by which the jury or the individual juror was selected, called, summoned, or by which his name was listed or placed in a box, wheel, or similar device, was in compliance with the law in effect at the time of such action.

SEC. 6. (a) The table of sections at the head of chapter 121 of title 28 of the United States Code is amended by amending items 1864 and 1865 to read as follows:

"1864. Jury commission; duties, compensation, and methods of selecting and drawing jurors."
"1865. Apportionment within district."

(b) The catchline at the beginning of section 1865 of title 28 of the United States Code is amended to read as follows:

"§ 1865. Apportionment within district."

Senator ERVIN. It is not my intention in this statement to deal with possible technical deficiencies of title I or any other provisions of S. 3296. Such problems can be aired during the course of the hearings and resolved in executive session. However, I am compelled to mention one point in title I about which I feel very strongly.

As the Attorney General knows, this subcommittee has for some time been engaged in exhaustive investigations into the separation of church and state and into the right to privacy. In this connection, I note the requirement on page 6 of the bill that a prospective Federal juror must fill out a form stating his "name, address, age, sex, education, race, religion, occupation * * *." The Judicial Conference in 1960 suggested that questions as to race or religion of jurors are impertinent, if not constitutionally objectionable. I would like to state simply and emphatically that the religion of any juror is none of the business of the jury commissioner; it is none of the business of the courts; and it is none of the business of the Justice Department. I intend to make it my business to see that race and religion are not sanctioned by Congress as qualifications for jury service.

In closing my remarks of title I of the administration bill, I reiterate my conviction that the greatest care must be exercised as we consider change in the jury system, lest by our good-intentioned tinkering we adversely affect the quality of Federal justice.

TITLE II

But if title I must be approached with caution, title II requires even more care and humility on our part. For here we are faced not only with proposals affecting the administration of criminal justice, but also with a critical issue of federalism. Perhaps my colleagues have become bored with warnings that Federal legislation is encroaching upon constitutional and traditional areas of State responsibility. I sincerely hope not, because the constitutional responsibility of the States to administer justice, and the complicated and delicate balance between State and Federal jurisdiction, are among the most important elements of American government.

I am most pleased to welcome to the cause of federalism the prestige of the Chief Justice of the United States, who is not generally suspect as a "State's righter." His recent warnings that the balance of federalism is being threatened by proposed legislation on State juries gives me great hope that the Senate will look closely and critically at the need and propriety of such legislation.

I have spent much of my career arguing for a strong jury system, characterized by integrity and impartiality. No one would maintain that race or religion are appropriate considerations for jury service, and it has been a violation of Federal law for almost 100 years for any person charged with the duty of selecting or summoning a jury panel to discriminate because of race, color or previous condition of servitude.

Remedies are already available, both civil and criminal, to the parties to a case and to the Justice Department when it appears that the State jury selection system is discriminatory on its face or that a fair system has been abused. Title 18 United States Code, section 243 is the statute establishing the Federal criminal offense of jury discrimination. As far as I, the subcommittee staff, or the American Law Division of the Library of Congress can determine, in the 90-year history of this provision it has been used only once—in 1879, in the case of *Ex Parte Virginia*. Why do we need more laws when the ones we have are not being used? Certainly there is no claim that section 243 is inenforceable. Recent southern Federal and State juries have brought convictions for civil rights crimes. If convictions can be obtained in Federal courts under subsection 241 and subsection 242, then why have prosecutions for jury discrimination not been brought under these statutes and subsection 243? As a matter of fact, officials conspiring to discriminate in the selection of jurors would probably be guilty of violating all three statutes. Until it is demonstrated by clear evidence that present law is inadequate to deal with the problem, I seriously doubt both the necessity and desirability of this legislation.

We should realize, moreover, that title II goes much further than merely to restate the ancient prohibitions against racial discrimination. Far more seriously, it introduces into law a policy of national uniformity in State jury systems, and it is founded upon the basic assumption that Federal administration of State criminal law is valid and a worthy objective.

The Federal rules that would be imposed upon the State legal systems by title II are said to be authorized by the 14th amendment. The fallacy of this assertion, however, is elementary constitutional law. The amendment is prohibitory in nature. It does not require

the States affirmatively to revise their criminal procedures. It does not permit the Congress to establish Federal rules of State criminal procedure. Never before has any source asserted that "equal protection of the laws" permits Federal absorption of the State judicial system. Such a claim is too novel even for the Chief Justice.

I question the desirability of uniformity for its own sake. I consider that the proponents of this kind of legislation have a very heavy burden to discharge if they are to convince us that national policy should supplant State decisions concerning the administration of the civil and criminal jury system.

It appears that at least some 24 States have statutes which on their face violate title II, section 201. Three States bar women from serving, and 16 others seemingly violate it by requiring women to volunteer. Some seven States have property or taxpaying qualifications for service. New York requires $250 of real or personal property.

We may as individuals oppose jury qualifications based upon sex or economic status, upon education or occupation. But do we as legislators in the national body have the right to impose these values upon the States in the face of their contrary views? We must ask ourselves whether these questions are so important that the people of the States, in their wisdom, cannot be trusted to make the decisions on an individual basis.

Congress would show anything but superior wisdom by sanctioning the ill considered and unworkable provisions of section 204. This section imposes a number of discovery obligations which are automatically invoked upon a claim of discrimination in a criminal trial. The mere assertion of discrimination requires the prosecution to present a full statement of the procedures used in juror selection. In addition, the State jury officials are automatically subject to cross-examination. If there is "some evidence" that the assertion of discrimination is valid, "any relevant records and papers used by jury officials in the performance of their duties" must be presented. The bulk of this paperwork, the burden on the State courts will be overwhelming.

Finally, if all this fails to rebut a showing of "probable cause" of discrimination, the burden shifts to the State to disprove the allegation. By so abolishing the salutory and fundamental presumption that officials perform their duties lawfully, this legislation does more than impugn the integrity of local officials—it opens every criminal prosecution in every State to obstruction, delay, and frustration. I say this because the discrimination that may be asserted is not restricted to race alone. Section 201 bars jury discrimination on the basis of religion, sex, national origin, and economic status, as well. It could change the laws of all States.

I would like to add at this point, so far as I know, this bill represents the first time that the Congress of the United States has been asked to prescribe rules of procedure which must be followed in the courts of the States. It requires that in every case, where counsel for a defendant asserts that there has been discrimination on the ground of race or on the ground of sex or on the ground of economic status, that the jury officials of the county must file a written statement to negative a charge which is supported by nothing other than an assertion. It does violence to the fundamental principle that courts are

not required to pass upon matters when there is no reasonable ground to suppose that the charge has any basis.

I cannot imagine anything which more offends the principle of good Federal-State relationships or which more offends the principle that trials should be speedy and have regard to the merits of the individual case, because this gives authority to raise unmeritorious issues.

Justice Brandeis, one of our Nation's greatest students of the Constitution, once noted that the States are the laboratories of the Republic. Let us be careful not to impose a needless consistency merely because it pleases our sense of legal symmetry. Let us not presume too readily that we in Washington have a monopoly on all the wisdom in the country. Above all, let us not be too eager to sacrifice centuries of experience with the administration of criminal law merely because of a new-found infatuation with sociology.

(At this point Senator Scott entered the hearing room.)

Senator ERVIN. Incidentally, this would permit an inquiry into the property holdings of everybody serving upon a jury. It seems to me that we might well let the State courts spend their time in more fruitful inquiries concerning the guilt and innocence of the parties instead of inquiring into the economic status of the persons who are summoned to serve upon the juries in State courts.

TITLE III

Any objective examination of title III must be made in light of the history of titles III, IV, and VI of the 1964 Civil Rights Act. And to make an honest appraisal, the concerted action by the Departments of Justice and Health, Education, and Welfare under that act must be comprehended. These Departments were given statutory tools, the magnitude of which had never before been suggested to the Congress. The unelected officials in these Departments unfortunately accepted their new authority with but one apparent goal in mind—to exercise a maximum effort to insure so-called racial balance in public education and public facilities unintended by Congress. It is my belief that too much power was delegated to these officials; even so they have far exceeded their statutory authority.

It was my hope that enforcement of the 1964 act would occur without arbitrary and capricious control over education by the Federal Government and according to the dictates of Congress and the pronouncements of our judiciary. Such has not been the case.

Apparently, few realized that the South would comply with a new law that many people felt was so distasteful. But we put aside our strong feelings and did comply. As a consequence, the Attorney General states that he has not had enough complaints upon which to intervene; the Secretary of Health, Education, and Welfare has found little discrimination upon which to act under title VI of the 1964 act; and both have observed much advancement in the process of desegregating schools and other public facilities.

It is now proposed that the Attorney General may institute his own actions without a complaint of any kind to insure integration in public education and other facilities. Again he will work in concert with the Secretary of Health, Education, and Welfare in areas where people are obviously living and attending schools in harmony with their neighbors, but where the statistical ratio of white and Negro

fails to meet an arbitrary standard set by the Secretary. In a locality in which the ratio differs from some arbitrary standards, the Attorney General may find an individual whose conduct constitutes a "threat to threaten" or a "threat to intimidate." There, I would suppose, the Department will bring an action under title III. The request for this type of authority comes after a very brief and law-abiding experience with the 1964 act. I can only ask, Where have there been efforts to enforce titles III and IV of the 1964 act?

And I might mention that if threats of intimidation are a major concern of the administration, then I suggest that attention be focused on the worst examples of intimidation: the intimidation by pressure groups which apparently forces Federal agencies to give in to increased demands for racial balance; and the intimidation by these agencies of Southern State officials who are forced to conform to the will of the pressure groups under threat of a cutoff of funds.

The Attorney General has asserted that his present authority is deficient for three principal reasons, the first of which is the requirement of a written complaint before the Attorney General may sue. And he has not received the complaints necessary to justify the 1964 act. He also asserts that many people do not know how to file a complaint. But as I understand it, the procedures for filing such complaints were established by and are controlled by the Department of Justice. I suggest that this procedure be tailored to fit the needs of those participating.

I would also like to remind the subcommittee that information supplied to me by the U.S. Civil Rights Commission indicates that there are several major organizations providing legal representation to Negroes and civil rights workers in the South. Where necessary, these services are furnished free of charge. They include: (1) NAACP Legal Defense Fund, (2) Lawyers Constitutional Defense Committee, (3) Lawyers Committee on Civil Rights Under Law, and (4) American Civil Liberties Union.

Certainly if there are grounds for a complaint, at least one of the attorneys employed by these organizations would bring it to the attention of the Justice Department.

The second reason asserted as justification for this new power is the alleged time-consuming and difficult judgment required to determine whether interested parties will be unable to bear the burden of litigation themselves. Yet, the Department of Justice employes over 600 attorneys, each of whom has sufficient training to make this judgment. Surely, attorneys who routinely make decisions concerning complicated antitrust, corporate and tax matters can form an opinion as to the financial ability of a potential litigant.

Finally, it is asserted that school desegregation has generated an increase of violence and intimidation aimed at Negroes who assert their constitutional rights. Quite frankly, I have failed to observe widespread violence except in areas outside the South, such as in Watts, Calif., in Rochester and New York City, and in Philadelphia.

I say this to place in context my comments concerning the granting of new unbridled power to the Attorney General.

(At this point Senator Bayh entered the hearing room.)

Senator ERVIN. Under existing law, the Attorney General may institute an action merely upon the receipt of a complaint and upon his certification that the signers are unable to maintain the appro-

priate legal proceedings. When this power was first proposed to the Congress, it seemed strange to me that there was no requirement that the Attorney General establish by evidence that the complaint upon which he is acting is meritorious. For this reason I offered an amendment to require the finding of such evidence. I was able however, to convince only 36 Senators of the wisdom of that suggestion. It is incredible to me that now the Attorney General seeks authority to act on his own volition without evidence and without a complaint from an aggrieved person.

The Attorney General has stated that new title III would give him the tools to complete desegregation of our schools. He said the same thing in 1964 when other "tools" were created including: civil actions for appropriate relief by the United States where equal protection of the laws is denied any individual on account of race in the utilization of any public facility; authorization for technical assistance in the adoption and implementation of plans for desegregation; the establishment of training institutes to deal with special educational problems occasioned by desegregation; and the granting of power to Federal agencies to terminate or refuse assistance to any beneficiaries deemed not in compliance with regulations promulgated to insure nondiscrimination.

But all this, to the Department, is not enough. It now wants plenary power to insure undefined integration of public facilities. Authority, clearly defined, by Congress does not seem to meet with the approval of the administration. This conclusion is obvious from its proposal of title III. Under section 302 the Attorney General could institute actions whenever and wherever he has reasonable grounds to believe that there is even a hint of his notions of "interference" with the enjoyment of equal protection of the laws in respect to any public school or facility. At the minimum, all he would have to do is to allege that he believes someone's right to equal protection of the laws has been somehow threatened.

(At this point Senator Javits entered the hearing room.)

Senator ERVIN. The subcommittee should remember that these constitutional rights are personal rights which do not belong to the public or to the Federal Government. In bringing suits without complaints he not only is ignoring this, but also is depriving individual citizens from exercising a constitutional right to attend the school or other public facility of their own choice.

I would like to add at this time that under the decisions of the Supreme Court of the United States as I construe them, that the right to determine whether one will exercise a constitutional right is a personal right belonging to the individual, and despite these decisions, this bill would undertake to deny to individuals the right to determine for themselves whether they wanted to exercise their constitutional rights or not, and permit the Attorney General to make that determination for them, even against their will in an individual case.

The alleged authority for this new-found power—unrestricted and uncircumscribed—was born in a case which was undergoing its first reading in the Supreme Court building when this bill was being drafted. This new power enables the United States to intervene in matters involving the 14th amendment but in which no State action has occurred. In one stroke of the pen, a tragic effort to erase almost 100 years' precedent was made by concurring Justices in the case of *U.S.*

v. *Guest*. And just as quickly, the Justice Department seized upon it. Mr. Justice Harlan called the action of three of the Justices who joined the Court's opinion "extraordinary" in pronouncing themselves on the far-reaching constitutional questions. It is more extraordinary for the Justice Department to rely on this dictum to write a bill. I might add that to me as a lawyer it is rather queer for any judge to say if Congress should happen in the future to pass a law, and a case arising under that law should come before me for decision, I am going to decide it a given way, even before the law has been passed, even before the case has arisen, and even before I have heard the evidence.

Before passing to another matter, I think it should be noted at this point that the findings which enable the Attorney General to institute civil actions under title III are made crimes under title V and punishable by $1,000 fine or imprisonment for not more than 1 year. Among others, title V includes intimidation or attempts to intimidate. It does not include, I am happy to observe, a "threat to threaten" or a "threat to intimidate," as does title III. I might state at this point that title III is to me a violation of the words of the writer of the Book of Ecclesiastes that there is nothing new under the sun. This is the first time so far as I know that anybody has ever proposed that there be legislation to punish a man for a "threat to threaten," and I would commend a rereading of title III to the Justice Department to see whether the Justice Department really does want Congress to pass a law to deal with threats to threaten.

In recent months it has come to the attention of many of us that important health, education, and welfare programs are being placed in jeopardy by an effort on the part of certain Federal officials to correct so-called racial imbalance. I hasten to add that Congress must share the blame because the provisions of its legislation are vague and easily misunderstood.

I have introduced on behalf of myself and Senator Fulbright an amendment to the 1964 act in the form of a new title VI to S. 3296 with three basic purposes in mind. First, it is necessary to draw a clear definition of discrimination which would be understood by all concerned.

Second, routine and established adjudicatory practice should be instituted in the withholding procedures under title VI of the 1964 Civil Rights Act. Finally, no persons, otherwise eligible for benefits afforded by Federal legislation, should be denied these benefits simply because the vendors of Federal assistance may fail to comply with arbitrary guidelines established to insure an absence of discrimination on the basis of race or color.

As with other proposed legislation we are discussing, I hope the subcommittee can elicit testimony which will improve the amendment. Technical and clarifying changes which may be necessary have already been called to my attention. That we must enact its substance, however, is clear.

The need is apparent from the recent pronouncements of the U.S. Commission on Civil Rights. The Commission stated:

> The legislative history of title VI does not make clear what relationship, if any, was contemplated by Congress between the standards to be established by the Office of Education and the body of judicial decisions in the area of school desegregation.

Federal legislation concerning desegragation in education has been promulgated as a result of the mandate from *Brown* v. *Board of Education*. Congress, as well as the executive branch, apparently at one time or another has listened to the Federal judiciary. But since enactment of the 1964 act, the executive branch, at least, has ignored it.

Notwithstanding a multitude of decisions following the *Brown* case and the 1964 act, the U.S. Office of Education has implemented that act as it pleased. Almost uniformly, the Federal courts have reached an opposite conclusion to that of the Commissioner of Education. For example, the Federal courts have consistently upheld "free choice plans" as a method of meeting the desegregation requirements of the 1964 act and of the decision of *Brown* v. *Board of Education*. In fact, the U.S. Commission on Civil Rights reported just 4 months ago that most courts have upheld the validity of freedom of choice plans providing for a choice among schools not segregated by law.

The decisions cited by the Commission in support of this statement include, among others, the following: *Bush* v. *Orleans School Board* (1962); *Stell* v. *Savannah-Chatham County Board of Education* (1964); *Monroe* v. *Board of Commissioners of City of Jackson* (1964); *Vick* v. *County Board of Education of Obion County* (1962); *Kemp* v. *Beasley* (1965); and *Kier* v. *County School Board of Augusta County* (1966).

In construing the *Brown* decision, the eminently able jurist, John J. Parker, said in *Briggs* v. *Elliott:*

> It has not decided that the States must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend * * * but if schools which it (the State) maintains are open to children of all races, no violation of the Constitution is involved even though children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as a result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The 14th amendment is a limitation upon the exercise of power by the State or State agencies, not a limitation upon the freedom of individuals.

Notwithstanding these decisions, the Secretary has apparently been compelled by pressure to seek means of violating the law himself. He has seen fit to ignore the express statutory provisions which say that "desegregation" does not mean the overcoming of racial imbalance and that "nothing" in the act "shall empower any official or court in the United States to issue any order to achieve racial balance." He has deliberately instituted a sociological approach rather than a legal one—an approach designed primarily to balance the races, for in this manner he has been better able to create an image of discrimination in areas where there has been a good faith attempt to end discrimination.

The purpose of this amendment, therefore, is to clarify the ambiguities of title VI of the Civil Rights Act of 1964. This is necessary to avoid the further submission of Federal officials to the pressures of outside forces which have compelled them to perform quasi-judicial functions and to allow them to concentrate on their statutory duty.

At the outset, I want to emphasize that the amendment is not designed to change the intent of Congress in enacting title VI of the 1964 Civil Rights Act. On the contrary, it is to implement that

intent as set forth in section 601 of the act. It is not designed to diminish the effect of decisions of the Federal courts; rather it is designed to rely on those decisions in applying the sanctions of title VI. Nor is it designed to permit unlawful discrimination—it only assists in defining such discrimination.

Section 601, which is the heart of title VI of the 1964 Civil Rights Act, would be left untouched by the amendment. That section provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The remaining, implementing language of the title, as I have said, transfers to the executive the lawmaking power of Congress, leaves the definition of discrimination and the application of sanctions to the uncontrolled discretion of agency officials, and surrenders the control of the Federal purse strings to the "equal opportunity officer" of each agency which he may use to effectuate his own notions of sociological progress. The predictable result has been that many officials have not only taken full advantage of their new power, but indeed some have usurped far more than was given by the act.

I will mention two examples in North Carolina, only to illustrate how this legislative and judicial power which officials have assumed has resulted in the distortion of the original Federal programs they are charged with administering.

An adult basic education project in Charlotte, under which 1,400 Negroes and 170 whites in a total of 91 classes were being taught to read and write, was threatened with termination by the Office of Economic Opportunity because of alleged de facto segregation and so-called racial imbalance in two classes. This threat, without complaint from any local organization or individual, was made under the provisions of title VI.

In another North Carolina city, a hospital is at this moment under threat of losing Federal funds because nonwhites do not comprise as large a percentage of the patient load as is the percentage of nonwhite population of the city. There is no allegation of discrimination or segregation in the staffing, in employment, or in the assignment of patients to wards and rooms. The only allegation is that the local populace does not become ill and choose the threatened hospital according to racial quotas.

Incidentally, I wrote the Department of Health, Education, and Welfare that if it was the policy of the Department to require that the people in a community should become ill and seek hospital treatment according to racial quotas, then the Department would have to arrange to bring that about because notwithstanding, the people of North Carolina were not smart enough to make disease have incidence according to race.

Finally, there is the example of the Office of Education integration guidelines recently published for the South. There is no pretense in the language of the guidelines that their purpose is to prevent either discrimination or State-supported segregation. The whole thrust is so-called racial balance in pupil and teacher assignment according to percentages.

Furthermore, in other States, as well as in my own State of North Carolina, many elderly people of all races, through no fault of their own, may be denied the benefits of the recently enacted Federal medical care program in an effort to discipline the policies of hospitals.

Despite the fact that these individuals may well have spent hundreds of dollars in premiums for social security insurance, they would be punished only because they happened to be assigned by their doctors to hospitals which have not achieved a racial balance of patients sufficient to the Department of Health, Education, and Welfare.

These mindless threats and fatuous guidelines cannot be remotely reconciled with the language or the legislative history of title VI or with the unlawful conduct—as defined by the courts—that was intended to be condemned. One brief statement confirms this.

The best authority on congressional intent of any legislative act is the floor manager of the bill, and the floor manager of the 1964 Civil Rights Act was the then assistant majority leader, Vice President Humphrey. In developing legislative history and articulating the intent of the act, the Vice President stated in 1964:

> * * * while the Constitution prohibits segregation, it does not require integration. The busing of children to achieve racial balance would be an act to effect the integration of schools.
>
> In fact, if the bill were to compel it, it would be a violation, because it would be handling the matter on the basis of race. The bill does not attempt to integrate the schools; it does attempt to eliminate segregation in the school systems.

The amendment Senator Fulbright and I introduced will prohibit such interpretations of their own power under title VI as some Federal officials have divined. It will accomplish this by defining section 601 according to the intent of Congress and the decisions of the Federal courts; if it is adopted, title VI, in the future, will be implemented according to the intention of Congress and not the whim of bureaucrats who are not answerable to the people for their sociological follies. If our amendment is adopted, every American will be subject to the same guidelines and can ascertain what those guidelines are. No longer will "discrimination" mean something different in one year from what it means in the next as is presently the case. No longer can the title be applied in one section of the country and not in another, without the protections of due process, as is presently the case. No longer will "free choice" be allowed by one department or agency and not by another, as is presently the case. Whatever the outcome of this amendment and title III of S. 3296, I would not object to the addition of express language in this bill which would implement the Attorney General's constitutional authority to insure that no State officially enforces segregration and that no State is compelled by law to integrate its public facilities.

In other words, the Attorney General would be required to assure that no State assigns children to schools on the basis of their race. In this manner, he may be better able to illustrate that the Constitution is colorblind.

RESPONSIBILITY OF CONGRESS TO CONSIDER CONSTITUTIONALITY

At the moment the administration bill was introduced, a national furor erupted concerning its constitutionality. Title IV especially has been the subject of a national debate on this question.

Before discussing titles IV and V, I should like to mention briefly Congress' duty to consider the constitutionality of proposed legislation. Notwithstanding the oath each Member of Congress takes to uphold and support the Constitution, there is an attitude among some that we should not be too troubled by this requirement. Instead, they advocate consideration of only the political and social aspects of legislation, leaving all determinations of constitutionality to the Supreme Court. This approach is completely fallacious and unsupportable according to the traditions and decisions of American jurisprudence and the principle of separate coequal powers.

The Supreme Court, according to its own rules of interpretation, is guided by one overriding presumption when undertaking its function of judicial review which dispels the notion of abdicating this congressional responsibility.

It proceeds on the assumption that the Congress is no less mindful than the Court of the restraints imposed upon the powers of the National Government by the Constitution, and that, prior to its approval of any measure the legislative branch conscientiously appraised its validity and in perfect good faith concluded that the enactment met the test of constitutionality. Therefore, the Court will not consider the constitutional question if that can be avoided; and if it does consider the question, the burden is on him who challenges the act's constitutionality.

The Court has expressed this many times and recently as follows:

> This Court does and should accord a strong presumption of constitutionality to acts of Congress. This is not a mere polite gesture. It is a deference due to deliberate judgement by constitutional majorities of the two Houses of Congress that an act is within their delegated power or is necessary and proper to execution of that power (*U.S.* v. *Gambling Devices*, 346 U.S. 441, 449 (1953)).

Congress cannot shift its responsibility to the Attorney General and assume that a legislative proposal is constitutional because he asserts that it is. The duty and responsibility rests solely upon the shoulders of each Member of Congress to determine whether a proposed measure is compatible with our Constitution.

Many of us, unfortunately, attempt to discharge this duty by predicting what the Supreme Court will hold when a given bill under consideration is ultimately reviewed. This may be a natural reaction, but it utterly fails to comprehend the nature of the responsibility we face.

Court decisions are, of course, a useful tool which we may use to recognize legislative limitations and obligations. But we should not, by contenting ourselves with reading the tea leaves of past judicial decisions, escape the duty of deciding for ourselves what is constitutional.

This is not what the Constitution expects of us. On the contrary, it requires that we look to the language, the intent, and the legislative history of each of its provisions in determining whether a bill is consonant with that document.

The Court properly upholds the constitutionality of any act of Congress unless it finds that what we have done is clearly repugnant to the words and spirit of the Constitution.

So, during these hearings I ask that the members of the subcommittee and the witnesses act as more than fortunetellers—that they judge the bills before us against the mandates and prohibitions of the

Constitution according to our own individual intellect and conscience and not abdicate that responsibility to the President or to the Court.

I might interrupt my reading of the statement at this point to inform Senator Bayh and Senator Javits that I have a very long statement, and that when we opened the committee hearing I offered any member of the committee an opportunity to make a statement, and I would not want to foreclose either of you gentlemen or Senator Hruska or Senator Scott who were not present. If any of you have a statement you would like to read at this time, I will give way for the time being.

Senator SCOTT. Mr. Chairman, I would like unanimous consent to insert my statement without reading it, at the conclusion of the chairman's statement, and such other statement as I may wish to put in.

Mr. ERVIN. I assume there is no objection, and therefore that request will be granted.

Senator JAVITS. Mr. Chairman, I have a 5-minute statement. The Chair has always been so gracious to me that I will stand by until the Chair is finished. But if the Chair wishes me to proceed——

Mr. ERVIN. I will leave that up to the Senator. I still have some distance to go.

Senator JAVITS. I think the chairman is at page 14 and I can do mine anytime before 12. I will just stand by and await the pleasure of the Chair. I might explain to the chairman that I had to go the the Franklin D. Roosevelt Memorial Commission meeting this morning.

Mr. ERVIN. I am certainly conscious of the fact that every Senator has more obligations than he can possibly get around to.

Senator JAVITS. I hope to make a brief statement when the Chair is finished.

Senator BAYH. Mr. Chairman, I appreciate the courtesy. I have no statement to make.

Senator HRUSKA. I have none at this time, Mr. Chairman.

Senator ERVIN. Then I will proceed.

TITLE IV

Although I have strong objections to the administration's proposed title IV, I find myself in the anomalous position of first commending the President for submitting it. I do this because there has been considerable criticism of the President for not "enacting" the provisions of the title by Executive order and integrating housing with the "stroke of a pen."

I will admit that all of us could enjoy a more leisurely summer and politically secure November if the President had decided this controversial issue for us.

Unfortunately for our tranquillity, however, every last drop of legislative power of the National Government is vested in Congress—there is none left for the President. We receive a fair wage for performing these functions; and the executive has enough problems of its own without assuming those conferred by article I, section 1.

Although I believe the President is mistaken in his view of the constitutionality of this measure, he has been faithful to the Constitution by allowing Congress to legislate rather than usurping the power to himself.

It is a sad commentary that anyone should seriously advocate that the separation of powers and the integrity of Congress be sacrified merely to avoid controversy.

Title IV proposes a Federal housing law which would deprive the American people of their right to sell, lease, or rent their property to whom they choose; it could prevent landowners from refusing to negotiate for the sale of their property; and it could subject homeowners to the harassment of lawsuits with unprecedented Federal civil sanctions in cases where they refuse to convey or negotiate the conveyance of their property for reasons which could be construed to be based on racial discrimination.

This entire title is, in my judgment, clearly beyond the authority of Congress—under either the commerce clause or the 14th amendment. Further, the section violates the freedom of association, implicit in the first amendment, property rights, explicit in the fifth amendment; and partially, the right to privacy within the penumbra of the Bill of Rights.

It is obvious that real property does not move in the channels of interstate commerce. Yet, the Attorney General has stated that the power granted to Congress by the commerce clause allows it to regulate all housing. The proponents suggest that these few words from the Constitution enable such regulation—"Congress shall have the power to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." But the very attribute of real property which distinguishes it from all other property excludes it from interstate commerce—its immovability. A house may be bought and sold, but with the exception of the house trailer and in the absence of acts of God, it never crosses a State line. I fail to see how we can rely upon tornadoes and hurricanes as channels of interstate commerce; and the Attorney General has not limited this bill to the sale and rental of mobile homes.

The very tenuous and erroneous suggestion is made that the materials and furnishings which make up any physical structure bring the whole into interstate commerce. Congress can, of course, regulate the materials and furnishings as they move in the channels of interstate commerce but in this instance the flow has stopped. The materials have, by legal definition, assumed the character of reality.

An example or two will illustrate the absurdity of the Attorney General's contention.

Suppose a doctor decides to volunteer for civilian service in Vietnam for a year. While he is there his family goes to live with his wife's mother and he rents his house to a colleague who he knows will care for the property. Where is the interstate commerce? And where is there any proper national policy which says he should not rent to whom he pleases?

Suppose a widow, whose only income consists of social security payments, wishes to supplement that income. She rents a room in her home to one of her own race. Where is the interstate commerce? And where is her right to freedom of association, her right to privacy—indeed, her personal right even to be prejudiced?

Suppose a man who owns the house and lot next door to his home sells it to a friend? Where is the interstate commerce? And why should the Federal Government care?

Suppose the manager of a home for retired Methodist ministers refused to negotiate with a retired Baptist minister for the rental of an apartment? Where is the interstate commerce? And, anyway, what business is it of ours?

Yet the proposed legislation would subject each transaction to Federal control in the name of regulating interstate commerce. Those who argue that this control can be based on the commerce clause might do well to give careful thought to the consequences if their position is accepted.

It is elementary that this Nation was founded and has become great upon the proposition that the powers of government are derived from the governed, and that liberty is directly dependent upon the degree to which the individual is able to remain free from governmental control. A corollary to this idea is the restraint on governmental power embodied in the Federal system according to which the National Government has only those powers granted to it.

This proposition is written into our Constitution.

If it can be successfully maintained that this housing proposal is constitutionally permissible under the commerce clause, then there is no conceivable limit to the power of the Federal Government, except for those matters expressly forbidden. The Attorney General's interpretation of the limits of the commerce clause power is supported by references to "the interpenetrations of modern society." But the constitutional fallacy of such scholastic reasoning as a basis for extending Federal power was long ago recognized by Justice Frankfurter in *Polish Alliance* v. *Labor Board:*

> The interpenetrations of modern society have not wiped out State lines. It is not for us to make inroads upon our Federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single state, but that cannot justify absorption of legislative power by the United States over every activity (322 U.S. 643, 650 (1944)).

I challenge the Attorney General to mention any area of human activity not subject to Federal legislation under his interpretation of the commerce clause. We should appreciate that "federalism" is not a meaningless platitude nor an outmoded cliche. It is not merely a happy accident of history; not merely a convenient tool of government. Rather, it is the foundation of our Government. The administration's interpretation of the clause destroys this foundation. And today it is threatened by an interpretation of one constitutional clause concerning interstate commerce by which the Federal Government could ultimately control every activity of every American from the time he is born till the time he "shuffles off this mortal coil."

The 14th amendment is also relied upon in the effort to support the constitutionality of this title. This argument, however, is so ridiculous, so absolutely unsupportable by the language of the amendment, that I have yet to hear someone seriously defend it. Until some attempt at documentation is made, I see no reason to waste the subcommittee's time discussing it.

But even if we accept the Attorney General's suggestion that the commerce clause or the 14th amendment may be relied upon, we still must consider specific constitutional prohibitions on our legislative power.

Much has been said recently concerning "human rights" as opposed to "property rights." This is nonsense. Property has no rights,

only attributes. The right to property is a human right, a civil right—a right expressly protected by the Constitution. It is one of the basic rights of a free people. Conversely, failure to protect the human right to property is a typical characteristic of totalitarian states along with the denial of freedom of speech, press, and religion.

The basic human right not be be deprived of liberty or property without due process of law—the only right expressly mentioned in both the 14th amendment and the Bill of Rights—would be sacrificed by this title to a new so-called right of open occupancy.

Furthermore, there are other human rights and freedoms protected from governmental interference which are placed in jeopardy by this legislation. Among those are the right to freedom of association, recognized in the case of *NAACP* v. *Alabama* (357 U.S. 449 (1958)), and the right to privacy recognized in the case of *Griswold* v. *Connecticut* (381 U.S. 479 (1965)). As Justice Douglas said in *Griswold* at page 484:

> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . .
>
> The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which Government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people!"

and again at page 485:

> Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."

No one would contend that Congress may use the legislative power conferred by section 5 of the 14th amendment or by the commerce clause in a way which would invade those liberties specifically guaranteed by the first section of the 14th amendment, or by the 5th amendment, or by the first 10 taken together. Human liberty requires the maintenance of restraint upon governmental power. Restraint is hardest when the power sought is for noble ends. But power conferred is not easily recaptured. History shows that no one can guarantee that the ends of power will always be worthy. It may well be said that a noble expediency is the fatal disease of human liberty.

But noble as its purpose may be, all evidence indicates that title IV will be ineffective to accomplish its intended goal. Although it will disrupt the real estate trade, it will not integrate neighborhoods or housing; although hundreds of homeowners will be harassed by suits incorporating unprecedented Federal tort claims, the broad policy will be unenforceable.

The objective claimed for this title is adequate and integrated housing for deprived minority groups. Twenty States, the District of Columbia, Puerto Rico, the Virgin Islands, and some 26 municipalities have fair-housing laws (although none with coverages as broad as the one proposed here). Yet the largest slums and ghettos of

which we hear so much are in States with fair-housing laws; and no appreciable change in housing patterns ever followed their enactment. Housing is still inadequate and substandard. At best, the only ones who have benefited by these local laws, and the only ones who would benefit by the proposed national law, are the wealthy and the upper middle class.

On the day the bill was introduced, I noted that "if enacted, I fear that such a law would bring false hope and frustration to those who are deluded about its effect and purpose." Although we may agree on little else, the National Committee Against Discrimination in Housing views the legislation in the same light. The committee calls title IV—

> totally inadequate to meet today's critical national problem of the explosive racial ghetto . . . even if it could be strengthened . . . such a proposal at this strategic moment may raise false hope among the Negro masses which cannot possibly be fulfilled by this proposal.

It is apparent that the American people and I are in agreement in opposing forced housing legislation. It has been overwhelmingly rejected. For instance, the people of the State of California, and of the cities of Seattle, Tacoma, Akron, Omaha, Detroit, and Berkeley have defeated decisively by referendum such proposals. It is extraordinary that the Federal Government would impose on every American what obviously the great majority do not want.

The extraordinary enforcement provisions of title IV deserve separate scrutiny from the desirability and constitutionality of the title, for it is no understatement to say they amount to a revolution of the American legal system.

Briefly, the title provides that an individual without payment of fees, costs, or security, and without regard to the amount in controversy, may have a court-appointed attorney bring a civil action. The court, which can grant a permanent or temporary injunction, may allow the plaintiff, if he prevails, attorneys fees, it may award him, in addition to actual damages and punitive damages of $500, other damages on such vague grounds as "humiliation" and "mental pain" and "mental suffering" without limit as to amount.

The Attorney General may intervene in a private suit if he feels the action is of "general public importance." Additionally, he can on his own, institute suits when he believes a person is engaged in a pattern or practices of "resistance" to the full enjoyment of any right granted by the title.

These unique additions to Federal tort law are dangerous and unfair. As far as I know this is the first instance, State or Federal, in which a plaintiff is provided counsel by the Government in a tort action case. Why should counsel be provided here but not for an individual who is struck down by an automobile or train? More to the point, why should we not also guarantee counsel to the defendant homeowner or landlord?

Further, there is presently no other Federal law specifically allowing damages for such nebulous injuries as "humiliation" or "mental suffering." Nor do any of the more than 20 State and territorial antidiscrimination housing laws authorize such damages. I am thoroughly opposed to such actions, but if they are to be sanctioned by Congress, then let the homeowners counterclaim on the same basis.

In any event, if the plaintiff does not prevail, let the defendant homeowner also collect attorney's fees and costs.

In this connection, immediately prior to the introduction of this measure, I introduced, at the request of the Justice Department, several bills intended to provide equality and eliminate discrimination in civil suits between the United States and private individuals. These bills provide among other things that no attorney's fees be allowed, but that the loser in any case bear the costs. Even before these measures are passed, the administration seems to be forsaking the policy of equal justice embodied in those bills.

The enforcement provisions which we are expected to pass illustrates the bias inherent in the bill—bias against homeowners who must bear not only the cost but also an overwhelming burden of proof in a case where his opponent may be not only an individual plaintiff, but also the U.S. Department of Justice.

Equitable relief for alleged discrimination is authorized in every negotiation or transaction concerning real property. The end result will be that mortgage lenders, grantors, and grantees will be in a constant quandary regarding finality of any sale or loan.

The provisions constitute an invitation to unwarranted harassment by unjustified lawsuits each time an owner sells or rents his property.

In 1964, Congress established a conciliation commission known as the Community Relations Service whose purpose was to solve civil rights disputes by mediation rather than by litigation or demonstration.

Earlier this year, over my vigorous objection, this agency was transferred from the neutral aegis of the Commerce Department to the national prosecutor, the Justice Department.

One of the objections to transfer was that the administration has become impatient with conciliation and was forsaking that tool for settling disputes for quicker if more abrasive methods. Although this was denied by the administration then, by implication they confirm it now. Although every State law contains some procedure for conciliation, and although the Justice Department now has over 100 employees hired to perform this function in its Community Relations Service, nowhere in the title is conciliation mentioned as a means of enforcement.

In spite of all its unique enforcement methods, the purpose of the title cannot be achieved any more than alcohol was destroyed by the Volstead Act. In the final analysis, there is no way a free country boasting a free economy can tell its citizens to whom, when, or for how much they may sell their houses. Yet the precedents it would create are dangerous and—just as with prohibition—trade will be in turmoil and the purpose left unaccomplished.

Taken in its entirety, title IV can only result in one of two things: If its purpose is accomplished, then basic rights of property and freedom of choice are extinguished; if I am correct, and the title fails in its purpose, then we have enacted a stupid law which can only bring frustration and ill will.

TITLE V

In many ways title V is a sad provision—sad and bad. It is sad because its submission to us was suggested by the commission of a few unconscionable crimes and bad because it is the product of the gra-

tuitous and mistaken advisory opinion of several of the Justices of the Supreme Court in *United States* v. *Guest*.

The advisory opinion of which I speak was contained in the concurring opinions, to the effect that State action is no longer a necessary element in acts of Congress designed to implement the 14th amendment. This is absolutely contrary to the legislative history of the amendment, the clear language of the amendment, and scores of cases from the civil rights cases in 1883 to *Brady* v. *Maryland* (373 U.S. 82, 92 (1963)) interpreting the amendment. No amount of intellectual sophistry, no amount of torturing of the language of the 14th amendment can change the fact that a prosecution brought pursuant to its mandate requires the element of State action or action taken under color of law.

Indeed, the title, as now worded may violate the first amendment provision for freedom of speech insofar as it prohibits undefined action such as "intimidation," "interference," and "attempts to interfere." It also may be unconstitutionally vague in violation of due process.

Further, from a standpoint of policy—and apart from its constitutional problems and poor drafting—enactment of title V would be dangerous and illiberal. If Congress can make it a Federal crime for an individual to "interfere" with another's "right" to rent a house or to be served in a place of accommodation, the Congress can make it a Federal crime to interfere with the right to walk the streets without being robbed or the right to be protected in conducting a private business.

Title V would serve as a precedent for making any State crime a Federal crime and would require a Federal police force—the opening wedge of a police state.

It would seem to me that if Federal jury antidiscrimination laws were enforced, there would be no need for title V. At this point we have ample evidence that convictions can be obtained in Federal courts, and it seems to me that sections 241 and 242 of title 18 constitute an adequate remedy. The constitutionality of these statutes have been adjudicated and upheld. Indeed, within hours of the decisions in the *Guest* case, it was reported that new arrests were made by the FBI. All that is needed are provisions for increased penalties for 241 and 242 if death or bodily harm result from their violation. Certainly, in a hypothetical case, if a sheriff charged with enforcing the law were to murder an individual on account of the victim's race or color, he should receive life imprisonment.

Assuming, however, that the Justice Department continues to prefer to request new laws rather than to enforce present ones, it should respond to that request in the only way consistent with our form of government; by constitutional amendment.

Beyond that, the principle of federalism and the protection of individual rights demand that we consider very carefully more extreme legislative measures.

CONCLUSION

Current HEW policies requiring assignment of school desks and hospital beds according to race, the identification of jurors according to race, and religion, the use of minority group status questionnaire by which all Federal employees are to be designated according to race and ancestry, the proposal of Secretary Wirtz that all private busi-

nesses dealing with the Federal Government classify their employees according to race—all these innovations defy constitutional proscriptions and commonsense. Such requirements will lead to every American being officially identified according to his race, creed, or national origin. This can only bring divisiveness to our people. These are not the proper policies of a government which is supposed to be colorblind.

Again, I emphasize what I said when this bill ws introduced. With the exception of the title concerning Federal jury selection, S. 3296 is in line with the recent succession of civil rights proposals, each more drastic than the one before, each more threatening to the rights of individuals, each more destructive of the rights of States. I [illegible]tly fear we may be witnessing the twilight of federalism. The [illegible]tes more and more are resembling the "conquered provinces" to w[illegible]ich Justice Black alluded in his partial dissent in the recent voting rights case, and the "meaningless zeroes" to which Justice Frankfurter alluded earlier. If Congress enacts this bill as presently drafted, if it capitulates again to the political pressure of unpeaceful demonstrations and to misplaced righteous indignation, we will be sharing in the demise of the Constitution.

It is imperative that Congress rise above both the pressure of demonstrators and the emotions aroused by extremists on both sides and defeat any proposal which would extinguish the freedom of the individual and the identity of the States. As members of this subcommittee, we will, I trust, assume our obligation to the country and to the Constitution by deciding for ourselves what is correct and what is constitutional.

Our duty here is to determine how to protect the rights of all Americans of all races and all generations without extinguishing other precious rights. Our duty is to implement the Constitution without perverting it.

These obligations, I hope, will remain paramount in the minds of both the members and the witnesses as the hearings progress.

I felt it was incumbent upon me to express my views at length because I consider these bills to be the most drastic assault upon the freedom of 190 million Americans as individuals, and also the most drastic assault upon the principle of federalism on which our Constitution and system of government rest.

I appreciate the indulgence of the members of the subcommittee, and at this time would like to give Senator Kennedy, the ranking member present, an opportunity to present his statement.

Senator KENNEDY. Thank you, Mr. Chairman. I have a short statement which I should like to read at this time.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Mr. Chairman, I have studied very carefully the Administration's proposed Civil Rights Act of 1966, S. 3296, as well as the six other related bills which are before this Subcommittee. I have also gone over the transcripts of the testimony taken on these bills in the House Judiciary Committee. In my judgment this legislation is vitally needed, and needed now. I have no doubts as to its constitutionality. I am, therefore, proud to be a co-sponsor.

Despite the progress we have made as a result of the reforms instituted under the Civil Rights Act of 1964 and the Voting Rights Act of 1965, much still remains to be done before the American Negro can claim his rights of full citizenship.

We, as a nation, cannot realize our national goal of justice and equal opportunity for all Americans so long as crimes of racial violence continue to go unpunished; Negroes continue to be excluded from service on state and federal juries; public schools continue to be racially segregated; and Negro Americans continue to be denied the opportunity for equal access to good housing.

The Administration bill is aimed at ending these injustices. It represents still another step in what must be, because of a century of neglect and injustice, a concerted national effort to make justice and equal opportunity a reality for all Americans.

In particular, I would like, at the outset, to express my support for Title IV of the Administration bill, which seeks as a matter of national policy to remove racial and religious discrimination as a barrier to obtain housing. As long as the Negro American remain isolated from other Americans and denied equal access to good housing, he will continue to live in segregation, forced to pay a higher price for the limited inferior housing to which he does have access. His children will continue to go to segregated schools of inferior quality, and his family will continue to experience segregation in most other aspects of their daily lives, cut off from the society that surrounds them.

Ending discrimination in housing does not mean giving special advantages to minority groups. It does mean that the American Negro and other minority groups will have the same right and opportunity that all other Americans now possess to live where they choose. Most Americans do not consider this a revolutionary right. But is should be basic and fundamental to all Americans.

Although I believe the objectives of this bill are laudable and can be simply stated, we all must recognize that there is ample room for disagreement regarding the most desirable manner of implementing these objectives. This is evidenced by the differences among the various bills before us, all ostensibly designed to realize the same objectives.

For my part, there are a number of matters unresolved in my own mind, in which I am particularly interested.

1. In the area of federal jury reform:
   (a) whether the use of voting lists supplemented by names supplied by Judicial Councils is a better approach than the use of random sampling techniques;
   (b) whether the prosecution in a criminal case should be given the right to challenge the manner in which his jury is selected, and the Attorney General given the right to intervene.
2. In the area of state jury reform:
   (a) whether, given the difficult burden of proving state jury exclusion, it would not be wise to provide an "automatic trigger" procedure, as we did in the Voting Rights Act, in order to shift the burden of showing non-discrimination to the State.
   (b) whether States ought to be required to record race, color, religion, sex and national origin whenever a prospective juror is called to demonstrate his qualifications for jury service.
3. In the area of housing:
   (a) whether, given our lack of success with the individual law suit approach in voting rights, it is wise to rely exclusively on that approach in housing.
   (b) whether Title IV should provide an administrative remedy as well as a judicial one?
   (c) whether the exemption in Title VI of the 1964 Civil Rights Act which excludes contracts of insurance and guarantee from the cut-off provisions of that Title should be eliminated?
4. In the area of expanding federal jurisdiction over racial violence:
   (a) whether the 42 USC 1983 should be amended to permit suits by private persons for injunctive relief against persons seeking to interfere with the rights set out in Title V, and to make local governments that employ officials who deprive people of such rights jointly liable with those officials for injuries caused by such misconduct?
   (b) whether persons injured as a result of violations of rights covered in Title V should be given a right to sue for damages in federal district court?

I am therefore looking forward to the testimony we shall hear in the days ahead, on these and many other questions, in order that the bill ultimately reported by this Subcommittee reflects the best possible legislation we can devise to achieve the stated goals of these proposals.

I would also like to take this opportunity to commend the President and the Administration for the courage and dedication displayed in this legislation.

Senator ERVIN. Thank you Senator Kennedy. The record will include at this point, immediately following the statement of Senator Kennedy, the statement of Senator Scott, a member of the full Judiciary Committee. The subcommittee is delighted to have Senator Scott join in the deliberations surrounding this far-reaching bill.

(The statement of Senator Scott follows:)

STATEMENT BY U.S. SENATOR HUGH SCOTT OF THE STATE OF PENNSYLVANIA

Mr. Chairman, as a co-sponsor, I am grateful for this opportunity to express my views on S. 3296, the proposed Civil Rights Act of 1966. This legislation is clearly necessary despite the progress resulting from four Congressional enactments within the past decade because of the failure of certain States and localities to provide for the fair and impartial administration of justice. Recent tragic events in these areas and the failure to bring those responsible for them to justice testify to the need for the first two titles of this bill.

At the outset, let me make clear my feeling that the President was unwise in deciding to ask for the fair housing law embodied in Title IV of the bill. I, of course, strongly favor the objective of Title IV for it is my deeply held conviction that every individual should have the opportunity to seek housing accommodations for himself and his family wherever he chooses to locate himself subject only to his financial capacity and his personal tastes. In my opinion, however, Federal legislation is unnecessary to secure this opportunity.

In enacting the Housing Act of 1949, Congress proclaimed as the fountainhead of our national housing policy the objective of "a decent home and a suitable living environment for every American family." The President of the United States is responsible for implementing that policy through the department administering that Act as amended and the agencies supervising the banks and lending institutions which finance most of this Nation's housing. Accordingly, I have felt that the President has ample executive authority to take steps designed to insure that equal access to housing is a fact and not a goal. For this reason, I repeatedly called upon the late President Kennedy to issue an executive order barring discrimination in all Federally assisted housing.

President Kennedy did issue such an order in November 1962, but its scope is so limited as to render it ineffectual. As the Civil Rights Commission pointed out in its 1961 report, mortgage lending institutions are "a major factor in the denial of equal housing opportunity." They, however, are not affected by the President's 1962 executive order which covers only FHA and VA-insured mortgages. On several occasions since its issuance, I have urged extension of this executive order to include conventional mortgage activities of Federally assisted lenders. My most recent plea in this regard was made last December when I deplored reports that the Attorney General was recommending the legislative route to bring about an end to housing discrimination.

I have preferred the stroke of the President's pen as the means of achieving the intended result of Title IV for four reasons. First, it is a way of achieving the end in mind quickly without the highly charged controversy that is presently swirling around Title IV. By tossing the fair housing ball into the legislative court, the President has risked the danger of setting back the cause of fair housing because if Title IV is eliminated or crippled such action will weaken the moral basis for a subsequent decision to extend the November 1962 executive order against discrimination in housing. Indeed, the controversy over Title IV jeopardizes the chances to enact the remainder of S. 3296 this year.

Second, more than 80 percent of the Nation's housing supply can be reached by a broadened executive order, and the remaining 20 percent would soon follow suit.

Third, by employing his existing monetary and regulatory sanctions instead of the court sanction proposed in sections 406 and 407 of S. 3296, the President could achieve the result contemplated in Title IV without burdening the courts and without requiring them to formulate new standards defining discrimination.

Finally, a broadened executive order would avoid putting all the pressure on the individual homeowner as S. 3296 does. Rather, the pressure under a system instituted by executive order would be upon banks and brokers, the parties most in need of regulation and the ones most likely to comply and thereby influence their clients to comply.

Although he had the option to extend the November 1962 executive order, President Johnson instead presented us with the *fait accompli* of Title IV. Con-

gress' task now is to amend Title IV to meet legitimate objections which have been raised against it as well as to blunt the highly strident opposition applying the misnomer "forced housing" to Title IV. Here let me offer three alternative suggestions for the Subcommittee's consideration.

First, Title IV might be more workable if in the first instance it were to rely on administrative procedures instead of on the courts as presently provided. Is the court procedure proposed therein not too blunt to be really effective? Does it not minimize the opportunity for cooperation and compromise? Why put this kind of new burden on the courts which will have to develop new standards out of whole cloth? In raising these questions, I am trying to suggest the advisability of providing machinery for mediation and conciliation as a way of settling some of the problems encountered in the area of housing discrimination. These problems must be decided equitably, and discrimination ended. Here, the Subcommittee may well want to give serious consideration to Amendment No. 578 proposed by my able and distinguished colleague from New York, Senator Javits, which authorizes the creation of an Equal Housing Opportunity Commission.

Another alternative for the Subcommittee's consideration would be broadening the scope of Title VI of the Civil Rights Act of 1964. Title VI, which prohibits discrimination under any program or activity receiving Federal assistance, explicitly excludes from its coverage a "contract of insurance or guaranty." Deletion of the language just quoted would, I believe, do by legislation what a broadened executive order would do if it were extended to include all conventional mortgage activities of Federally assisted lenders.

Finally, the Subcommittee might want to consider limiting the application of Title IV in the following manner: 1) by conforming to the most advanced State laws and 2) by excluding from its coverage the homeowner who sells to a member of his immediate family or to one who has been an employee for a reasonable term of years.

Turning to the other titles of the bill, I am concerned about the failure of Title I to grant to the prosecutor in a Federal criminal case a right co-extensive with that of the defendant to object to a jury selection process which is in violation with section 101. To remedy this defect, I commend to the Subcommittee's attention Amendment No. 581 introduced by Senator Javits.

Title II is unclear as to what remedy is available to defendants tried before juries in State courts from which Negroes have been excluded because of their race. Whereas Title I provides for the challenge of jury selection procedures by crinimal defendants and civil litigants, Title II is curiously non-parallel, and it does not, as does Title I, explicitly authorize staying the proceeding. Beyond granting power to the Attorney General to sue in the appropriate Federal district court for preventive relief in cases where racial discrimination in State jury selection is belevied to occur, Title II becomes vague as to what relief can be granted. Language similar to that in section 101 should be included to permit the Federal court to stay the proceedings of the State court pending the selection of a jury that conforms with the prohibition in section 201.

In closing, Mr. Chairman, I earnestly hope that the Subcommittee will approve a meaningful bill that will effectively fill the gaps still remaining in existing civil rights statutes.

Senator KENNEDY. Will the Senator from New York yield for just one question on his statement?

Senator JAVITS. Mr. Chairman, may I just say to Senator Kennedy—do we have permission to sit after 12 o'clock?

Senator HRUSKA. Through the morning hour.

Senator JAVITS. I yield.

Senator KENNEDY. Just 1 minute. I would like to ask the chairman where on the top of page 4 of his statement when he was talking about the Chief Justice of the United States, he said:

His recent warnings that the balance of federalism is being threatened by proposed legislation on state juries gives me great hope that the Senate will look closely and critically at the need and propriety of such legislation.

The Chairman is not suggesting that the Chief Justice in using the words "proposed legislation," was commenting on the legislation which the administration has put forward, is he?

Senator ERVIN. I am unable to answer the question as to what the Chief Justice was referring. I read the statement attributed to him in which he said in substance—I do not undertake to quote his exact words—that some of the bills now pending before Congress threatened serious injury to the principle of federalism.

Senator KENNEDY. The opinion of the Chief Justice is certainly a matter of great import. I think it is important to have included in the record the Chief Justice's statement as it refers to this question. The newspaper report in the New York Times, which was reported by Mr. Graham, gives a number of the comments made by the Chief Justice where the Chief Justice departed from his text. In the news report itself, it says, "Observers assumed that the Chief Justice was not referring to the jury provision of the administration's proposed civil rights bill of 1966." And it then continues on.

Senator ERVIN. It says "assumed."

Senator KENNEDY. Exactly. What I am suggesting is that we ought to have included in the record the complete statement, to get accurately his comments on that provision——

Senator JAVITS. Is the text available, may I ask?

(The text of the Chief Justice's address appears at p. 201.)

Senator ERVIN. I do not profess to be authorized to state what the Chief Justice said or what he meant, but I would inform the Senator that any documents he may want to put in the record relating to this speech will certainly, as far as I am concerned, be included in the record and I also inform the Senator that we have requested the American Law Institute to furnish us with the official reporter's transcript of the speech so it can be included in the record.

Senator KENNEDY. And then in the——

Senator ERVIN. I was just endorsing the Chief Justice's concern about the Federal-State relationships.

Senator KENNEDY. The other insertion I would like in the record is the quote of the Vice President of the United States in reference to the 1964 bill. I feel that perhaps the Vice President's views at that particular time, as well as currently, might be misunderstood from a quote later taken out of context. I would hope, Mr. Chairman, that at a later time that we could include the contents of the language of the Vice President prior to that particular quote, and offer appropriate quotes which might accurately reflect his opinion.

Senator ERVIN. I will be glad to put in the record anything the Senator from Massachusetts desires on any of these points or on any other point. I certainly do not want the Vice President to be misinterpreted or misquoted. This material will be placed in the appendix.

Senator KENNEDY. I appreciate that.

Senator JAVITS. I thank my colleague. Mr. Chairman, in the same vein, I ask unanimous consent to include in the record the total statement of the national committee against discrimination on housing referred to at page 19 of the chairman's opening statement. I wish to point out that it was my understanding that they were protesting against the weakness of the legislation in making this statement on title IV with regard to discrimination in housing, whereas the Chair indicated, at least implied that they were sustaining the views that this legislation was inadvisable. I do not think they would want to be subjected to that interpretation.

Senator ERVIN. That may be included at this point.

(The statement follows:)

NCDH POSITION REGARDING PROPOSED FEDERAL ANTIDISCRIMINATION HOUSING LEGISLATION, APRIL 28, 1966

(Statement by the National Committee Against Discrimination in Housing (NCDH))

The proposed Federal Antidiscrimination Housing Act is totally inadequate to meet today's critical national problem of the explosive racial ghetto. Twenty-five years ago, such an act by Congress might have established the posture of the National Government as opposed to racial discrimination and prevented the use of FHA and VA guarantees, resources of the Home Loan Bank Board, savings and loan associations, and other federally guaranteed lending institutions from creating the massive lily-white suburban rings surrounding and constricting and swelling our tension-filled, inner-core black ghettoes. This proposal is too little and too late to effect the affirmative and immediate step required.

Congressional action in 1866, as stated in section 1982 of title 42 of the United States Code, established 100 years ago that a Negro shall have the same real property rights as white citizens. Neither President nor Congress has seen fit to enforce these rights; instead, the Congress has abdicated its control of vast billions of dollars in housing appropriations since the 1930's to the will of the executive department and the whim of the real estate and mortgage lending industries. They have been allowed, with Federal sanction and Federal support, to follow the custom of the marketplace to restrict the housing choices of Negroes and other minorities and segregate them in multiplying and expanding ethnic ghettoes in growing urban communities over the country.

The proposed bill, even if it could be strengthened and ultimately passed after long and divisive debate, could not alone have appreciable effect on the accelerating racial tensions created by a ghetto way of life. In fact, such a proposal at this strategic moment may raise false hope among the Negro masses which cannot possibly be fulfilled by this proposal. With or without this additional legislation, the key to today's racial problems in housing lies right now in the hands of the President and his executive department, including the recently established and powerful Department of Housing and Urban Development.

The President has not been reluctant to use his executive powers in other areas to bring about needed reforms. Under title VI of the Civil Rights Act of 1964, for example, he has alternately tightened and then loosened the purse strings under executive control in order to effect desegregation of schools, health and other facilities, in North and South alike, wherever Federal funds or powers are directly or indirectly involved.

It now remains for him to make comparable use of executive control of the vast Federal funds, credits and powers available for the planning, development, and marketing of housing accommodations, utilities and facilities in projects, neighborhoods and large parts of entire communities. Every day these funds are being used more to segregate Negroes than to include them. The President has the power now to require the use of these funds and powers to bring about dispersion and inclusion, rather than segregation and exclusion. He must exercise this choice every day, whether or not he ultimately achieves national antidiscrimination housing legislation with adequate enforcement machinery.

Furthermore, he now has before Congress vast and sweeping housing legislation to reshape urban communities. Unless the President directs the control and use of funds and powers, these new programs will surely accentuate the ghetto problems of a Watts or a Harlem long before the limited effect of any national antidiscrimination law could be applied. In that event, the National Committee Against Discrimination in Housing could not support the adoption of any current or new national housing programs until the President moves to exercise affirmatively the great powers now in his hands.

NCDH has always favored the concept of insuring equal opportunity under laws which provide machinery for effective enforcement. We do not oppose this antidiscrimination legislation, although at this juncture we believe it to be of little moment. Until the President exercises to the fullest the pervasive Executive powers already in his hands to bring Negroes back into the stream on national and community life, he will not have redeemed the pledge in his landmark address at Howard University on June 4, 1965.

On that historic day in June 1965, President Lyndon B. Johnson said:

"But freedom is not enough. You do not wipe away the scars of centuries by saying, 'now you are free. You can go where you want or do as you desire, and

choose the leaders you please.' You do not take a person who for years has been hobbled by chains and liberate him, bring him up to the starting line of the race and then say, 'You can compete with all the others,' and still justly believe that you have been completely fair. Thus, it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates."

We strongly and vigorously commend the President for having taken this position. We now call—and while the Congress works its will, shall continue to call—upon President Lyndon B. Johnson to give meaning to those works with affirmative Executive action to insure that the Nation's housing and related programs and resources are administered to provide true equality of opportunity for all Americans, and with the specific goal of wiping out the ghetto way of life which afflicts our whole society.

Senator JAVITS. Thank you.

Mr. Chairman, I believe I am in a rather unique position of being the only member of the Senate who is either sponsor or cosponsor of all seven provisions before us today in bills heretofore introduced in the Congress, and the numbers of those bills are S. 1497, S. 1654, S. 2845, S. 2846, S. 2923, and S. 3170, and S. 3296.

Mr. Chairman, one measure concerning the protection of civil rights workers and those attempting to exercise their rights is S. 2846, which I introduced with others back in 1961 when the Civil Rights Commission first recommended the change. An early jury bill which Senators Case, Fong, and I introduced last January, S. 2845, was the result of apparent failures of certain State courts in the South to be effective in bringing justice to persons accused of civil rights murders. S. 3170, which Senator Robert Kennedy and I introduced—is primarily the product of the Civil Rights Committee of the Bar Association of the State of New York, which has worked diligently on the proposal for the transfer of certain cases from State to Federal courts for a long time.

Mr. Chairman, while I do have some comments on the administration's bill which is before us, I wish to express at the outset that any reservations which I have arise out of the disagreement on tactics and out of my desire to have an even more effective bill. Certainly I favor and have cosponsored the administration's bill even in its present form.

Within this frame of reference, I wish to make the following observations:

(1) I deeply regret the President's decision to send us fair housing legislation as a congressional enactment, since I believe that putting the matter before Congress jeopardizes the chances for the implementation of this whole concept.

President Kennedy's 1963 housing order, while it has not yet been enforced with sufficient vigor in my judgment, covers the housing insured by the FHA and the VA, and I believe that this Executive order of President Kennedy's, now 3 years old, should be extended to cover all housing with mortgages held by FDIC banks and Federal Savings and Loan Insurance Corporation savings and loan companies.

This simple move, this stroke of the pen as President Kennedy characterized it, could, if effectively enforced, end discrimination in 80 percent of the Nation's housing, and that is far more effective than getting this matter embroiled in the legislative struggle which will ensue, as is clearly indicated by the chairman's presentation already made.

(2) Given legislation to end housing discrimination, I believe a more effective method of enforcement could be provided through an

administrative agency rather than through the courts. Twelve years after the *Brown* decision it seems naive to say that a right denied to millions of Americans as a class can only be secured through a case-by-case journey through the courts.

Congress has already recognized that this procedure is lengthy, expensive, and unrealistic as a way to desegregate schools. How much greater these criticisms should be when applied to fair housing, where, except in cases of pattern or practice, each individual must go to court every time he is rebuffed by a landlord or real estate agent. With the Chair's permission, I would like to yield to Senator Scott.

Senator SCOTT. Mr. Chairman.

Senator ERVIN. Yes, Senator Scott.

Senator SCOTT. If I may ask to make one statement before I have to keep an important appointment, I simply want to say that I find myself in much sympathy with the statement of the Senator from New York. I am very much concerned about the fact that no administrative order has been issued which could have bypassed this longer and certainly more costly proceeding. I say this without commenting as to my future disposition on this or other bills. The Senator from New York in my opinion is on the right track. Thank you.

Senator JAVITS. I thank my colleague from Pennsylvania for his gracious intercession.

New York was one of the first States in the Union to have a fair housing law. Many other States and cities have followed this pattern by providing that administrative bodies shall receive and decide complaints of housing discrimination and shall issue cease and desist orders subject to court review. This is accomplished with speed and without cost to the complainant. And the respondent, of course, retains his right to appeal the Commission's decision to the courts. This procedure far more effective and realistic, should be incorporated in the Federal bill. And I am today offering an amendment to do exactly that.

(3) Title I of the bill provides for a uniform method of jury selection in Federal courts. If this method is not complied with, the defendant, or in civil cases either party is given the right to challenge compliance and obtain a stay of proceedings until a jury is chosen according to to law. This right, however, is not available to the prosecutor in criminal cases in spite of the fact that this very bill has arisen because of the alleged bias of defendant-oriented juries in civil rights crime cases.

Two bills of which I am the cosponsor S. 2845 and S. 2923, give the prosecutor the right to file this motion, and I am today offering an amendment to the pending administration bill to do that, too.

(4) The administration's bill contains no provision for the indemnification of persons injured because they exercise or attempt to exercise their constitutional rights. Many acts of violence and murder which have occurred since the inception of the civil rights movement have not only gone unpunished, but have left families and injured parties without any civil redress against the perpetrators. I am introducing an amendment today creating a Civil Rights Indemnification Board, and establishing a trust fund of $10 million to pay these claims, and to allow subrogation to actions against the State, municipality, or individual responsible for the injury.

(5) Another of the amendments which I am introducing today incorporates an automatic trigger provision in the selection of State juries, which is also part of the bill I introduced, S. 2923. This would create an automatic presumption for Federal intervention where certain evidence of discrimination on the grounds of race or color exists.

If, for example, over a 2-year period jury service by Negroes fell below a certain percentage of Negro population, an automatic presumption would be created that discrimination exists in jury selection, and the Federal courts would take over. The analogy is to the Voting Rights Act of 1965.

Finally, I am offering an amendment today proposing that the language of S. 3170, the removal of cases from State to Federal courts bill, be incorporated as an additional title in the administration's bill.

Finally, Mr. Chairman, may I say no one has greater respect here for the views of our chairman than I. I count my friendship with him and my respect for his judgment as very high, and I hope he feels the same way about me. And so I will take the liberty of stating what I consider to be the necessary other point of view. For a century the Negroes of this country have been depressed and deprived of justice in many areas of the country, and I do not exclude my own. We are guilty, too. I think it is high time that we repair this damage to the moral fabric of our country and to its law, and I believe the Constitution permits what we are trying to do.

Perhaps what we have written here is defective or inartistic in some respects. We will find a way.

Mr. Chairman, I am resolved as one Senator at least, with every bit of influence and power that I have, to see that we do find a way. The job is not yet done, and I hope we can take another measurable step in this legislation.

Thank you.

Senator ERVIN. I appreciate the remarks of the Senator from New York. I think it would have been a fine thing if New York had solved all these problems and made itself a good example for the rest of the country to follow.

Senator JAVITS. Mr. Chairman, I think we have set many good examples in this field and in others, but we do not claim perfection.

Mr. AUTRY. Mr. Chairman, the first witness is the Honorable Nicholas Katzenbach, Attorney General of the United States.

Senator ERVIN. Mr. Attorney General, before you proceed, I want to express my regret that we have kept you here so long. The subcommittee has received a tremendous amount of mail on this subject. As of June 1, from States outside of North Carolina, we have received 2,100 letters, of which all except 24 oppose the bill. Three-quarters of these letters come from areas outside of the South.

From my own State of North Carolina, I have received 254 letters, of which all except 3 are opposed to this bill. If the Department of Justice would like to read these letters, they certainly may.

Thank you.

STATEMENT OF HON. NICHOLAS deB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES; ACCOMPANIED BY DAVID SLAWSON, ATTORNEY ADVISER, OFFICE OF LEGAL COUNSEL; AND ALAN MARER, ATTORNEY, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

Attorney General KATZENBACH. Perhaps your own opposition, Senator, has led some of the mail to be directed to you and you might find the experience in the other body would be somewhat different as to numbers and statistics.

Senator ERVIN. I might add that a great many Senators from other areas of the country tell me their mail runs about the same.

Senator HRUSKA. May I ask what the schedule of the subcommittee is? The morning hour has terminated now. We have the bank holding bill coming up. It is considered kind of important to a lot of people, not only with reference to the instant situation, but what is the schedule for the rest of the week, so we can sort of gage the time?

Senator ERVIN. I think we will probably make less progress if we try to hold sessions too long. It should seem to me we might let the Attorney General make his statement, and then we can postpone examination until tomorrow.

Senator HRUSKA. The morning hour has concluded. I have no objection to the meeting continuing beyond that time.

Senator ERVIN. I understand that you have made arrangements to be here tomorrow.

Attorney General KATZENBACH. I am available to this committee in the morning, in the afternoon, in the evening and any hour it wishes me, Mr. Chairman.

Senator ERVIN. It seems to me in this circumstance, it would be well for you to make your statement and the members of the committee will forbear asking questions until you have completed.

Attorney General KATZENBACH. I have quite a long statement, Mr. Chairman. I am willing to forego reading it all, if that would expedite the consideration of the matter. It has sometimes been my experience that the statement itself answers or anticipates questions and that it is helpful to read it.

Senator ERVIN. Yes, I think so. I am sure you have given a great deal of attention to the preparation of the statement and I think the members of the subcommittee would be happy to have you read the entire statement unless you prefer not to.

Attorney General KATZENBACH. No, I am happy to do that, but before I proceed, I wonder if I could address one question to the Chair. There is a reference on page 12 of your statement to a hospital in North Carolina. If the facts are as you state, they are completely contrary to the policies of HEW in this regard, since there are no such requirements as the facts would indicate there, and I wonder whether I could have the name of that hospital, because it seems to me that the subcommittee might be interested in having the actual facts with respect to that hospital.

Senator ERVIN. Yes, I will be glad to supply you with the name of the hospital. I would rather not do it publicly.

Attorney General KATZENBACH. Then perhaps I can at least submit the facts as we see them.

Senator ERVIN. I called the Department of HEW and they promised me an answer about 4 weeks ago and I have thus far, unless it has come since this hearing started, not heard from them.

Attorney General KATZENBACH. My point is that there is no such rule or regulation, talking about a ratio between hospital population and population within the area. That does not exist. That is not the way the bill is being implemented. It has nothing to do with it, and I wouldn't want to leave you, sir, with a false impression of what HEW was doing.

Senator ERVIN. I had the situation called to my attention accompanied by a letter which the hospital had received from HEW. The substance of the report which was transmitted to me and which included the letter from HEW was: That HEW found no discrimination, but that they had notice that the percentage of nonwhite patients the hospital did not correspond with the percentage of nonwhites residing in the community served by the hospital, which would indicate that there was discrimination. There was a threat to withhold funds from the hospital unless the hospital investigated the cause of this apparent discrimination and took positive action. I transmitted it to the Department of Health, Education, and Welfare with the explanation of the hospital to the effect that there was in that same community a heavily endowed hospital which had been established some years ago for nonwhites. By reason of its heavy endowment, the rates were much cheaper in that hospital than they were in the hospital in question. It seems to me that that ought to have been sufficient explanation, but I got a promise that I would eventually receive a reply, which I have not yet received. But I will give you the name of the hospital.

Senator JAVITS. Could we all have a copy of your reply?

Attorney General KATZENBACH. Yes.

Mr. AUTRY. Mr. Attorney General, before you proceed, would you identify, please, sir, for the record, your associates?

Attorney General KATZENBACH. Yes. I am accompanied by Mr. Alan Marer on my right and by Mr. David Slawson on my left, both attorneys in the Department of Justice.

Mr. Chairman, I appear to urge enactment of S. 3296, the proposed Civil Rights Act of 1966. This is a bill designed to accomplish a few simple, clear objectives.

Titles I and II seek to end racial discrimination in our Federal and State jury systems. There is nothing more fundamental to our legal system than the right to have an impartial trial of the facts in every criminal and civil case. There may be no more fundamental duty of citizenship than to serve on juries when called.

Any invidious discrimination in the selection of jurors is incompatible with these tenets.

Title III would provide the tools to complete the desegregation of schools, which 12 years ago was ordered carried out "with all deliberate speed."

Title IV would end compulsory residential segregation, a formidable obstruction to progress toward human equality.

Title V would provide capacity to deal effectively with racial violence. The title is a response to the number of killings and assaults which have gone unpunished.

Problems treated by this bill are deeply engraved on the national consciousness and conscience. They are not undefined shadows on a distant horizon. To the common citizen as much as to the constitutional expert they are apparent and present realities.

This administration is committed to continue the national effort to expunge the blight of human neglect and injustices as long as such problems remain.

The commitment was voiced by President Johnson only 5 days ago when he pledged his days and talents "to the pursuit of justice and opportunity for those so long denied them."

Mr. Chairman, before I turn to detailed warrants for each section of the bill, I would like to comment on the labeling of title IV by some of its opponents as a "forced housing" proposal.

I find this ironic. For forced housing is just what title IV is designed to eliminate—forced housing through which walls of segregation not only force Negroes to stay out of some residential areas but, conversely, force them to remain in others.

Title IV would not force an owner to sell or rent his home.

It would not force him to sell or rent to anyone who is financially unsound or otherwise legitimately undesirable.

What it would do is assure that houses put up for sale or rent to the public are in fact for sale or rent to the public.

What it would do is free the housing market of barriers built only on encrusted bigotry—barriers which are often unwanted handicaps not only for the Negro buyer but also for the white seller.

I submit that forced housing exists today.

I suggest that all Americans truly opposed to forced housing unite in support of title IV—just as all Americans dedicated to the finest ideals of democracy should support the entire bill.

Let me now turn to a title-by-title review of the bill.

TITLES I AND II: JURY REFORM

Exclusion of any person from jury service in any court in this country on account of race, color, religion, national origin, sex, or economic status is inconsistent with our principles.

Yet discrimination against potential jurors continues to infect our system of justice.

There have been scores of cases involving such discrimination over the past century. In recent years, there have been State court findings of jury discrimination in Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, and North Carolina.

There have been more than 30 Supreme Court decisions relating to jury discrimination in the States. And in the past few months, Federal courts have found that Negroes have been systematically excluded from jury service in Lowndes and Macon Counties, Ala.

Such discrimination strikes a triple blow at Negro citizenship:

It deprives Negro defendants and litigants of fair trials;

It denies, in some places, Negroes and civil rights workers equal protection of the laws by virtually insuring that juries will not truly represent the interests of the entire community in securing convictions of civil rights violators when warranted by the facts;

Finally, such discrimination denies to qualified Negroes the opportunity to participate in the operation of their government in one of the few direct ways open to the average citizen.

Nor is the problem of jury discrimination limited to the exclusion of Negroes. Women, persons from low-income groups, persons of particular national origins, and others have sometimes been excluded from jury service either by law or practice.

Legal challenges to jury discrimination should not have to be the exclusive concern of individual criminal defendants or private citizens.

Under present law, the Federal Government may not initiate action to eliminate jury discrimination in State courts. Title IX of the Civil Rights Act of 1964 authorizes the Department of Justice only to intervene in jury discrimination suits brought by private litigants under 42 U.S.C. 1983.

(Pursuant to this authority, the Department recently has intervened in six such suits and participated as amicus curiae in five other recent jury discrimination cases.)

Substantial constraints often operate against the individual who seeks to initiate action against jury discrimination.

One was pinpointed in the observation of the Court of Appeals for the Fifth Circuit in a recent opinion (*Whitus* v. *Balcom*, 333 F. 2d 496, 1964):

> We believe that we know what happens when a white attorney for a Negro defendant raises the exclusion issue in a county dominated by segregation patterns and practices: both the defendant and his attorney will suffer from community hostility.

Moreover, even if a criminal defendant or civil litigant decides to challenge jury discrimination, the records of jury selection—necessary to prove the allegation—may not have been preserved by jury officials or, if retained, may not be accessible to the complainant.

A somewhat different problem exists concerning jury selection in the Federal courts. Varying selection systems are used and the results in some cases can create the appearance of unfairness. At a minimum they lack desirable uniformity in the opportunities for service afforded to all segments of the community.

Of the varying methods now used to obtain source lists of names in the Federal courts, the so-called key man system is the most common. This system is used as the exclusive source of potential jurors in over 40 Federal judicial districts. It relies on a selected group of residents of the district—the key men—who are requested by Federal jury officials to submit names of persons whom they believe to be suitable for jury service.

Many of the persons selected for jury duty under this system are, inevitably, from the same social groups as the key men.

A recent informal survey taken by the Department of Justice in Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas, indicates substantial underrepresentation of Negroes on Federal jury lists when compared with the percentage of adult Negroes residing in the district.

FEDERAL JURIES

The basic purpose of title I is to insure that Federal jurors are drawn from a broad cross section of the community.

It provides, first, that no person or class of persons shall be denied the right to serve on Federal grand or petit juries because of race, color, religion, sex, national origin, or economic status.

Second, it specifies voter registration rolls as the exclusive source from which names of prospective jurors are to be drawn.

Third, it lays down definite requirements for the selection of names from the voter rolls and details mandatory procedures for each subsequent step in the juror-selection process.

Fourth, it provides a challenge mechanism for determining whether jury officials have followed the prescribed procedures.

Section 1864 requires the jury commission in each district to maintain a master jury wheel containing names from official voter registration lists.

These lists reflect a fair cross section of the community in most areas and the Voting Rights Act of 1965 provides the means to insure within the near future that they will do so in all areas.

This section also provides, however, that where Negroes or other groups are not yet adequately represented on the voting rolls, the judicial council of the circuit is to designate supplementary sources of names for the master jury wheel.

Thus, what is designed to be a fair original standard is supplemented by the discretion of Federal appellate judges.

Those whose names are drawn from the wheel must fill out a juror qualification form. Title I retains the qualifications prescribed by present law, including the requirement that a juror must be literate—but this requirement based solely on his ability to fill out the form. Higher qualifications—in an effort to obtain "blue ribbon" juries—would not be permissible.

The names of those found qualified then would be placed in a qualified juror wheel to be drawn as needed for grand and petit jury panels.

Section 1867 establishes a special procedure in both criminal and civil cases for determining whether there has been compliance with the selection procedures.

If the court determines that there has been a failure to comply, it is required to dismiss the indictment or stay the proceedings pending the selection of a petit jury in conformity with this title.

STATE JURIES

Title II of the bill is designed to eliminate unconstitutional discrimination in the selection of jurors in State courts. It contains three basic provisions.

First, it prohibits discrimination in State jury selection processes because of race, color, religion, national origin, sex or economic status.

Second, it authorizes the Attorney General to enforce the prohibition by civil injunctive proceedings against State jury officials.

Third, it provides a discovery mechanism to facilitate determinations of whether unlawful discrimination has occurred in the jury selection process.

The terms of the prohibition on discrimination contained in section 201 are identical to the corresponding section in title I governing Federal juries. The effect of the prohibition of discrimination on account of sex and economic status, however, would be somewhat different.

Under title I, all Federal jurors would be selected at random from the voter rolls. No exemptions, excuses, or exclusions based solely on sex or economic status would be authorized.

Under title II, two types of State laws regulating jury service by women would be nullified:

First, those in Alabama, Mississippi, and South Carolina which totally exclude women from jury service;

Second, those in Florida, Louisiana, and New Hampshire which exclude women unless they affirmatively volunteer for jury service by taking steps—not required of men—to sign up for jury service.

It would not nullify laws which exempt women from service only if they affirmatively claim exemption, such as exist in a number of States.

The ban on economic discrimination in title II would not outlaw every State procedure which may have some incidental economic impact.

State laws imposing direct economic qualifications for jury service would be nullified by title II. State laws prescribing the tax rolls as the exclusive source of names of jurors also would be nullified unless the tax base is so broad as to include practically every adult in the community.

Title II would authorize the Attorney General to institute a civil action in Federal court for preventive relief against State jury officials who violate the prohibition against discrimination. This provision is similar to those in other civil rights legislation.

If in such a lawsuit (or in a similar lawsuit brought by private persons under existing laws) the court makes a finding of discrimination, it would be authorized to grant effective relief. This would include suspension of the use of objectionable qualifications and procedures and, if necessary, the appointment of a master to operate a State court jury system.

A Federal court in Alabama recently took the position that under the present law it had the power to appoint a master for this purpose and would do so should other remedies fail.

The third important provision of title II is the special discovery procedure contained in section 204. This machinery, to be available in addition to that afforded under the Federal rules or applicable State law, would be set in motion whenever it is asserted in an appropriate case that discrimination had occurred in the jury selection process.

Local officials would be required to furnish information and records about their jury selection process to enable the court to base its decision on a complete record of the questioned events.

TITLE III: PUBLIC SCHOOLS AND PUBLIC FACILITIES

Considerable progress in the desegregation of public schools and public facilities has been made since passage of the 1964 Civil Rights Act. With regard to public schools, much of the progress is attributable to title VI of that statute, which requires desegregation as a condition of eligibility for Federal financial assistance.

But in some areas, school authorities have yielded to community pressures and forfeited Federal aid rather than desegregate. And in school districts where "freedom-of-choice" desegregation plans have been formally adopted, intimidation of Negro pupils and their parents has prevented any meaningful integration of the schools. It is in these areas that the need for Federal intervention is greatest.

Yet the Attorney General now can sue to desegregate public schools and facilities only after he has received a written complaint from a local resident and determined that the complainant is unable to sue on his own behalf.

This complaint requirement is unrealistic in areas where the likelihood or fear of harassment makes Negroes understandably afraid to complain to the Federal Government. We have found that the other restriction in the present law—that the complainant must be found unable to sue on his own behalf—does not sufficiently serve the public interest in achieving orderly desegregation.

Title III of the bill is designed to insure that intimidation does not affect the power of the Federal Government to bring suits to desegregate schools and public facilities.

It would permit the Attorney General to sue when he believes suit to be necessary—giving him essentially the same authority he now has in the areas of voting, public accommodations, and employment.

Thus, title III would repeal both the written complaint requirement and the requirement that the Attorney General determine the complainant is unable to sue. In addition, title III would provide a direct remedy against intimidation by authorizing the Attorney General to seek injunctive relief against interference by private individuals or public officials with desegregation of public schools and facilities. (Title V would impose criminal penalties for such interference.)

TITLE IV: HOUSING

In the years since World War II we have seen tremendous strides toward full citizenship for the Negro American. *Brown* v. *Board of Education* did more than merely hold segregated schools to be in violation of the Constitution. It set in motion forces of democracy aimed at the ultimate goal of destroying every aspect of discrimination.

Substantial progress has been made in such areas as schools, voting, public accommodation, transportation, public facilities, expenditures of public funds and employment.

Yet we have hardly made a start in dealing with the one pervasive problem which silently sabotages efforts toward equality in all of these areas—enforced housing in segregated ghettos of vast numbers of Negro citizens.

The period from 1910, when only 10 percent of this country's Negroes lived outside the South, through 1960, when that figure rose to almost 40 percent, has been a period of migration to northern cities. Economic necessity, restrictive covenants, and refusals by real estate dealers and landlords to lease or sell forced this group into racial ghettos.

Today, ghetto living is the fate of great numbers of our Negro citizens in urban areas across the United States. The housing is of inferior quality and overcrowding is intense. For example, in Harlem 237,792 people live in a 3½ square mile area, or 100 people per acre. Ninety percent of the housing is more than 30 years old and nearly half was built before 1900.

This problem is not limited to any one region of the country. No section of the United States is free from housing discrimination and racial ghettos.

Segregated housing isolates racial minorities from the public life of the community. It means inferior public education, recreation, health,

sanitation, and transportation services and facilities. It restricts access to training and employment and business opportunities. It leads a large class of citizens to despair—a despair which has at times contributed to violent outbreaks against society itself.

The Negro citizen has not been able to benefit from the post-World War II housing boom on a par with other Americans. His choice of a place to live is limited not merely by his ability to pay, but by his color. As the U.S. Commission on Civil Rights had concluded, today "housing seems to be the one commodity in the American market that is not freely available on equal terms to everyone who can afford to pay."

Illustrative of the problem's scope is a recent survey of 235 Defense installations by the Department of Defense. The survey disclosed that Negro servicemen faced severe discrimination in obtaining housing near 102 of the installations.

Reported in the survey were case after case of Americans, in the service of their country, being denied houses or apartments, or being charged outrageous prices for housing, simply because of their skin color.

Often they were forced to live far away from their duty stations, sometimes in inferior dwellings in deteriorating neighborhoods. Many of these service members decided against having their families join them and be subjected to these conditions.

Among the instances reported was that of an officer who signed a contract for the construction of a home only to have the construction firm refuse to fulfill the contract after learning that he wanted the house built in an area where no Negroes lived. Despite efforts to resolve the problem, it was still unresolved when the officer departed for Vietnam.

A lieutenant colonel stationed near Washington was unable to rent a home in either of two communities near his base and found it necessary to purchase a house farther away.

Twelve officers reporting on their housing problems said, in part:

> We often saw white nonrated men move into facilities which were "unavailable" to us. In many cases we were separated from our families for long periods as we watched persons reporting to the area after us acquire accommodations and rejoin their families.
>
> Often persons have recommended "nice colored" locations usually served by "nice colored" schools which offer our children substandard education * * *.
>
> We simply want to be able to find decent housing just as easily (or with as much difficulty) as anyone else * * *.
>
> Often it is said that our situation is understandable and everyone sympathizes with us but very little can be done * * *.

Mr. Chairman, experiences like this, repeated daily across the country and affecting hundreds of thousands of citizens, add up to a system of forced housing which disables our society.

State and local governments have made some headway in attacking this system. Fair housing laws have been enacted by 17 States and by a large number of municipalities. I might add, Mr. Chairman, I don't think any of those States are totalitarian and I don't think that you do. Efforts by private groups, such as Neighbors, Inc., here in the District of Columbia, have been made in many communities.

Nor has the Federal Government ignored the problem. In 1948, the Supreme Court held racially restrictive covenants unenforcible in both State and Federal courts. And President Kennedy's Execu-

tive order of November 20, 1962, established the President's Committee on Equal Housing Opportunity and forbade discrimination in new FHA- or VA-insured housing.

By now, it should be plain that scattered State and local laws are not enough. The work of private volunteer groups is not enough. Court decisions are not enough. The limited authority now available to the executive branch is not enough.

The time has now surely come for decisive action by Congress. Only Congress can fully commit the Nation to begin to solve the problem on a national scale. That is the purpose of title IV.

The title applies to all housing and prohibits discrimination on account of race, color, religion, or national origin by property owners, tract developers, real estate brokers, lending institutions, and all others engaged in the sale, rental, or financing of housing.

It also prohibits coercion or intimidation intended to interfere with the right of a person to obtain housing without discrimination—for example, firing a Negro from his job because he inspected a house for possible purchase in an all-white neighborhood.

Title IV provides a judicial remedy. An individual aggrieved by a discriminatory housing practice could bring a civil action in either a Federal district court or a State or local court for injunctive relief and for any damages he may have sustained. In the court's discretion, he could also be awarded up to $500 exemplary damages.

The title authorizes the Attorney General to initiate suits in Federal courts to eliminate a "pattern or practice" of discrimination, and to intervene in private suits brought in Federal courts.

Title IV is primarily based on the commerce clause and on the 14th amendment of the Constitution. I have no doubt that it is constitutional.

The commerce clause makes Congress responsible for the protection and promotion of interstate commerce in all its forms. The construction of homes and apartment buildings and the production and sale of building materials and home furnishings take place in or through the channels of interstate commerce. When the total problem is considered, it is readily apparent that interstate commerce is significantly affected by the sale even of single dwellings, multiplied many times in each community.

The housing industry last year represented $27.6 billion of new private investment. This expenditure on residential housing is considerably more than the $22.9 billion which all American agriculture contributed to the gross national product in 1965. Forty-one million tons of lumber and finished woodstock were shipped in the United States in 1963, and 43 percent of it was shipped 500 miles or more.

With regard to interstate financing in the housing industry, Secretary Weaver has said that, for example, in 1964 approximately 40 percent of the mortgage holdings of mutual savings banks—representing some $15 billion—was on properties located outside the States where the banks were located. There is also a very substantial interstate flow of mortgage funds involved in the activities of savings and loan associations. Secretary Weaver also pointed to the ever-increasing mobility of our population—14 million persons moved from one State to another between 1955 and 1960, and of course sought new

homes in the State of their destination—as a critical factor in assessing the interstate character of the housing business.

Secretary Weaver's statistics were illustrated by a statement of Mr. William J. Levitt, president of Levitt & Sons, Inc., the builders of residential homes. Mr. Levitt, who supports title IV, says that "perhaps 80 percent of the materials that go into our houses come from across State lines."

Mr. Levitt says that—

with the possible exception of the New York Community that we are building now, every other community in which we build receives its financing from a State other than the one in which it is located.

Mr. Levitt also says that "75 to 85 percent" of his firm's advertising was interstate and that "out-of-State purchasers run from about 35 to 40 percent, on a low side, to some 70 percent, on our high side."

The power of Congress over interstate commerce and activities affecting that commerce is broad and plenary. With that controlling principle in mind, let me anticipate three questions at the outset. First, the congressional power is not, I repeat, Mr. Chairman, is not restricted to goods actually in transit. In sustaining the public accommodations title of the 1964 act as it applies to restaurants catering primarily to local residents, the Supreme Court laid any such notion to rest, saying:

Nor are the cases holding that interstate commerce ends when goods come to rest in the State of destination apposite here. That line of cases has been applied with reference to state taxation or regulation but not in the field of federal regulation (*Katzenbach* v. *McClung*, 379 U.S. 294, 302).

Second, it does not matter whether Congress motive in acting is solely to promote commerce. What was said by the Court in upholding another section of the public accommodations title of the 1964 act disposes of the point:

That Congress was legislating against moral wrongs in many of these areas rendered its enactment no less valid (*Atlanta Motel* v. *United States*, 379 U.S. 241, 257).

Third, I recognize that it is difficult to determine the extent to which discrimination by individual homeowners affects interstate commerce. But each part of the pattern of discrimination affects, and is affected by, the whole. And to eliminate the clear and substantial effect that patterns of discrimination have on commerce, Congress can and must deal with separate parts.

It is settled that the reach of the commerce clause is not exceeded merely because the particular activity regulated is local or is quantitatively unimportant where considered in isolation—such as the sale of a single dwelling. In *Mabee* v. *White Plains Publishing Company*, 327 U.S. 178, the Fair Labor Standards Act was applied to a newspaper whose circulation was about 9,000 copies and which mailed only 45 copies—about one-half of 1 percent of its business—out of State. And in *Wickard* v. *Filburn*, 317 U.S. 111, the Agricultural Adjustment Act of 1938 was applied to a farmer who sowed only 23 acres of wheat and whose individual effect on interstate commerce amounted only to the pressure of 239 bushels of wheat upon the total national market. See also *Labor Board* v. *Fainblatt*, 306 U.S. 601, 607; *United States* v. *Darby*, 312 U.S. 100, 123; *United States* v. *Sullivan*, 332 U.S. 689.

The discrimination at which title IV is directed affects commerce in several different ways. For instance, it restricts the movement of building materials and home furnishings from one State to another. The confinement of Negroes to older homes in the ghettos restricts the number of new homes which are built and consequently reduces the amount of building materials which move in interstate commerce. It has a similar impact upon the number of new apartment buildings constructed, and the amount of materials purchased for their construction.

Additionally, discrimination in housing impedes the interstate movement of individuals. Although many Negroes do move from one part of the country to another despite the lack of unsegregated housing at their destination, there can be little doubt that many others are deterred from doing so. In particular, Negroes in the professions or those with technical or other skills are less likely to move into communities where a "black ghetto" is their only prospect. See *Katzenbach* v. *McClung*, *supra* at 300.

Title IV is also sustainable as "appropriate legislation" to enforce the substantive guarantees of the 14th amendment.

The right to acquire property without the discrimination dates from emancipation. The Negro slave was, of course, confined to a segregated compound or "slave quarters," legally disabled from acquiring a residence of his choosing. This was, indeed, one of the "necessary incidents of slavery." *Civil Rights Cases*, 109 U.S. 3, 22. Nor did the situation change radically immediately after formal emancipation. Some of the so-called Black Codes of 1865 and 1866 continued these disabilities, sometimes altogether fencing out the Negro from the towns. See *Slaughter-House Cases*, 16 Wall. 36, 70. It is not surprising, therefore, that the drafters of the 14th amendment explicitly addressed themselves to the problem.

Viewing the right to hold property as one of "those fundamental rights which appertain to the essence of citizenship * * * the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery" (*Civil Rights Cases*, *supra*, 109 U.S. at 22), the 39th Congress acted even before the adoption of the 14th amendment, invoking its power to enforce the 13th.

The very first Civil Rights Act, in 1866, provided that all citizens of the United States—

> of every race and color, shall have the same right . . . to inherit, purchase, lease, sell, hold and convey real and personal property . . . as is enjoyed by white persons . . . any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding (Act of April 9, 1866, subsection 1, 14 Stat. 27).

Two months later, the same Congress—some of its Members doubtful of the constitutional basis for the legislation, others anxious to place it beyond easy repeal (see *Hurd* v. *Hodge*, 334 U.S. 24, 32–33)—proposed the 14th amendment, which was understood as incorporating into the Constitution the guarantees of the Civil Rights Act of 1866. See *Slaughter-House Cases*, *supra*, 16 Wall. at 70; *Civil Rights Cases*, *supra*, 109 U.S. at 22; *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369; *Buchanan* v. *Warley*, 245 U.S. 60, 78–79; *Olama* v. *California*, 332 U.S. 633, 640, 646; *Shelley* v. *Kraemer*, 334 U.S. 1, 10–11; *Hurd* v. *Hodge*, *supra*, 334 U.S. at 32–33; *Takahashi* v. *Fish Commission*, 334 U.S. 410, 419–420. And to make the assurance doubly sure, a subsequent Congress expressly reenacted the 1866

provision in the Enforcement Act of 1870. Act of May 31, 1870, section 18, 16 Stat. 144, 146.

That law remains on the statute books today. R.S. section 1978, 42 U.S.C. 1982. The right involved is not a mere abstract privilege to purchase or lease property which is satisfied if Negroes are not absolutely disabled from acquiring property at all. What was given was more than the bare right to hold property. The constitutional and statutory guarantee includes also an immunity from being fenced out of any neighborhood, indeed, any block, on the ground of race. *Buchanan* v. *Warley, supra; Harmon* v. *Tyler*, 273 U.S. 668; *Richmond* v. *Deans*, 281 U.S. 704; *Shelley* v. *Kraemer, supra; Hurd* v. *Hodges, supra; Barrows* v. *Jackson*, 346 U.S. 249.

To be sure, despite its absolute language, the existing statute has been held to protect only against State action. *Shelley* v. *Kraemer, supra.* But it does not follow that Congress may not now enlarge the right. On the contrary, in light of its origin, the right to be free of racial discrimination in the purchase and rental of residential property—partially grounded as it is in the 13th amendment—is one of those privileges of national citizenship which Congress may protect even as against wholly private action. See *Slaughter-House Cases, supra*, 16 Wall. at 80; *Civil Rights Cases, supra*, 109 U.S. at 20, 23: *Clyatt* v. *United States*, 197 U.S. 207, 216–218.

Indeed, in the *Civil Rights cases*, the Supreme Court distinguished between the asserted right to be free from discrimination in privately owned places of public accommodation—which is characterized as one of the "social rights of men and races in the community"—and the "fundamental rights which are of the essence of civil freedom," enumerated in the Civil Rights Act of 1866; and the Court came close to suggesting that, while Congress could not constitutionally protect the former as against private discrimination, it might be competent to fully safeguard "civil rights." 109 U.S. at 22.

In any event, it is clear that the right to freedom from discrimination in housing enjoys particular recognition under the 14th amendment. This is reflected in the fact that State-imposed residential segregation was held unconstitutional (*Buchanan* v. *Warley, supra*) as early as 1917, at a time when enforced segregation in public and private schools was condoned (*Berea College* v. *Kentucky*, 211 U.S. 45; see *Gong Lum* v. *Rice*, 275 U.S. 78, 85–87; *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 344, 349), as it was with respect to transportation (*Plessy* v. *Ferguson*, 163 U.S. 537; see *McCabe* v. *A.T. & S.F. Railway Company*, 235 U.S. 151, 160) and other activities (for example, *Pace* v. *Alabama*, 106 U.S. 583). So, also, it is revealing that in the restrictive covenant cases (*Shelley* v. *Kraemer, supra; Hurd* v. *Hodge, supra; Barrows* v. *Jackson, supra*), the Court found prohibited "State action" in the apparently neutral judicial enforcement of private discriminatory agreements—invoking a doctrine which it has declined to follow elsewhere.

Moreover, it is highly relevant that government action—both State and Federal—has contributed so much to existing patterns of housing segregation. Local housing segregation orders were outlawed in 1917 (*Buchanan* v. *Warley*, 245 U.S. 60) but ordinances which had a similar effect were still being tested in the courts as late as 1930. See *Harmon* v. *Tyler*, 273 U.S. 668 (1927); *City of Richmond* v. *Deans*, 281 U.S. 704 (1930). Private racially restrictive covenants were

enforceable by the courts until the Supreme Court's 1948 decision in *Shelley* v. *Kraemer*, 334 U.S. 1, and as late as 1936, the Federal Housing Administration in its Underwriting Manuals affirmatively recommended such covenants and warned against "inharmonious racial groups." With such a history of past governmental support, it can hardly be argued that present practices represent purely private choice.

As was stated in the opinion of Mr. Justice Brennan in *United States* v. *Guest*, the 14th amendment includes "a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens." In the light of the history of particular concern in the framing and interpretation of the 14th amendment for the right of Negroes to purchase or lease property and in view of the past contributions of government to housing segregation, the "positive grant of legislative power" contained in the 14th amendment surely provides a constitutional basis for title IV.

The authority for the legislation is clear. So, too, is the need. As Mr. Levitt's testimony made clear, a builder or landlord who now resists selling or renting to a Negro often does so not out of personal bigotry but out of fear that his prospective white tenants or purchasers will move to housing limited to whites and that, because similar housing is unavailable to Negroes, what he has to offer will attract only Negroes. This, generally, would narrow his market considerably.

If all those in the housing industry are bound by a universal law against discrimination, there will be no economic peril to any one of them. All would be in a position to sell without discrimination.

Therefore, I think it would be a mistake to regard the most significant aspect of a Federal fair housing measure as its sanctions against builders, landlords, lenders, or brokers. What is more significant, rather, is that they can utilize this law as a shield to protect them when they do what is right.

Nor need we fear that title IV would impair real estate values. Mr. James W. Rouse, the president of a nationally known mortgage banking and real estate development firm, has said that, in his opinion, a national fair housing law would prevent any irrational fluctuations in real estate values. He stated that "the preponderance of real estate developers and homebuilders would prefer to operate in a fully open market, but they fear the results of going it alone." He went on to say that open housing does not have adverse effects on mortgage financing.

TITLE V: TERROR AND VIOLENCE

What I have described so far are measures to help the Nation deal with the effects of segregation, in many instances segregation long enforced by law.

What is equally—critically—necessary is to deal decisively with segregation enforced by lawlessness.

As President Johnson observed in his recent civil rights message:

> Citizens who honor the law and who tolerate orderly change—a majority in every part of the country—have been shocked by attacks on innocent men and women who sought no more than justice for all Americans.

There is small need to catalog the brutal crimes committed in recent years against Negroes seeking to exercise rights of citizenship—and against whites supporting them. Just to cite the names of some of the victims is enough:

Medgar Evers, Andrew Goodman, James Chaney, Michael Schwerner, Lemuel Penn, James Reeb, Mrs. Viola Liuzzo, Jonathan Daniel, Vernon Dahmer.

It is not only murders—or injuries or bombs or bullets—that must concern us. For as the President noted, the effect of such violence goes far beyond individual victims. It generates widespread intimidation and fear—fear of attending desegregated schools, using places of public accommodation, voting, and other activities in which Federal law and American citizenship demand equality.

Where the administration of justice is color blind, perpetrators of racial crimes will usually be appropriately punished and would-be perpetrators deterred by local authorities.

In some places, however, local officials either have been unable or unwilling to prosecute crimes of racial violence or to obtain convictions in such cases even where the facts seemed to warrant conviction.

But the need for effective Federal criminal legislation to deal with the problem of racial violence does not arise solely from a malfunctioning of State or local administration of the criminal law. Crimes of racial violence typically are directed to the denial of affirmative Federal rights, and thus reflect an intention to flout the will of the Congress as well as to perpetuate traditional racial customs.

The principal Federal criminal statutes dealing with crimes of racial violence are sections 241 and 242 of the Federal Criminal Code. Two months ago, the Supreme Court decided two cases, *United States* v. *Price* and *United States* v. *Guest*, involving the construction of these statutes.

The Court's decision in *Price*, concerning the indictment of private individuals and public officials in connection with the killing of the three civil rights workers in Neshoba County, Miss., establishes that when public officials, or private individuals acting in concert with public officials, interfere with the exercise of 14th amendment rights, section 241 is violated.

In the *Guest* case, however, which involved the highway slaying of Lemuel Penn, only private individuals had been indicted. The Court sustained a part of the indictment charging a private conspiracy to interfere with the right to travel interstate—a distinctly Federal right not flowing from the 14th amendment.

But the part of the indictment charging a conspiracy of private persons to interfere with 14th amendment rights (in that case, the right to use highways and other State facilities without discrimination) appears to have been found sufficient only because of certain allegations of official involvement in the conspiracy, even though no public officials had been indicted. The majority and concurring opinions leave in doubt whether Congress, when it enacted section 241 in 1870, intended to reach private interference with 14th amendment rights.

What we should take particular note of, however, in the *Guest* decision is that six Justices expressly said that Congress does have the power under section 5 of the 14th amendment to reach such purely private misconduct.

Another defect in the present law stems from the fact that section 241 is worded in general terms. Because it is not always clear just what rights are encompassed by the 14th amendment, the Supreme Court has read into this statement the requirement that the prosecution prove a "specific intent" by the defendant to deprive the victim of a particular 14th amendment right. Commenting on this "specific intent" requirement in his concurring opinion in the *Guest* case Mr. Justice Brennan said:

> Since the limitation on the statute's effectiveness derives from Congress failure to define, with any measure of specificity, the rights encompassed, the remedy is for Congress to write a law without this defect * * * [if] Congress desires to give the statute more definite scope, it may find ways of doing so.

Title V is intended to achieve four main objectives:

First, it would make it a crime for private individuals forcibly to interfere, directly or indirectly, with participation in activities protected by Federal laws, including the 14th amendment—whether or not State action is involved. It would also protect these activities against interference by public officials.

Second, it would specify the different kinds of activity which are protected—thus giving clear warning to lawless elements that if they interfere with any of these activities, they must answer to the Federal Government.

Third, it would protect not only Negroes and members of other minority groups, but also civil rights workers and peaceful demonstrators seeking equality.

Fourth, it would provide a graduated scale of penalties depending upon whether bodily injury or death results from the interference.

Title V prohibits injury, intimidation, or interference, based on race, color, religion, or national origin, that occurs while the victim is actually engaged in protected activity; for example, a person assaulted while he is standing in line at the polls or swimming at a public pool.

This title gives the same protection to persons seeking to engage in protected activities; for example, entering a restaurant, enrolling a child in school, or applying for a job.

Title V also covers interference that occurs either before or after a person engages in protected conduct but which is related to that conduct. This would include, for example, reprisals or threats against a Negro after he inspected a home in an all-white neighborhood.

This title also would cover interference with persons performing duties in connection with protected activities; for example, a public school official implementing a desegregation plan or a welfare official distributing surplus commodities.

Title V would not require proof of "specific intent" as is required under 18 U.S.C. 241 by the decision in *Screws* v. *United States* (325 U.S. 91 (1945)). This is so primarily because, unlike section 241, title V clearly describes the prohibited conduct and stands by itself. No reference to the 14th amendment, or any other law would be required in order to determine what conduct is prohibited.

We have recognized that violence which merely happens to occur at or near the time that a person engages in a federally protected activity, does not necessarily fall within Federal jurisdiction. For this reason, section 501(a)—which prohibits interference that occurs

while a person is actually engaging or seeking to engage in protected activity—applies only to racially motivated conduct.

Similarly, under sections 501 (b) and (c)—which cover reprisals and attempts to deter protected activity—the jury would have to find that the defendant's purpose was to deter persons from engaging in protected activity or to punish persons who have done so.

Title V covers one situation in which the victim of the interference need not himself have had anything to do with any kind of civil rights activity—the terrorist act in the truest sense. This is the case where there is an indiscriminate attack on a Negro simply because he is a Negro and for the purpose of discouraging Negroes generally from engaging in the activities specifically described in title V. Such incidents are not rare and when they occur they are often silently effective in generating wide intimidation.

CONCLUSION

Mr. Chairman, I hope that this discussion has made clear the need for each title of this bill.

I recognize fully the mindfulness which you and the members of this subcommittee have that legislation of this character be scrupulously reviewed. Proposals of this sort deserve conscientious and exacting analysis in open hearings.

But circumspection and searching analysis do not require an indefinite stay of judgment or the invoking of a hypothetical future more seasonable for action.

There seems to be no reason why we cannot in the weeks immediately ahead fully ventilate all questions, consider all honest doubts and ambiguities, and clarify public understanding. We stand prepared—morning, afternoon, and evening, weekday and weekend to assist the committee and the Congress in the completion of this task.

We cannot do less in attempting to compensate for decades of neglect with legislation that is necessary, constitutional, and timely. Thank you, Mr. Chairman.

Senator ERVIN. Thank you, Mr. Attorney General.

We will recess now until 10:30 tomorrow. I am prepared to give the name of this hospital.

Attorney General KATZENBACH. Yes, sir.

Senator ERVIN. And no answer has been given to me. As a matter of fact, a full explanation was given to the Department on April 8, 1966, and at that time they promised to give me an answer, but for some reason or other they are too busy to do it.

Attorney General KATZENBACH. You will have an answer tomorrow morning at 10:30, Mr. Chairman.

Senator ERVIN. Fine, I hope so. I will supply the name.

Attorney General KATZENBACH. Yes, sir; I understand.

(Off the record.)

Senator ERVIN. Thank you. We will recess now until 10:30 in the morning.

(Whereupon, the subcommittee recessed at 1:05 p.m. until 10:30 a.m., Tuesday, June 7, 1966.)

CIVIL RIGHTS

TUESDAY, JUNE 7, 1966

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:30 a.m., in room 2228, New Senate Office Building, Senator Samuel J. Ervin, Jr., presiding.

Present: Senators Ervin, Kennedy of Massachusetts, Scott, and Javits.

Also present: George Autry, chief counsel; H. Houston Groome, Jr., Lawrence M. Baskir, and Lewis W. Evans, counsel; and John Baker, minority counsel.

Senator ERVIN. The subcommittee will come to order.

Mr. Attorney General, as I said in my statement yesterday, despite the cowardly crimes of a few individuals and despite the concurring advisory opinion by some members of the Supreme Court to the contrary, the language, the legislative history and the interpretations of the 14th amendment make it clear that Congress cannot make punishable as crimes the acts of private citizens. Nevertheless, it was brought to our attention again yesterday that some action is in order.

Therefore, I intend to offer a constitutional amendment as a substitute for title V of the proposed Civil Rights Act of 1966, presently entitled "Interference With Rights."

I do this first because I abhor violence or threats of violence against anyone, and I do not believe any person should be deprived of his constitutional rights because of his creed or color by violence or threats of violence.

In the second place, I do this to save the American people from having their Constitution amended by the Supreme Court.

Thirdly, I want to save the administration from having to urge the Supreme Court to usurp and exercise the power to amend the Constitution in violation of the explicit wording of the 14th amendment.

The text of the amendment is as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, two-thirds of each House concurring therein, That the following article is proposed as an amendment to the Constitution of the United States, it shall be granted to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:

Article—

SECTION 1. The Congress shall have the power to make punishable as crimes the activities and conspiracies of individuals designed to prevent any person, by violence or threats of violence, from exercising any right secured to him by the Constitution or laws of the United States on account of race, or creed, or national origin.

SEC. 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the

States within seven years from the date of its submission to the States by the Congress.

I have consistently fought to maintain orderly constitutional government in America, and I am offering this amendment to preserve these remaining provisions of the Constitution which, as of this date, have not been changed by judicial decree.

I hope the administration will manifest the same fidelity to the Constitution by dropping title V and joining me in support of this amendment. If it would do so, I am sure that Senator Bayh and his subcommittee would consider early action on the proposed amendment.

STATEMENT OF THE HONORABLE NICHOLAS deB. KATZENBACH; ACCOMPANIED BY DAVID SLAWSON AND ALAN MARER, DEPARTMENT OF JUSTICE—Resumed

Attorney General KATZENBACH. May I make a comment on that, Senator?

Senator ERVIN. Yes.

Attorney General KATZENBACH. I am delighted that you feel as I do that it is necessary for the Congress to legislate in this area. You know from my statement and from my view that I believe that the 14th amendment presently gives that authority. I believe the majority of this Congress is going to adopt my view. I think the President will sign it and I think there is indication that at least six Justices of the Supreme Court would say that presently in the Constitution that the Congress presently has that authority. But I think the significance of this, the importance of this, is recognition which I welcome, that you feel that this is necessary for Congress to take action in this regard.

Senator ERVIN. Equally important is the preservation of the Constitution.

Attorney General KATZENBACH. Mr. Chairman, I will yield to no man in my desire to preserve the Constitution. It is possible for lawyers to disagree about this. I think in this instance that the Congress of the United States, the President of the United States, and the Supreme Court of the United States are all going to take my view of the Constitution. We agree with respect to that.

I think perhaps the subcommittee might be interested, Senator. I talked with Mr. Doar this morning about the shooting yesterday. He visited Mr. Meredith and talked with Mr. Meredith's surgeons and the doctors at the hospital—he is in good condition at this point and very fortunately the shotgun pellets all went into nonvital parts of his body. There will be no surgery necessary. There are about 75 pellets in him, and so I think that that is something I know you will join me in welcoming that this particular act did not have more tragic results.

Senator ERVIN. Mr. Attorney General, I wonder if you and I can't agree on something very fundamental, and that is that there is not a single word in the first section of the 14th amendment which has any reference whatever to actions of individuals, however criminal they may be.

Attorney General KATZENBACH. Yes, sir; that is perfectly correct. The section does not refer specifically to acts of individuals.

Senator ERVIN. And cannot you and I agree that every decision of the Supreme Court of the United States concerning the 14th amendment handed down since 1868 to the present moment—I am not talking about *dicta* but I am talking about decisions—has held that the first section of the 14th amendment only applies to State action and does not reach or authorize Congress to reach the private actions of individuals?

Attorney General KATZENBACH. No, sir; I am afraid we can't agree on that statement, sir. I think what we could agree on is that the legislation that has been enacted under the 14th amendment has been interpreted by the Supreme Court to apply only to State action and, indeed, that was as I read the *Guest* case, the Court so interprets sections 241 and 242. I do not know of a case where a statute has been enacted where the Supreme Court has upheld that statute applying only to private action. I don't believe that issue has come. But, six Justices of the Supreme Court have said that that was within the power of Congress to enact. I think we could agree on that.

Senator ERVIN. Isn't it one of the fundamental rules of judicial practice that a judge will not do anything except decide the case that is before him?

Attorney General KATZENBACH. Yes, sir.

Senator ERVIN. Yes.

Attorney General KATZENBACH. That is correct, that he decides just the case before him. But it is also correct, I think you will agree with me, that the language in that case, the implications of the holding, the approach which the Court takes to that, are things which we lawyers use in order to determine what the judicial view of the Constitution or of the statute is, and that we use these in our everyday work and in our practice of law as indications and guides.

I do not find it unusual for the Supreme Court to say, as it has said many, many times, Congress has the power to do this but they haven't done it in this case as a matter of statutory interpretation, saying there is no question about the fact that Congress could do something, but in this case they have not chosen to do so. That is not unusual at all.

Senator ERVIN. Mr. Attorney General, are you convinced that it is usual for a judge to say, "If Congress shall hereafter pass a law of a certain type, and if somebody happens to have a case involving that law, and if hereafter that case comes before this judge for decision, this judge will decide that case in this way"? Now, that is what these six Judges said, didn't they?

Attorney General KATZENBACH. No, sir; I don't think you have quoted them accurately on that.

Senator ERVIN. Isn't that the substance of it?

Attorney General KATZENBACH. The substance of what I understood them to say was that in terms of our contention that this did cover private action, section 241 did, without the involvement necessarily of State officials, that Mr. Justice Brennan and other Justices on the Court said they did not think that Congress had intended in this, section 241, to reach private action, and if they intended to reach private action, that was up to Congress to do and they had the power to do so.

Senator ERVIN. Yes, and that was a matter not before the Court, because the Court said that the bill of indictment contained sufficient allegations of State participation, didn't it?

Attorney General KATZENBACH. Yes.

Senator ERVIN. And those statements of the Court were what we lawyers call *obiter dicta.*

Attorney General KATZENBACH. Oh yes, surely, it is not unusual to have *obiter dicta*——

Senator ERVIN. Don't you think it is very bad practice judicially speaking for a judge to express opinions on issues that are not before him?

Attorney General KATZENBACH. If they were to do it in the way in which you suggested, which was a paraphrase of the way you interpreted the Court, I can't imagine the Court saying it in that way, but I do think you should recall, Senator, in the *Guest* case, that Mr. Justice Brennan joined by the Chief Justice and Justice Douglas did find it necessary to reach that conclusion, since they thought that section 241 as drafted did reach private action. So three Justices did find it necessary to cover that point, and the statement that you are critical of here was something that they needed to reach in order to reach their decision, because they did hold that 241 had——

Senator ERVIN. Let's see if our interpretations of these concurring opinions are so different. Don't you interpret them to say if Congress passes title V, we will hold it constitutional when the question comes before us?

Attorney General KATZENBACH. Well, of course, they didn't say that. They didn't discuss title V. As a matter of actual fact, Senator, title V was drafted after the opinion, so that they couldn't have said anything about title V.

Senator ERVIN. But title V was drafted——

Attorney General KATZENBACH. Title V was drafted after the opinion and we based it to some extent on the views which had been expressed by the majority of the Court.

Senator ERVIN. Title V was drafted after the six members of the Supreme Court gave you an advisory opinion, wasn't it?

Attorney General KATZENBACH. I think it is inaccurate, Senator, to call that an advisory opinion. I think it is important, we contended in that case that section 241, as drafted, did require the Court to reach the conclusion that private action was incorporated in 241, an action pursuant to the 14th amendment.

On that point, prior to that, prior to getting the decision of the Court on that, it was less important to draft title V. The majority of the Court did not agree with us. Three Justices did agree with that contention, and, therefore, it was necessary for those three Justices, Justice Brennan, the Chief Justice, and Justice Douglas, to reach the question of whether or not, as a constitutional matter, the 14th amendment did permit Congress to legislation with respect to congressional action, and, indeed, Mr. Justice Brennan says, "My view as to the scope of section 241 requires that I reach the question of constitutional power."

The other three Justices expressed no disagreement on the constitutional issue, but said that section 241, it was not intended by Congress to reach purely private actions without some official involvement, and all the Justices agree that if there is some official involvement, title V does reach the acts of private individuals.

Now as I understand your statement of title V, you would even disagree with that.

Senator ERVIN. No, I do not disagree with that.

Attorney General KATZENBACH. If there is nothing said about private action and it is to refer only to State action, then how do you square that with the fact that you can indict private individuals under that section as drafted?

Senator ERVIN. Because as a lawyer, I recognize that where State action is involved, a private individual can be convicted of the crime as the aider and abettor of the crime that is committed by the State official.

Attorney General KATZENBACH. He is charged as a principal.

Senator ERVIN. That is the uniform holding of the cases from the time the amendment was adopted down to the present moment and I certainly agree that if private citizens join State officials in a violation of the 14th amendment that the Congress has the power to reach those private individuals, not as what we would call common law principals in the first degree but as principals, as aiders and abettors.

Attorney General KATZENBACH. Of course, they are not charged as aiders and abettors, and as far as the count that you referred to in the *Guest* case is concerned, I think it well to recall that no official had been charged with any crime. But they said if there was any official involvement at all, whether or not the official had committed a crime, it could reach private individuals. Now do you agree with that part of the decision or not?

Senator ERVIN. I agree with the decision that the indictment alleged State action. That was the specific holding of the case.

Attorney General KATZENBACH. You just put it on aiding and abetting, Senator, and you can't reach aiding and abetting to the charge of these people as principals without the charge of State officials.

Senator ERVIN. An aider and abettor is equally guilty.

Attorney General KATZENBACH. That is my point exactly, Senator, that there was nobody charged as a principal. How you can have aiding and abetting without a principal——

Senator ERVIN. Mr. Attorney General, are you saying that the majority of the Court in the *Guest* case did not hold that the indictment alleged State participation?

Attorney General KATZENBACH. No.

(At this point Senator Scott entered the hearing room.)

Attorney General KATZENBACH. I am saying that nobody was charged, no State official was charged with any offense under that indictment. I am saying that to my knowledge it is very hard to charge somebody with aiding and abetting a crime that you don't have a principal to.

Senator ERVIN. I don't know that you and I disagree. I have never taken the position that you can't convict an individual where State action is involved, but I have taken the position that all the decisions have held you cannot convict an individual under these civil rights statutes or under the 14th amendment where there is an absence of State involvement.

Attorney General KATZENBACH. Certainly, that is true under these statutes, and the Court themselves in this case, at least the majority of them, believed it was necessary. Three believed that the statute already applied to purely private interests.

Senator ERVIN. The opinion of Mr. Justice Stewart, which is the opinion of the Court, says:

> It is commonplace that rights under the equal protection clause itself arise only where there has been an involvement of the State or of one acting under the color of its authority. The equal protection clause does not add anything to the rights which one citizen has under the Constitution against another. As Mr. Justice Douglas more recently put it, the 14th amendment protects the individual against State action, not against wrongs done by individuals. This has been the view of the Court from the beginning. It remains the Court's view today.

Is that not a correct reading of what Mr. Justice Stewart said on that point with the citations of cases omitted?

Attorney General KATZENBACH. Yes, it is, Senator; and I would simply italicize in that statement the word "itself", "the equal protection clause itself."

Senator ERVIN. Yes.

Attorney General KATZENBACH. Because he is not talking about what may be enacted by Congress under section 5 of the 14th amendment.

Senator ERVIN. Well, don't you know that the case he cites, *United States* v. *Cruikshank* (92 U.S. 542), expressly held that Congress could not go beyond the scope of the amendment in legislating under section 5?

Attorney General KATZENBACH. That is a possible——

Senator ERVIN. A very good case.

Attorney General KATZENBACH. Reading of some *obiter dicta* in the *Cruikshank* case.

Senator ERVIN. It was squarely on the point involved.

Attorney General KATZENBACH. They didn't have to reach that question in the *Cruikshank* case.

Senator ERVIN. Oh, yes they did. That was the very point.

Attorney General KATZENBACH. Senator, I wonder whether we could just clear up that point about the hospital?

Senator ERVIN. Yes.

Attorney General KATZENBACH. If I could just give you the facts of what happened there. Compliance with title VI of the Civil Rights Act of 1964 by the North Carolina hospital to which you referred yesterday, was questioned as a result of the analysis of its compliance report. It is located in a community with slightly more than 23 percent nonwhite population; its patient census was approximately 7 percent nonwhite. A field visit was scheduled to determine whether or not the low percentage of Negroes was attributable to discrimination.

It was found that there are three major hospitals in the area. The hospital in question is on the outer edge of the service area, and in the center of the area there is a predominantly Negro hospital which is larger than the hospital in question. The existence of the larger hospital tends to reduce the Negro patient load at other hospitals. It was also learned that almost a year before the hospital in question opened, much publicity was given to its intention to operate on a nondiscriminatory basis. Subsequent articles have appeared in the newspaper encouraging Negro doctors to use the facilities of the hospital and students to apply for training. As a result, their practical nurse training program is integrated and it hopes to have Negro students in its fall 1966 registered nurse class. In addition, it was

found that patients are assigned to all rooms, wings, and floors without regard to race, color, or national origin.

For these reasons, and on the basis of the satisfactory data provided by the administrator, the hospital to which the chairman referred was certified for participation in all HEW programs, including medicare, on May 24, 1966. At no time were any Federal funds terminated or withheld or, insofar as I have been able to discover, even threatened to be.

Senator ERVIN. Well, they did threaten it, Mr. Attorney General, because I have a letter in my possession written by the Department of Health, Education, and Welfare in which it is said that due to the fact that the percentage of nonwhite patients was less than the percentage of nonwhite residents in the community, discrimination was indicated, and that funds would be withheld unless the hospital investigated the cause of that discrepancy, and took positive action to remove it. That is in a letter in my possession.

Attorney General KATZENBACH. If discrimination existed?

Senator ERVIN. Yes.

Attorney General KATZENBACH. I think that is quite appropriate to inquire as to whether or not there is discrimination in the operation of a hospital. I think that is what is intended by title VI. I think the important thing here, Senator, is that when they took these figures, they made inquiry as to the reasons why the discrepancy existed. HEW was entirely satisfied that there was no discrimination in fact and no funds were at any time withheld and it was certified approximately 2 weeks ago to participate in this program, and it never lost any funds. I think that is a real credit to the operation of title VI and the way in which the Department of Health, Education, and Welfare is administering it.

Senator ERVIN. We may disagree on a question of semantics, but if HEW says we are going to withhold funds if you don't do so and so, I would construe that as a threat under my understanding of the English language.

Attorney General KATZENBACH. I lack your advantage because I don't have the language in front of me and I have to look at the actual language. I would say if it is said "We find you are discriminating and not taking action to go on a nondiscriminatory policy, we will have to withhold funds." I would think that was not a threat but an explanation of the obligations imposed on the Department of Health, Education, and Welfare by title VI of the 1964 Civil Rights Act.

Senator ERVIN. Well, I just hope if that is not a threat the Department of Health, Education, and Welfare will never actually make a threat. I have none of the instincts of a prima donna, but as I have been working on this case with them I wonder why they didn't notify my office on May 24 that they had made this decision?

Attorney General KATZENBACH. I think they should have notified your office, Senator.

Senator ERVIN. Yes, especially after I not only wrote them and told them that I had waited for about 6 weeks, I sent them a telegram to that effect and asked for a reply.

Attorney General KATZENBACH. I am sure you will get that letter today.

Senator ERVIN. Well, that is pretty fast I guess, from the 24th of May. That is about 2 weeks to get one letter across the street.

Attorney General KATZENBACH. Could I say this, Senator. Attempting to bring several thousand hospitals into compliance and to get them certified for medicare has imposed a tremendous strain on the Surgeon General and on his facilities. He has literally had to assign hundreds of people within his office to try to enforce title IV, and I am sure, I am genuinely sure that no discourtesy was intended to you.

Senator ERVIN. Having been down to the Department of Health, Education, and Welfare, I am satisfied they could have had a stenographer write me a one-line letter advising me that they had taken action on a matter I had indicated an interest in some 6 weeks before, but that is beside the point.

Attorney General KATZENBACH. I am sure they didn't intend any discourtesy, and I am sure that they wish they had notified you.

Senator ERVIN. Well, I sincerely wish they had too because you and I could have saved about 10 minutes of conversation yesterday and we could have saved about 10 minutes more this morning.

Attorney General KATZENBACH. Yes, sir.

Senator ERVIN. And I am certain it wouldn't have taken any stenographer in the Department of Health, Education, and Welfare that many minutes to have written me a letter about the matter.

Now, Mr. Attorney General, this *Guest* case is a very interesting one. Do you make any distinction between the concurring opinion written by Justice Clark in which Justices Black and Fortas concurred and the concurring opinion written by Justice Brennan in which the Chief Justice and Justice Douglas concurred?

(At this point Senator Javits entered the hearing room.)

Attorney General KATZENBACH. Well, the basic distinction I suppose between those is that Mr. Justice Brennan and the Chief Justice and Justice Douglas took the view that section 241 already covered private conspiracies, and the other three took the view that as drafted, section 341 did not. That is the basic distinction between the two opinions.

Senator ERVIN. I notice that Justice Clark in his opinion states that:

> I believe it both appropriate and necessary under the circumstances here to say that there now can be no doubt that the specific language of section five empowers the Congress to enact laws punishing all conspiracies with or without State action that interfere with 14th Amendment rights.

Now, why does Justice Clark put that on the basis of conspiracy instead of on the basis of specific crimes, as Justice Brennan did?

Attorney General KATZENBACH. The only reason I can suggest, Senator, is that since the indictment alleged conspiracy, and that was what we were talking about, that he talked about conspiracy as well.

Senator ERVIN. Justice Clark is not talking about the indictment at that point, he is talking about the power of Congress as distinguished from the allegations of the indictment. I am asking this for information because it is very intriguing to me why Justice Clark restricts the power of Congress to the punishment of conspiracies to interfere with 14th amendment rights, and Justice Brennan talks about specific crimes as distinguished from conspiracies.

Attorney General KATZENBACH. I don't draw any inference. I don't know what inference it is that you draw from it. As I say,

my only explanation of it is that the Court was talking about conspiracies and, therefore, he was talking about conspiracies. I don't draw an inference that, therefore, conspiracy becomes the essential ingredient under the 14th amendment.

Senator ERVIN. Is there anything in Justice Clark's opinion that says Congress has the power to define specific crimes as interference with 14th amendment rights?

Attorney General KATZENBACH. I don't see any significance to this. He says he felt that, because Brennan had raised this question, he ought to say something about it. Then he says, "I don't have any question about it, * * * no doubt as to the specific language of section 5, the power of Congress to punish all conspiracies with or without State action."

Senator ERVIN. I am curious why Justice Clark restricts his statement as to the power of Congress to conspiracies, whereas Justice Brennan, instead of talking about the power of Congress with respect to conspiracies talks about specific crimes.

Attorney General KATZENBACH. I don't think there is anything in Justice Clark's opinion that would suggest that any particular importance should be attached to the fact that he used the word "conspiracies" there.

Senator ERVIN. Your diagnosis is that some members of the Court were just suffering from writer's "itch" rather than anything else at the time they wrote these opinions and that one or the other of the concurring opinions is unnecessary?

Attorney General KATZENBACH. Yes, I think that we are here talking about a conspiracy. I think the word "conspiracy" was, therefore, used by Mr. Justice Clark. I would not find that a strange thing to do, because the whole discussion was in terms of a conspiracy. The indictments alleged a conspiracy. Three Justices said that conspiracy was already covered by section 241. Mr. Justice Clark said he found it necessary to add that he had no doubt that Congress could cover such conspiracies, and he, therefore, is just talking about the facts of this case. They could have done it, but they didn't, and if they can cover conspiracies of private individuals without State involvement, Mr. Chairman, I can't see any reason in logic or in law that would lead you to say they can't cover individual crimes absent the conspiracy. If you are talking purely about private individuals, I don't see what——

Senator ERVIN. That is the reason I can't understand why they wrote two opinions, if they agreed.

Attorney General KATZENBACH. They didn't agree, Senator. You see, the disagreement was on whether section 241 presently covered purely private conspiracy. On that point, there was not agreement. So it would be very difficult to have written one opinion if three Justices felt section 241 did cover this, and other Justices did not, with respect to various counts in the indictment. I think it required separate opinions to make clear that they took a different view of section 241 as presently drafted, but did not in my judgment take a different view of the power of Congress to enact laws pursuant to section 5 of the 14th amendment.

Senator ERVIN. Well, I think a very good case can be made for the proposition that they didn't make it clear, they made it more confused. As a matter of fact, there were four different opinions in that case.

Attorney General KATZENBACH. Yes. It took a good deal of reading.

Senator ERVIN. Yes.

Attorney General KATZENBACH. To try to straighten it out.

Senator ERVIN. Now, let's go back to the 14th amendment. The pertinent part of section 1 so far as title V is concerned, is this provision:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Isn't that the pertinent part of the first section of the 14th amendment?

Attorney General KATZENBACH. Yes, sir.

Senator ERVIN. Now, is it possible to read into that pertinent portion of the first section of the 14th amendment anything except these prohibitions, that "no State shall abridge the privileges or immunities of citizens of the United States or deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws?"

Attorney General KATZENBACH. Just that section?

Senator ERVIN. Yes.

Attorney General KATZENBACH. You are not talking section 5 at all?

Senator ERVIN. I will come to section 5 in a minute. I am just talking about section 1.

Attorney General KATZENBACH. I would agree.

Senator ERVIN. Yes.

Attorney General KATZENBACH. I think the Court agrees that that section, without further implementing legislation, simply applies to the State itself.

Senator ERVIN. And in those words there is nothing whatever that inhibits any action on the part of individuals, where they are not cooperating with the State.

Attorney General KATZENBACH. That section of the 14th amendment alone, without talking about implementing legislation, has been held by the Court to apply only to State action.

Senator ERVIN. All right. Let's go to section 5, and I think you and I are in complete agreement thus far. Section 5 says:

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

Now, the provisions of the article that Congress is empowered to enforce by legislation are the prohibition resting upon the State not to abridge the privileges or immunities of citizens of the United States, the prohibition against depriving any person of life, liberty, or property without due process of law, and the prohibition that it shall not deny to any person the equal protection of the laws.

Now, isn't that all it is authorized to enforce?

Attorney General KATZENBACH. No; it is not all that it is authorized to enforce.

Senator ERVIN. Well——

Attorney General KATZENBACH. What?

Senator ERVIN. Go ahead.

Attorney General KATZENBACH. I think that in making those rights effective, the rights guaranteed, the equal protection of law, due process of law, it is possible for Congress to legislate with respect to purely private action without State involvement, particularly where the State fails to do so, and particularly where those private actions may be the result of violations of the 14th amendment in the past on the part of the States.

I think it was the intention of the 14th amendment at the time it was enacted to give Congress the broad and plenary power to make sure that the guarantees incorporated in that amendment to individuals would in fact be realized, and I think as an incident of that it can deal with not merely State action, but with private action that has that effect.

Perhaps to go back to your favorite clause, Senator, the commerce clause, for a minute, I point out that there is nothing in the language of the commerce clause, not a word in the language of the commerce clause, that gives Congress the power to regulate local commerce. Yet the Court has repeatedly and for a century and a half said that you could regulate local commerce as an incident in regulating interstate commerce.

I think here you can regulate private action in those circumstances where it is necessary fully to effectuate the guarantees of section 1 of the 14th amendment.

Senator ERVIN. Well, we will discuss the interstate commerce clause later on.

Attorney General KATZENBACH. No; I wasn't substituting it as a basis here, Senator. I was simply pointing out that you could read to me the language of the commerce clause, and you will find not one reference to local commerce. Yet, you would have decision after decision which says you may, as an incident of regulating interstate commerce, regulate local commerce. I was saying here you may as an incident of regulating State action and implementing the guarantees of the 14th amendment, regulate private action.

Senator ERVIN. However, the courts always have held that the power to regulate interstate commerce embraces the power to regulate intrastate activities only when regulation of intrastate activities was necessary or appropriate to the regulation of interstate commerce itself.

Attorney General KATZENBACH. That is right.

Senator ERVIN. Yes.

Attorney General KATZENBACH. And I would think exactly the same thing applied here, and it is for that reason that I emphasize the fact that a good many of the things or efforts to be regulated here come as a result of unconstitutional State action over a long period of time.

It seems to me that in trying to undo those deprivations under the 14th amendment in which the State itself participated, that it is appropriate for Congress to enact legislation under section 5 of the 14th amendment, and of course that is the view that Mr. Justice Brennan and his colleagues took, and apparently the view that the majority of the Court took in the *Guest* case.

Senator ERVIN. I believe you conceded earlier, however, that up to the present moment there is no decision to that effect, and that the decisions are exactly to the contrary.

Attorney General KATZENBACH. I agree with you about no decisions to that effect when you haven't had this kind of Federal law. It is hard to see how you could have had a decision to that effect. It is also hard to see how you could have had decisions to the contrary, if the issue didn't come up.

Senator ERVIN. In *United States* v. *Cruikshank*, reported in 92 U.S. 542, some of the same statutory phraseology was involved as was involved in the *Guest* case.

The provision is, that if two or more persons shall band together, or conspire together or go in disguise upon a public highway, and so on. The court, in an opinion by Chief Justice Waite, had this to say at pages 554 and 555 about the meaning of the 14th amendment, including section 5:

> The 14th Amendment prohibits a state from denying to any person within its jurisdiction the equal protection of the laws, but this provision does not, any more than the one which precedes it, and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is the principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the states; and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.

I can't imagine any clearer English which could be found to express the idea that the only power of Congress under section 5 is to enforce the prohibitions which the 14th amendment imposes upon State action, and that has been the uniform interpretation that has been placed on it by the courts.

Attorney General KATZENBACH. I don't quarrel with you that the language which you quote from there could be read adversely to the contention that we make in the *Cruikshank* case. I think that ought to be acknowledged.

I do think that the court in the *Cruikshank* case does hold that Congress can implement the due process clause by making ordinary citizens subject to criminal sanctions for falsely imprisoning someone.

It seems to me if you look at the indictment in that case and the counts in that indictment which charge the denial of equal protection and the denial of the right to vote, if those counts were not dismissed by the court because Federal legislation enforcing them could not, could never reach private acts, but because the charge in that case failed to allege any intent to affect discrimination on account of race or color.

Now that is the contention that we made in our reading of the *Cruikshank* case, in the brief which we filed in the *Guest* case, and I would take it that a majority of the court agrees with that reading of the *Cruikshank* case. I agree with you, sir, that the case can be read differently.

Senator ERVIN. Indispensable to the decision in *Cruikshank* is the holding that Congress' power is limited to enactment of a law that would enforce the guarantee that the States should not do these three prohibited things.

Attorney General KATZENBACH. Senator, I agree with you that it is possible to read the holding in the *Cruikshank* case, the decision in the *Cruikshank* case as you read it. I would hope that you would agree with me that it is possible to read it differently.

Whether you agree with me or not, it seems to me true to state that a majority of the Supreme Court today has expressed the view that you can reach purely private action under the 14th amendment. I would hope that whether that view is reached by them, as I hope it will be reached by Congress, and as I would read it, by distinguishing the *Cruikshank* case, or reached because they think the *Cruikshank* case is wrongly decided, that it would still remain true that the Congress has the power to implement the provisions of the 14th amendment and to reach private action at least in the circumstances where that private action is effectively denying people equal protection of the law, and particularly where that situation arises out of prior unconstitutional State action.

Senator ERVIN. Mr. Attorney General, how can a private individual deny anybody the equal protection of the laws? The State can only act through those who make or execute or interpret its laws, isn't that true?

Attorney General KATZENBACH. The State can only act in that way?

Senator ERVIN. Yes.

Attorney General KATZENBACH. Yes.

Senator ERVIN. And no private individual can deny anybody due process of law.

Attorney General KATZENBACH. Private individuals can commit active violence, acts of intimidation aimed at preventing people from asserting their rights, which you and I would agree are guaranteed as equal protection of the law. Private citizens certainly can do that.

Senator ERVIN. But they cannot deny the equal protection of the laws. They can commit crimes, but they cannot deny anybody the equal protection of the laws, because they neither make the laws nor execute the laws nor interpret the laws.

Attorney General KATZENBACH. What you are defining is equal protection of the laws and saying that is merely and always a matter of State action. Having so defined it, then you say it therefore follows that only a State can do it.

I think from the definition that you put it does so follow. I agree. The issue here is whether in trying to effectuate the full protection of the laws, where the Congress by legislation can make criminal private conspiracies designed to prevent people from exercising their equal rights, and I take the position that Congress can do so, a majority of the Court apparently takes the same position, and I think it is particularly important to this argument, to the understanding of it, that the reason this kind of action is necessary is because in fact the States, many States, have violated section 1 of the 14th amendment as you read it, violated it repeatedly and repeatedly and repeatedly, and then turn around and say that no action is required by us to undo the effects of prior violations of the 14th amendment existing over a period of years.

I would say that Congress has scope and judgment to make in saying that where that situation exists, where equal protection of the law in fact does not exist, does not exist in fact because of various private actions designed to prevent that, where the States have indeed encouraged this for some time and now do not take positive action themselves to undo what I would regard as the results of prior violation, certainly in those circumstances the Congress of the United States has the power, and I would go beyond saying it has the power in saying it has the duty to enact legislation to deal with that situation.

Senator ERVIN. Well, do you conceive of the Federal Government being a government of unlimited powers?

Attorney General KATZENBACH. Of course I don't, Senator.

Senator ERVIN. Do you think that——

Attorney General KATZENBACH. I am just as devoted to the Constitution as any man I know, and I would yield to no one on that.

Senator ERVIN. Do you think that outside of the 14th amendment there is a single syllable in the Constitution that gives the Congress the power to enact criminal laws generally binding on individuals?

Attorney General KATZENBACH. Outside of that?

Senator ERVIN. Yes.

Attorney General KATZENBACH. Oh, yes, of course.

Senator ERVIN. Where?

Attorney General KATZENBACH. Well, there are a number of specified powers with respect——

Senator ERVIN. I know, but my question was generally. Do you think that Congress has any power to enact any criminal law whatever except for the purpose of giving effect to some power it is given by the Constitution?

Attorney General KATZENBACH. No, I think that is correct. It is a government of limited powers and you must find for Federal action, any Federal legislation, any Federal legislation whatsoever, a basis in the Constitution.

Senator ERVIN. Now if your interpretation of the 14th amendment, which I would submit with all due deference to you is contrary to its wording as well as all the decisions, is correct, Congress can legislate in the entire field of criminal law, can it not?

Attorney General KATZENBACH. No, sir.

Senator ERVIN. Well, take the question of the equal protection of the laws. Doesn't a possibility of the question of the equal protection of laws arise wherever a State law is either passed or applied or interpreted as to any individual?

Attorney General KATZENBACH. Yes, the question of equal protection arises under I suppose the administration at least of any State law, and indeed it could be under the wording of the State law.

Senator ERVIN. Yes.

Attorney General KATZENBACH. I mean if you would——

Senator ERVIN. Do you take the position that where a State has denied no one the equal protection of the laws, and has not abridged the privileges and immunities of citizens, or denied them due process of law, that Congress can enact legislation to punish purely private action, when the State has done everything in its power to abide by the prohibitions of the 14th amendment?

Attorney General KATZENBACH. I would think the answer to the question would be no to that, Senator, if your assumption, as I understand it to be, that a State has done everything in its power to carry out all of the provisions of the 14th amendment, is doing everything in its power to carry out all its provisions of the 14th amendment, and that these rights are not being denied either by the State, never have been denied by the State, it is hard for me to see what the Federal interests would be in that, what the necessity would be for section 5, for enacting legislation under section 5. But in this instance you agree with me, that title 5 is necessary today.

Senator ERVIN. No; I do not agree with you. I agree that Congress ought to give consideration to amend the Constitution to authorize legislation, because I don't believe in violence or threats of violence. But I think it should be done by constitutional amendment and not by distorting the words of the 14th amendment.

Attorney General KATZENBACH. Why do you think it is necessary to have a constitutional amendment?

Senator ERVIN. To keep——

Attorney General KATZENBACH. No, I mean apart from the fact that you think there is a need for Federal legislation in this area.

Senator ERVIN. I agree that the Congress should give consideration to the passage of a constitutional amendment. I would favor a constitutional amendment such as I propose to introduce, for three reasons, as I stated:

First, I don't believe in using force and violence to deny any man any right under the Constitution and laws of the United States.

Second, I think the changing of the meaning of our Constitution ought to be done by Congress and the States in the manner authorized by the fifth article.

Third, I want to remove from the Supreme Court of the United States the temptation to change the meaning of the 14th amendment according to its words, according to its history, according to all of the decisions.

I just don't like to have the Constitution of the United States changed by anybody except those the Constitution authorizes to change it. I have very good support for that view, because the Father of our Country, who presided over the Constitutional Convention, said in his farewell address to the American people:

> If the people are ever dissatisfied with the distribution of governmental powers made by the Constitution, let them change the distribution by an amendment in the manner in which the Constitution itself provides. Let there be no change by usurpation for usurpation is a customary weapon by which free government is destroyed.

Mr. Attorney General, I have been notified by some of my brethren that they would like to ask you some questions. They have some other chores to do. In deference to them, I am going to yield at this time and resume this interrogation later, because I feel very strongly on this point.

Attorney General KATZENBACH. I gathered you did, Senator.

Senator ERVIN. I am glad I have left that impression on you, if no other.

Senator SCOTT. Mr. Chairman, may I be recognized?

Senator ERVIN. Yes.

Senator SCOTT. Mr. Attorney General, in your opening statement, title V, you say:

> Provide capacity to deal effectively with racial violence and the title is a response to the number of killings and assaults which have gone unpunished.

Would title V have such application to the Meredith case as to expand the right of the Federal Government to proceed in that matter?

Attorney General KATZENBACH. I would think that it would cover the Meredith case, Senator. I think probably the Meredith case, and this would depend on really knowing all of the facts with respect to it, I would think it probably was already covered by section 11 of the Voting Rights Act, at least of the stated purpose of his walk along the

highway with respect to voting. But it would be covered certainly by title V.

Senator SCOTT. Mr. Attorney General, on page 2 you say:

Title IV would not force him to sell or rent to anyone—

No, that is not the clause.

What it would do—

Title IV, that is—

is to assure that houses put up for sale or rent to the public are in fact for sale or rent to the public.

I want to explore one possible area of what might be called the evasion or attempt to evade. Suppose the owner of a property with an actual value of $30,000, lists it with one or more real estate brokers at a valuation of $75,000. He then receives a bid of $27,000 for the property from a Negro, a few days thereafter he receives a bid from a white person of $28,000. How would title IV of the bill operate in this situation?

Attorney General KATZENBACH. Well, I would suppose that it would be permitted to sell it to whoever bid the most for the property, and if the white person bid $28,000 and the Negro bid $27,000, he would be entitled to sell it to the $28,000.

Now as you put the facts, you made at least suggestions there by the high valuation, that he and the real estate agent could be in a conspiracy to make sure that Negroes could not get it, I would think that it was possible, depending on what facts you assume in this situation, that it could be a violation, if the Negro offer which was made for this was willing to match or go in excess of the white person's offer.

In other words, if your facts are meant to infer from your facts that this was all part of a conspiracy between the owner and the real estate agent to prevent a Negro from getting it, and it worked out in that way, then I would think that it would be a violation.

But ordinarily if a white person offers more for the house, he can sell to the white person. If the financing arrangements are more favorable to him, he can sell to the white person. Any of those factors would not be dealt with nor do I think they should be.

Senator SCOTT. And that would be equally true if the bid was $28,000 by both the white person and the Negro person, I take it?

Attorney General KATZENBACH. I would take it if it were the same by both, the financing conditions were the same on both, that it would be very difficult to prove any discrimination in the case, if you selected one rather than the other.

Senator SCOTT. What I am getting at, of course, is the difficulty of establishing a conspiracy where an individual asserts that $75,000 is his price, but when it comes actually to the sale, he retains in himself the opportunity to decide between bidders by being unwilling to reduce his price until he gets the offer which he wants to accept. The difficulty of proving conspiracy does offer that opportunity for evasion, does it not?

Attorney General KATZENBACH. I think it does, Senator, and if you have suggestions as to how to improve it, I would be happy to use them. I think in any law there are opportunities for evasion.

I think most people, this is my firm conviction, that most people, once the law is put on the books, are not going to try to evade it and

will deal with it fairly. I think this is true of most brokers, bankers, and others, but it is hard to draft a law that doesn't at least have some possibilities of evasion.

Senator SCOTT. I was raising the questions to point out how difficult it is to establish conspiracy in that case.

Attorney General KATZENBACH. Yes, it is.

Senator SCOTT. Section 101 of S. 3296 provides for challenge by criminal defendants but not by the Government of jury selection, if the procedures established in section 101 have not been followed. Why is the Government not permitted to file challenges?

Attorney General KATZENBACH. Well, for two reasons, Senator. We considered the possibility of doing it.

I felt that, No. 1, if a jury was challenged by an individual, the Government could presently come in, as we have done in a number of cases, and intervene and thus be in the case, if it was one which was meritorious. So it is not as though we were unable to do anything in that kind of situation.

So far as the importance given to the Federal Government, the express power there, it seems to me that what our job should be would be an effort to reform the jury system within those counties and States and so forth where it wasn't operating propertly, where it was operating in an unconstitutional manner. One of the difficulties, if I can just go on with this——

Senator SCOTT. Sure.

Attorney General KATZENBACH. One of the difficulties of the individual challenge in this to a particular jury is that without having some further power, the individual may win his case, and he may continue to have unconstitutional juries in that State. This is particularly true because of some of the difficulties of discovery on this.

Senator Ervin would be familiar with the whole series of cases, in that of the Union County, N.C., where the North Carolina Supreme Court has said that the jury was selected unconstitutionally.

The first of these cases comes in 1958, and the jury system is still operating that way, at least the Supreme Court of North Carolina feels so 8 years later, and I think we need steps, some steps are needed to reform the system, and that was the reason for giving the Government that power.

Senator ERVIN. If I may interject myself at this point, I was very much intrigued by your suggestion that because the North Carolina Supreme Court had enforced the provisions of the 14th amendment as to jurors, that that was argument for conferring power on the Federal Government to take charge of North Carolina's efforts to do so.

I think that is about as logical, if you will pardon me for saying so, as arguing that because the North Carolina courts try a lot of people for murder the Federal Government ought to take charge of murder cases in North Carolina.

Attorney General KATZENBACH. No. My point was not in any way to criticize the North Carolina Supreme Court. In fact, I think what they did is exactly what they should have done.

My point, in response to what Senator Scott was saying, was to try to show that obviously the Supreme Court of North Carolina hadn't been able to do very much about the jury process in Union County, and that was the difficulty of the case-by-case approach.

I offered it as just one instance, and there are many, of why there was a necessity to have power in the Federal Government to deal with the problem and to reform the jury system, because case-by-case adjudication simply doesn't accomplish it.

Senator SCOTT. Mr. Attorney General, S. 2923, in which I joined with several other Senators in introducing, contains an indemnification title which would provide that political subdivisions, that is local governments, are liable as joint tort-feasors for civil rights damages caused by persons acting under color of law.

H.R. 13323 by Representative Mathias of Maryland has a similar provision. Could you tell us why an indemnification provision was not included in S. 3296?

Attorney General KATZENBACH. We studied the possibilities of indemnification. I find the idea of indemnification to be an interesting one.

My problem with respect to indemnification is, to some extent, why indemnification should be limited in the particular way that it is. In other words, I think there are interesting ideas with respect to indemnifying people who are the victims of illegal acts wherever they may occur, and there are proposals of that kind.

I wasn't sure in my own mind that indemnification should be singled out in this particular area, but if the committee is of the view that some indemnification provisions are essential on this, I don't have great feeling for opposition. I just question to some extent if this particular area should be selected for indemnification, particularly because I would guess that it is going to end up by and large with the Federal Government indemnifying people, and the right over, that is provided, is going to be extremely difficult to put into effect.

Senator SCOTT. S. 2923 also extends the equal employment provisions of the Civil Rights Act of 1964 to State and local governments. Would you tell me why S. 3296, the bill on which you are testifying, does not do this?

Attorney General KATZENBACH. Because the reason for that is sort of a simple procedural reason, really, Senator, and that is that at the time of the introduction of this bill, title 7 had already gone through one House of the Congress and been passed with a number of strengthening amendments not including this particular one, and seeing that that much progress had been made, quite frankly with respect to that bill we shouldn't throw it back into committee for further consideration, in view of the urgency of getting some strengthening amendments enacted to it.

I have no opposition to this. I suspect, Senator, that there would be a good deal of opposition in the Congress to this, based upon my experience with that title in the 1964 act, where it was thoroughly considered, and where a good many Members of each House were reluctant to have the Federal Government overlooking and overseeing the States.

Senator SCOTT. I did suggest in the——

Attorney General KATZENBACH. It has problems.

Senator SCOTT. It could well be anticipated. I did suggest in the two previous civil rights acts the inclusion of a number of provisions which were not finally recommended until the 1964 act. I find that sometimes being ahead of the proceedings is not always the legislatively tenable position, but I did want to explore it.

Thank you very much, Mr. Chairman.

Senator JAVITS. Mr. Chairman?

Senator ERVIN. If I may make one observation, this question of reparations is certainly a very effective way of visiting the sins of the guilty upon the innocent.

Attorney General KATZENBACH. It could work out that way, Mr. Chairman.

Senator JAVITS. Mr. Chairman?

Senator ERVIN. I recognize Senator Javits. Senator Kennedy waives his seniority on the subcommittee in your favor.

Senator JAVITS. Thank you, and I will yield to Senator Kennedy in a moment.

I think both Senator Kennedy and I have a few questions about this Meredith case which has just come up. This is another in a series of shocks to the country, because Meredith ran right into exactly what he himself predicted, he was going down to try to deal with the Negro's fear of just that kind of violence which was visited on him.

In my judgment, we have had enough martyrs in this area now. I am looking to this bill to strike probably as effective a blow as can be struck to deal with that very Meredith situation.

Now, Mr. Attorney General, I think it is important that we know from you the facts, because you are involved. The newspaper report says that Meredith asked you for help. It quotes him as saying;

> Katzenbach said it was not important enough to do anything.

Now that is a pretty important statement if true. Could you tell us whether any request was made for Meredith's protection, and what you did about it?

Attorney General KATZENBACH. Yes, I can. Might I say at the outset—is that a quote from the Washington Post this morning, may I ask?

Senator JAVITS. Yes.

Attorney General KATZENBACH. May I just say a word about that quote.

Senator JAVITS. Yes.

Attorney General KATZENBACH. Because I feel deeply and strongly about it.

Senator JAVITS. Good. That is why we are here, and I make no implication whatever.

Attorney General KATZENBACH. All right. Let me take it this way. The source of the Post quote was the Huntley-Brinkley program last night, in which Meredith said that a reporter had said to him that I had said this to the reporter. The Washington Post eliminated one of those steps.

The fact of the matter is I did not say it to a reporter. I would not have said it. I did not feel it, and I am really distressed and upset that a great many million people in this country, as a result of that television program and a result of the Washington Post story, would have thought that I would have said what is attributed to me in that statement by that device.

Senator JAVITS. Mr. Katzenbach, if it will help you, I believe you. I really don't think you are that kind of a man. I was amazed and shocked, and I am delighted to hear you say what you did.

Attorney General KATZENBACH. The Post did drop it from its later editions.

Senator JAVITS. Now can you give us the basic facts, the suggested facts, and what did happen? What is the situation?

Attorney General KATZENBACH. Well, Meredith stated that he was going to make this walk. He wanted to make it more or less alone. Obviously there were I suppose some dangers involved in it. He notified all of the local law enforcement officials along the route, and I don't know what response they made to him.

We were aware of it. I don't believe that he asked us for protection. I can't, at least I am not familiar with it whether he did or not. It makes very little difference really whether he did or not, because we wanted to keep the situation under observation, and take what steps could be taken to prevent this kind of incident or at least to deter it.

As you know, a lot of discussions with me in the past, it is not possible for the Federal Government, in the present circumstances, to absolutely guarantee the safety of anyone doing anything. It is impossible.

We get a lot of requests from civil rights workers saying, "Send marshals to protect us." I don't believe that one can effectively accompany around every civil rights worker, and that even if this is done, it is not necessarily going to protect them from violence when you have nuts and people of that kind.

And in this instance what we did was to notify all of the local sheriffs, to notify the Mississippi Highway Patrol. I can say that Governor Johnson was and always has been very strongly opposed to violence in these kinds of situations. And then beyond that, we kept an observation with respect to Meredith with agents of the Federal Bureau of Investigation in the vicinity, and I think you will find all the newspaper reports will so state.

At the time that the shooting occurred, there were at least 15 law enforcement officials, Federal, State and local, within yards of Meredith, and as a result of that, the person, a person was arrested within a matter of minutes. That immediately both State, local and Federal law enforcement officials were after the person who had fired the shots on this occasion.

One always looks back on this kind of situation and wonders whether this sort of sniping is something that could have been avoided. The man was concealed. Nobody knew that he was there. He apparently had been concealed for some time.

As you know I am sure, within the State of Mississippi there is a great deal of rural area. Much of it is covered, close to the road, and I think it is difficult to absolutely guarantee safety in those situations. At least the person who allegedly did this was promptly apprehended, was put in jail, will be charged. I take the position that it is probably a Federal offense as well. Assault with intent to kill would be the charges that I imagine would be made.

Senator JAVITS. Do you feel, concerning this bill, that the history of acquittals and hung juries in civil rights cases such as the Medgar Evers and other cases, has a bearing upon the continuance of this kind of violence in Mississippi, and that therefore this bill is necessary in order to deal with some of these attitudes?

Attorney General KATZENBACH. Yes, I think it is absolutely essential, Senator. I think that is true normally of title V, but also of the jury provisions as well. I think that really the way in which you can give people protection in these situations is really twofold.

One, what we are proposing in this bill is to assure the Federal Government can try people with effective penalties on this, to insure the integrity of the jury system.

I think beyond that, you never really can make this effective with just that, unless the people of Mississippi, and I am sure it is the overwhelming majority of the people of Mississippi, themselves, won't tolerate this kind of violence.

I really believe that to be true today. I don't think that it means—there are nut people in Mississippi, in North Carolina, probably in New York, who have strong feelings that they can commit acts of violence against somebody who they think is a civil rights worker, just against a Negro. I think the case of Colonel Penn is an example of that. He was a colonel returning from Reserve duty, driving along the highway early in the morning, and somebody comes out and just shoots him.

Senator JAVITS. This was Georgia, of course, and——

Attorney General KATZENBACH. Yes, but my point is that I don't know any way in the world one could have predicted Colonel Penn was going to be shot in that way. It seems to me the only effective way you can deal with this is to try to deter.

I would have thought that with the visibility of police officials, with respect to Meredith, with their presence, that this ordinarily, in most situations, would have been effective to deter anybody from attempting violence against him.

The very fact of immediate apprehension would tend to confirm that. I don't know anything at this moment about the background of the person apprehended or why he did what he did.

Senator JAVITS. Do you feel——

Attorney General KATZENBACH. But my point is that it is so absolutely, oh, I think I will probably just use a word. I don't know what word to use. I don't know if I should say absolutely insane in the literal sense, but sort of absolutely unpredictable that anybody, with police officials all around, would suddenly get up with a gun and shoot somebody. It has happened before, it has happened in many places, I guess, unconnected with civil rights activities.

Senator JAVITS. It is said that there was an FBI car parked at the side of the road.

Attorney General KATZENBACH. Yes.

Senator JAVITS. The car was parked while the shooting continued. Are you satisfied that the FBI really moves into a situation like this, or is it inhibited by the fact that it is in the presence of local police and only they can move and stop a man?

Attorney General KATZENBACH. That situation, from all of the information I have, they moved immediately into that situation. At least, my information is that the FBI agents as well as local and State officials, police officers, moved immediately into that situation to apprehend the person who had done it.

Senator JAVITS. I have just one other thing that I wanted to cover, and I would like to yield to Senator Kennedy, who is gracious in allowing me to proceed. This is primary day in Mississippi, is it not?

Attorney General KATZENBACH. Yes.

Senator JAVITS. And I understand you have poll watchers in 14 of the 82 counties.

Attorney General KATZENBACH. Yes.

Senator JAVITS. Do you feel under the circumstances that that is adequate?

Attorney General KATZENBACH. Yes.

Senator JAVITS. After all, this fear of violence which is now so vivid because there is violence. Don't you think that it is necessary really to cover the State?

Attorney General KATZENBACH. Well, let me take that up seriatim.

Senator JAVITS. Yes.

Attorney General KATZENBACH. I think in the first place, the poll watchers themselves are not designed to prevent violence. These are civil service people who are at the polling place to insure that Negroes and others are permitted to vote, that the votes are accurately counted, that illiterates are getting assistance, this kind of thing. They are not designed, nor equipped, nor trained, to prevent incidents of violence. This is handled in another and different way.

Senator JAVITS. Yes, but they encourage confidence if they are there, and the Negro wants to vote. There is a certain amount—it detracts from the Negro's fear if he sees a friendly face in authority. That is all I mean.

Attorney General KATZENBACH. Yes, it could have that effect, in the knowledge that they were there. My point is that we take other steps to try to deter and prevent violence. This is not the function of the poll watcher.

The second point that I would make on this is that under the law, I can send poll watchers into the counties where you have designated examiners, so that I have to designate every county in Mississippi to have poll watchers in 82 counties, and actually 24 counties, counting some, oh, two-thirds of the Negro population of the State have at this point been designated.

I can also take the position, if I have reason to believe that there is going to be some denial of the right of Negroes to vote in a county where I haven't put examiners, that that in and of itself, if I had reasonable grounds to believe, this would justify me in designating that county for examiners, so that I could put in poll watchers.

What our practice has been and was in Alabama and is in Mississippi, is to deal with this on a county-by-county and, then, even box-by-box basis. What we have been trying to do, Senator, is to encourage the local officials to make it clear that Negroes will be permitted to vote, that they can do this by various ways, by public statements that they make, by the appointment of the official observers there, by helping illiterates with the voting, and so forth.

In other words, I think the objective here is and should be to encourage them to take responsibility for the conduct of these elections. I don't think that we should try to make Federal responsibility have the conduct of all State elections. Where they have done this, and they have, where they have made these efforts themselves and the steps themselves, absent from difficulty on election day, some complaints, we have not initially assigned civil service personnel to those counties where, after discussions with Negro leaders, after discussions with residents of the area, after discussions

with the probate judge, after discussions with the Democratic and Republican chairmen, we are satisfied that they are making real efforts themselves to encourage this, to make it clear that Negroes can vote.

I think also it has some relevance to the fact that in not very many counties of Mississippi, in this particular primary, that are not voting for local officials as they were in Alabama. There is mostly the absence of any very serious contest in most of these counties.

I would suppose for that reason one could assume, except in certain counties, where there has been a good deal of activity, there will not be particularly heavy turnout of either whites or Negroes in this particular election.

Senator JAVITS. Do you have watchers or examiners in this county in which Meredith was shot?

Attorney General KATZENBACH. Yes, we do. We decided that before Meredith was shot, Senator.

Senator JAVITS. Do you feel this incident requires some acceleration or intensification of your activities in Mississippi—activities as examiner, poll watcher, and protector against violence?

Attorney General KATZENBACH. As to the latter, conceivably, yes. As to the former, I would think not.

Now, long before anything happened to Meredith, I believe that except in certain counties there was likely to be a fairly light turnout in Mississippi, in contrast to Alabama, because of the nature of the election. I suppose that if there is a light turnout there will be some speculation that this is directly related to the Meredith incident.

I think it is very difficult to know whether the effect of that would be to have more people turn out or less people turn out, but I suppose we will see when it comes along. It is not a very exciting election, basically.

Senator JAVITS. You are going to look into this as you would any Federal crime, that is, either committe[illegible] by those who assaulted Meredith or even by the State officials?

Attorney General KATZENBACH. Yes.

Senator JAVITS. State officials who might have stood by or known about it?

Attorney General KATZENBACH. Yes, but I would like to just make clear at this point that I have absolutely no information that would indicate that the State or local officials were doing anything but upholding the law in these circumstances. If I got such information, I would act on it, but I wouldn't want to leave the impression here, at this point, that I have any suspicions at all in that regard.

I think they acted probably—and from what I have been able to judge, this was true of State officials as well as the county sheriff's office—as well as the Federal officials. I wouldn't want to leave that implication.

Senator JAVITS. I wouldn't want to leave the impression that I have any either. I just wanted your answer to the question. Mr. Chairman, I have more questions, but I am so grateful to Senator Kennedy I would like to just yield to him.

Senator KENNEDY. Mr. Chairman, Senator Javits of New York has covered many of the points that are of interest to me. I also want to express my appreciation to the Attorney General for his responsive-

ness and for his answers. I have a brief comment that I would like to include in the record.

We in the Congress are now considering the third Civil Rights Act in 3 years. There are those who say that further civil rights legislation is not needed or desirable—that we have done all that we can do through law, that we can afford to rest on our oars, proud of the progress we have made.

Yesterday's ambush shooting of James Meredith was a product of race hatred—a hatred which has flourished in this country for a hundred years, because of our neglect, our intolerance and our failure as a nation to live up to the principles of justice and equal opportunity which we so proudly proclaim as the birthright of all Americans.

The shooting of Mr. Meredith was an isolated act but it reminded us nonetheless of how far we still have to go before the American Negro can claim his rights of full citizenship.

So long as crimes of racial violence such as this one continue to go unpunished, so long as jury discrimination continues to make the administration of justice only the white man's justice, so long as the Negro lives in ghettoes and attends segregated schools, contempt for the law and contempt for the rights of our Negro Americans will continue to plague our society.

James Meredith was fired on while seeking to show Negro citizens of Mississippi that they did not have to be afraid to register to vote—but his shooting vividly demonstrates that fear and intimidation are still a part of these Negroes' everyday life—a life described yesterday by the Attorney General as one of "segregation enforced by lawlessness."

Just as Reverend Reeb, Jonathan Daniels, Medgar Evers, Mrs. Viola Liuzzo, Chaney and Goodman and Schwerner and the long list of others before him, James Meredith risked his life to secure the rights of others.

In almost every case in the last 5 years, the assailants of these victims of racial violence have gone unpunished. I do not know what the fate of the assailant in this case will be. I believe the shooting of Meredith was a violation of his Federal rights under the Voting Rights Act and punishable before the Federal bar of justice.

But if Mr. Meredith's march had been directed toward encouraging the desegregation of schools or the equal right to public accommodation, or some other Federal right equally deserving of protection, then effective Federal criminal legislation would be lacking to prosecute and punish his attacker. That is the reason for title V of the administration bill which would specifically provide for Federal prosecution for violation of Federal rights.

The events of yesterday confirm the need for passage of this legislation, and the need for it now. To that end, I pledge my full support.

Mr. Chairman, I have a number of other questions on the bill itself, as I know a number of my colleagues do. I would like to determine when we will have an opportunity to examine the bill or how the Chair expects to proceed.

Senator ERVIN. I was undertaking, myself, to talk to the Attorney General here about title V. I assure the Senator from Massachusetts and the Senator from New York if they have any questions directed to title V or any other provisions, they can ask them at this time.

I do think it would help to discuss it title by title. I took title V, because of the unfortunate Meredith episode. I certainly deplore that episode, myself, for two reasons.

First, I think it is wrong to use violence toward any man. It is an offense against society as well as the individual. Second, it is an offense against people like myself, who think these bills offend the Constitution. It makes it much more difficult for us to protect against unconstitutional and unwise legislation when the public becomes concerned by such an outrageous act, to the extent that they lose their vision of the Constitution and the necessity of having a Constitution to protect everybody under all circumstances.

I greatly deplore it.

You may proceed to ask any questions on title V. I wouldn't undertake to restrict any member of the subcommittee on any question whatever on any other title.

Senator JAVITS. Mr. Chairman, if Senator Kennedy will yield to me, I have just one other question on this Meredith incident.

I do agree with the Chair that it would be much more orderly if we went into these things on the legal side on a title-by-title basis. Personally, I would just like to ask this one other question and then yield my time.

Senator ERVIN. I think this is directly relevant to title V.

Senator JAVITS. I agree with that. I would like to identify myself with the very fine statement made by Senator Kennedy, particularly concerning the point that the most eloquent protest we can make is by solidarity of action which we can make on this measure which, in a rather strange way, so directly zeroed in on the very situation which we face in the Meredith case, both as to identification of the miscreant and the punishment.

Mr. Attorney General, apparently Meredith was given treatment in one Memphis hospital and then moved to another. Did that have anything to do with segregation?

Attorney General KATZENBACH. No.

Senator JAVITS. In either of the hospitals?

Attorney General KATZENBACH. It was the same hospital, actually, Senator. It was a hospital complex, and it is a very fine hospital. And the movement, in fact, it was the hospital that he requested in the ambulance to go to. The reason for the movement from the one to the other was simply from the emergency room to a room. The hospital is desegregated, and in fact, in the emergency room to which Mr. Meredith was taken, there were both Negroes and whites.

Senator JAVITS. Thank you very much. I think that is an important point to clarify.

I do hope, Mr. Attorney General, that you will move into this situation even with the law as it is now. There are lots of relevant aspects to the law now. I feel very outraged, as Senator Kennedy obviously does and as our chairman does, and I hope very much that you will utilize all of the power of your office to move into this situation with the vigor it deserves.

Attorney General KATZENBACH. I certainly intend to, Senator. I think the State authorities intend to, equally.

Senator JAVITS. Thank you. Thank you, Mr. Chairman.

Senator KENNEDY. Mr. Chairman, I appreciate the points that have been mentioned by the Senator from New York. I think that

all of us agree that we should not, neither the committee nor the Congress, be considering the legislation solely on the question of being outraged. I support the point mentioned by our distinguished chairman and the Attorney General that what we are interested in is orderly procedure. I think that the Attorney General this morning has really given a brilliant definition of the basis for the authority of title V, and I think it has been extremely helpful to the members of the committee.

I would like to yield to the Chair for the continuation on title V. With the permission of the Chair, I would also like to ask questions as they come up, not in any way to interfere with the Chair.

Senator ERVIN. I believe it would be easier if each one of us continue without interruption.

Senator KENNEDY. Fine. I will yield back the Chair and pursue an opportunity later.

Senator ERVIN. Mr. Attorney General, that is the vote signal, I am informed, and so we will have to go to the Senate floor. We will take a recess now, because by the time we get over there and vote and call the roll, it will be pretty near adjournment time. What time will it suit you to come back this afternoon?

Attorney General KATZENBACH. Whenever you wish, Mr. Chairman.

Senator ERVIN. What about 2:30? Will that be all right?

Attorney General KATZENBACH. 2:30? Yes, sir.

(Whereupon, at 12:10 p.m., the subcommittee recessed, to reconvene at 2:30 p.m., the same day.)

AFTERNOON SESSION

Senator ERVIN. The subcommittee will come to order.

STATEMENT OF THE HONORABLE NICHOLAS DEB. KATZENBACH; ACCOMPANIED BY DAVID SLAWSON AND ALAN MARER, DEPARTMENT OF JUSTICE—Resumed

Senator ERVIN. Mr. Attorney General, I want to invite your attention to the case of the *United States* v. *Harris*, 106 U.S. 629.

In this case there was indictment in the Federal court under section 5519 of the revised statutes, which was the forerunner of the statute involved in the *Guest* case, and which made conspiracies to deprive persons of the equal protection of the laws or of equal privileges and immunities under the laws, a criminal offense.

The validity of the indictment was challenged upon the ground that the 14th amendment only authorized Congress to reach State action, whereas the indictment alleged only private action. The Supreme Court said this on pages 638, 639, and 640:

> The purpose and effect of the two sections of the 14th amendment, above quoted, were clearly defined by Mr. Justice Bradley in the case of the *United States* v. *Cruikshanks*, 1 Woods 308, as follows:

Quoting from that case:

> It is the guarantee of protection against the acts of the State government itself. It is a guarantee against the exertion of arbitrary and tyrannical power on the part of the government and the legislature of the State, not a guarantee against the commission of individual offenses and the power of Congress, whether express

or implied, to legislate for the enforcement of such a guarantee which does not extend to the passage of laws for the suppression of crime within the States. The enforcement of the guarantee does not require or authorize Congress to perform the duty that the guarantee itself supposes it to be the duty of the State to perform and which it requires the State to perform.

That is the end of the quotation from *United States* v. *Cruikshanks*. The opinion in the *Harris* case continues:

When the case of the *United States* v. *Cruikshanks* came to this Court, the same view was taken here. The Chief Justice delivering the opinion of the Court in that case said:

"The Fourteenth Amendment prohibits a State from depriving any persons of life, liberty, or property without due process of law or from denying to any person the equal protection of the law, but this provision does not add anything to the rights of one citizen as against another. It simply furnishes an additional guarantee against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society.

"The duty of protecting all its citizens in the enjoyment of an equality of right was originally assumed by the States and it remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees and no more. The power of the national Government is limited to this guarantee."

So in *Virginia* v. *Rives*, 100 id. 313, it was declared by this court, speaking by Mr. Justice Strong, that "these provisions of the Fourteenth Amendment have reference to State action exclusively and not to any action of private individuals."

These authorities show conclusively that the legislation under consideration finds no warrant for its enactment in the Fourteenth Amendment.

The language of the amendment does not leave this subject in doubt. When the State has been guilty of no violation of its provisions, when it has not made or enforced any law, abridging the privileges or immunities of citizens of the United States, when no one of its departments has deprived any person of life, liberty or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws, when on the contrary the laws of the State as enacted by its legislature and construed by its judicial and administered by its Executive Departments recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress.

Section 5519 of the revised statutes is not limited to take effect only in case the State shall abridge the privileges or immunities of citizens of the United States or deprive any person of life, liberty or property without due process of law or deny to any person the equal protection of the law.

It applies no matter how well the State may have performed its duty. Under it, private persons are liable to punishment for conspiracy to deprive anyone of the equal protection of the laws enacted by the State. That was quoted in the indictment in this case "In the indictment in this case, for instance, which would be a good indictment under the law, if the law itself were valid, there is no intimation that the State of Tennessee has passed any law or done any act forbidden by the Fourteenth Amendment. On the contrary, the gravamen of the charge against the accused is that they conspired to deprive certain citizens of the United States and of the State of Tennessee of the equal protection accorded them by the laws of Tennessee. As therefore the section of the law under consideration is without reference to the laws of the State or their administration by her officers, we are clear in the opinion that it is not warranted by any clause—

And I emphasize "by any clause"—

in the 14th amendment to the Constitution.

Now, Mr. Attorney General, if that statement which I just read from *United States* v. *Harris* constitutes a correct interpretation of the 14th amendment, then does it not necessarily follow that title V of this bill is clearly unconstitutional?

Attorney General KATZENBACH. I can answer that question best, Mr. Chairman, by saying that if the Supreme Court at this term had written the *Harris* case, and in—what was the date of that, about 1882—and in 1882 had written the *Guest* case instead of in this term, then I doubt that we would be here urging this legislation.

Senator ERVIN. Mr. Attorney General, as a matter of fact——

Attorney General KATZENBACH. I do not think it represents a correct statement of the 14th amendment. I can distinguish the case. We distinguished it in a brief in the *Guest* case. I think that is possible to do.

We can make some fine points of distinction here with respect to this case. I can point out to you that the statute involved talked about equal protection of the laws and clearly the right that was involved here was a due process right. I can make that distinction. But I think what is more important, Senator, is to recognize that it is a living Constitution.

I think that the 14th amendment in its history gave a good deal of indication that at least many Members of Congress in all legislative history, that it is somewhat ambiguous, and many Members of Congress thought section 5 vested quite broad powers to implement this.

There followed a period of time, immediately after the 14th amendment was passed, where it seems to me that this case—I think this is probably the strongest case that you have in this regard. I think it is stronger than *Cruikshanks* which preceded it. I think there was a period of time when the States were attempting to adjust to this, where a view of the 14th amendment, a rather restrictive and narrow view of the 14th amendment was taken.

For me it is extremely important to note, as indeed it was noted in the *Harris* case itself, that there has been no background of the State's failure to fulfill its obligations under the 14th amendment, and that was noted in the language which you read in that respect. It is also language you can find in the civil rights cases which I daresay we will get to.

Senator ERVIN. The Court was speaking, Mr. Attorney General, of the allegations of the indictment.

Attorney General KATZENBACH. No, in the language——

Senator ERVIN. Concerning the background of the State's failure to fulfill its obligations—the Ku Klux Klan had originated prior to this time in the State of Tennessee, in Pulaski, and there had been all kinds of racial violence in Tennessee.

Attorney General KATZENBACH. Yes, sir; but——

Senator ERVIN. Much worse than any racial violence that we have now.

Attorney General KATZENBACH. I believe I am correct in saying that it wasn't until the late 1880's, maybe 1887, around in there, that you began to get the first of your formal segregation laws in clear violation of the 14th amendment, when you began having your devices with respect to voting in some of these States.

When we had that history, starting I would say, in the late 1880's, and it seems to me that it is also accurate to say that perhaps beginning with the *Gwynn* case in 1915 and then, going down the line, that a broader view of the 14th and 15th amendments has been taken.

As a matter of fact, it is an interesting aside, perhaps, to note that Mr. Justice Bradley, in the quotation that you read here, did feel that the 15th amendment did apply to purely private action with respect to its enacting clause.

Senator ERVIN. Mr. Attorney General, I hate to engage in controversy with you on that, but I think he said exactly the opposite in the *Civil Rights Cases* of 1883.

Attorney General KATZENBACH. I believe——

Senator ERVIN. I know none of us can carry all that judges have said in our heads, but I challenge anybody to find that Justice Bradley ever in any opinion said anything to indicate that he thought these things were interfered with by the 13th amendment. He considered the 13th amendment and the 14th amendment and the 15th amendment all in the *Civil Rights Cases* where he wrote the majority opinion and repudiated the idea that any of them support such legislation as that proposed by this bill.

Attorney General KATZENBACH. Speaking of the 15th amendment in that same case, I will read the words of Mr. Justice Bradley:

> Considering as before intimated that the amendment, notwithstanding its negative form, substantially guarantees the equal right to vote to citizens of every race and color, I am inclined to the opinion that Congress has the power to secure that right not only as against the unfriendly operation of State law but against outraged violence and combinations on the part of individuals, irrespective of State laws. Such was the opinion of Congress itself in passing the law at a time when many of its Members were the same and were consulted on the original form of the amendment in proposing the States.

Senator ERVIN. He is speaking there of the right to vote.

Attorney General KATZENBACH. Yes.

Senator ERVIN. Which rests upon——

Attorney General KATZENBACH. Fifteenth amendment.

Senator ERVIN. The second section of the first article.

Attorney General KATZENBACH. Which I believe, sir, he was speaking of the 15th amendment when he said this.

Senator ERVIN. Which case are you reading from?

Attorney General KATZENBACH. I was reading from the *Cruikshank* case in the lower court, the same one that you are citing here in the *United States* v. *Harris*, and it appears in 1 Woods, page 324.

Senator ERVIN. It was held in *Cruikshank* that the indictment was not valid under the 15th amendment, wasn't it?

Attorney General KATZENBACH. Yes, sir.

Senator ERVIN. Because it wasn't based upon the allegation of denial of the right to vote on the basis of race or previous condition of servitude.

Attorney General KATZENBACH. My point was an aside, but I said it was interesting to note that Mr. Justice Bradley, who took this view of the 14th amendment, took a somewhat different view of the 15th amendment.

Senator ERVIN. But it was held in that case that the 15th amendment didn't apply.

Attorney General KATZENBACH. Yes, sir; that is right.

Senator ERVIN. Because——

Attorney General KATZENBACH. Because the indictment didn't say anything about race.

Senator ERVIN. That is right.

Attorney General KATZENBACH. Yes. The indictment had said something but it wasn't the issue as to whether or not they could reach private action.

Senator ERVIN. Anyway, Mr. Attorney General, do you think that what I read from *United States* v. *Harris* can possibly stand together, both of them being true?

Attorney General KATZENBACH. Yes, sir; I think they can stand together. As I say, I think that case can be distinguished. I

told you the ground for distinction, but I was trying to point out, Senator, that I think, and I think that you think, that the Supreme Court would uphold section 5 of this law.

Senator ERVIN. I am taking the position the Supreme Court ought not to uphold most of its provisions. I am taking the position that if the Supreme Court upholds this title in most of its provisions, it will be tantamount to the Supreme Court amending the Constitution by changing the meaning of the 14th amendment and changing the meaning of every decision down to this date construing the 14th amendment.

Attorney General KATZENBACH. Yes, sir; my recollection is you expressed the same doubts——

Senator ERVIN. Yes.

Attorney General KATZENBACH. With respect to the 1964 act, and the same doubts with respect to the 1965 act.

Senator ERVIN. I did with respect to certain features of both of them, but it turns out that I had entirely too much confidence in the judicial stability of the Supreme Court.

Attorney General KATZENBACH. What I don't really understand, Senator, is you think it is equally possible, just as a hypothetical proposition here, do you think it is equally possible that the Court could have been wrong in the *Harris* case as against the Court being wrong in the *Guest* case?

Senator ERVIN. No.

Attorney General KATZENBACH. When you cite the *Harris* case for yourself, I cite the *Guest* case on my side. Wouldn't you say at least we start out from the proposition that there is no particular reason why the Court was more right in the one case than in the other?

Senator ERVIN. I don't accept that because, as you and I agreed this morning, the 14th amendment has nothing whatever to say in respect to the action of individuals. It prohibits the State from denying any person due process of law, or denying him the equal protection of the laws, or denying him the privileges and immunities of Federal citizenship. That is all it does.

Certainly, it is illogical, when the 14th amendment doesn't cover private action to say that Congress, under the power to enforce the amendment's provisions, can reach private action. That is not only doing violence to the Constitution, but is doing violence to the English language and is doing violence to logic.

Attorney General KATZENBACH. Senator, we agreed that the 14th amendment, absent section 5, without implementing legislation, clearly is a simple prohibition upon the State. I have taken the view here, and I think it is the right view—obviously, you don't—I have taken the view that in the implementing legislation, it is possible for Congress to make sure that those rights are insured.

I think that is strengthened, and this is the point I was trying to make, is strengthened when you have the background and history of not only a failure on the part of States to insure that, but actual practices designed to deny those rights.

I don't believe that the people who drafted the 14th amendment and gave this power to implement by legislation to the Federal Government in section 5, intended, as I think your argument would carry, to say they could say no more than what the 14th amendment itself says, because the 14th amendment is drafted in very broad terms, as it says, no State can do this, that or the other thing.

I fail to see that you give very much scope to the implementation of this, if you say all it can do is restate what was first said.

Now I take the view that the important thing here is, these were rights, these are rights guaranteed to people, and that if the States, if there is a history, particularly, if there is a history where the States had not been securing these rights to the people, under section 5 as it was explicitly put in there, it was necessary and important to put in legislation. It uses the word "appropriate," I believe. I think the legislation is much more appropriate after many, many years of denial than it might have been at the time of the Civil Rights Act, the 1866 session and that period of time. I believe that is the view that the Supreme Court takes today. I doubt if that was the view the Supreme Court took at the time of the *Harris* case.

Senator ERVIN. We used to have the 18th amendment, which gave Congress the power to legislate to enforce the provision abolishing the manufacture, transportation, and sale of alcoholic beverages. Do you think Congress under that amendment could pass a law to prohibit people from raising bantam chickens?

Attorney General KATZENBACH. No, sir; but you will recall the *Everett Brewery* case. The legislation that Congress enacted went to the prohibition of the sale of alcohol for medicinal purposes. And you will recall the argument was made in that case, not unlike the argument you are making now, that it went beyond the language of the amendment, and that, again, was upheld by the Court.

Senator ERVIN. Section 5 of the 14th amendment merely says that Congress can enforce by appropriate legislation the provisions of the amendment.

Attorney General KATZENBACH. Yes, sir.

Senator ERVIN. And the provisions of the amendment merely prohibit State action, and that is exactly what *United States* v. *Harris* said, and exactly what the *Cruikshank* case said, that where Congress went beyond the enforcement of prohibition of State action forbidden by the first section, it was transcending its power. And I don't think there is any question that under those two decisions, most of title V of this bill is clearly invalid.

Now, title V does not have ——

Attorney General KATZENBACH. Senator, I think, to repeat, that the Supreme Court today, after all of this history, which I find extremely relevant to the decision, if today it had written the exact opinion of the *Harris* case and say, at the last term, decided the *Cruikshank* case, I don't think I would be here saying that I believe that this legislation—I might still believe that the Court was wrong but I would not believe that the Court would uphold this legislation. I think that these cases were wrongly decided even then, but I think it would be very wrongly decided if they were to be decided now after all these years of history.

Senator ERVIN. Would you be here advocating the enactment of title V, if six members of the Supreme Court had not indulged in *obiter dicta* in the *Guest* case?

Attorney General KATZENBACH. Yes, sir.

Senator ERVIN. You would?

Attorney General KATZENBACH. I would, subject to this qualification. If the Court, this present Court, in the *Guest* case, completely rejected the argument that we made, and if it had said in *obiter dicta*

that you could not reach private action in this case, then I don't think that I would be advocating.

If it had remained, that the Court had remained silent on that point, then I think that I would have urged this nonetheless.

Senator ERVIN. You do note that Justice Harlan said in a footnote that the action of Justice Clark and his two associates was extraordinary.

Attorney General KATZENBACH. I don't recollect the footnote, but I will take your assurance that that is what he said.

Senator ERVIN. I wish you would have one of your associates verify it. You will see that I am not a lone voice crying in the legal wilderness, by saying it is extraordinary for judges to announce what they will do in the future, if a case should happen to come before them.

Attorney General KATZENBACH. No, sir; but you appear to be a minority.

Senator ERVIN. I don't know about that. I expect——

Attorney General KATZENBACH. Just as Harlan, at least, was a minority on that point.

Senator ERVIN. I expect that you could find out I would either be in the majority or a very strong minority.

Attorney General KATZENBACH. Do I understand you to mean on this point, as to whether this is proper?

Senator ERVIN. Yes, on this point and also on the other.

Attorney General KATZENBACH. But we do agree on the need for Federal legislation in this respect?

Senator ERVIN. I agree on the proposition that before we pass title V we should amend the Constitution. We should remove from the Court the temptation to further twist the words of the 14th amendment.

Attorney General KATZENBACH. Well, of course, I don't think that they are.

Senator ERVIN. And also remove any temptation for the Attorney General to advocate such action.

Attorney General KATZENBACH. Could I just inquire for my own clarification, you talk about this as title V.

Senator ERVIN. Yes.

Attorney General KATZENBACH. Is it your view that every provision of title V is unconstitutional, or just those provisions which depend on the 14th amendment? Could we narrow the area of controversy in that way? I don't know whether——

Senator ERVIN. I think most of title V depends on the interpretations placed on the 14th amendment to deal with the duty of the State to refrain from doing some things.

Now, there may be a provision in there to the effect that interference with one's right to travel interstate is a crime, I would agree that comes under something besides the 14th amendment.

Attorney General KATZENBACH. How about voting? Are we all right on voting?

Senator ERVIN. No; because you are dealing with individuals. Only the United States or the States can violate the 15th amendment because it only applies to them.

Attorney General KATZENBACH. How about Federal elections on that?

Senator ERVIN. Federal elections, section 2, article I, I would agree that as far as Federal elections are concerned, it would be valid.

Attorney General KATZENBACH. It would be all right as far as that is concerned.

Senator ERVIN. But you have got plenty of law on that subject already.

Attorney General KATZENBACH. How about the employment provision?

Senator ERVIN. The employment provision possibly would come under the interstate commerce clause which the Court seems ready to interpret to cover everything on the face of the earth, from sexual intercourse to burying the dead.

Attorney General KATZENBACH. I don't know whether it is worth going through them all or not, but a number of these do depend on provisions other than the 14th amendment, Mr. Chairman.

Senator ERVIN. I would take the position that there is nothing in title V which makes the operation of any of its provisions dependent upon the action of a State in denying any of the rights secured against State action, by the 14th amendment.

Attorney General KATZENBACH. No, sir; but my point is that with respect to all except two of these, you could base them on other sections of the Constitution other than the 14th amendment, so I would think that probably—and the 15th amendment on voting, although you would confine that to Federal elections, despite the Voting Rights Act case—it seems to me that only in terms of schools and in terms of the old title VI part of the 1964 act, that is, participating in and enjoying any benefits, service, or privilege from the State or Federal Government, really all of your arguments now are directed to those two sections.

Senator ERVIN. There is a section in there with reference to negotiating sales of property.

Attorney General KATZENBACH. Oh, yes, sir; but I think that that might be justified under the commerce power. I thought you said a minute ago that was broad enough to do it.

Senator ERVIN. Well, I wouldn't go quite that far, but I say under the interpretations that have been placed on it, that the power to regulate commerce, which was originally intended to regulate the movement of persons, goods, and communications, from one State to another, now, under some decisions can be construed to cover everything that affects interstate commerce. Therefore, since people are created by sexual acts, Congress under that broad interpretation could regulate sexual intercourse, and it could also regulate the burial of the dead, because if the administrator buried the deceased in a coffin that had been shipped in interstate commerce, he would be promoting interstate commerce, and if he refused to do so, he would be impeding or obstructing interstate commerce. Under the suggestions in some of the cases, I don't believe I am very extravagant in those statements.

Attorney General KATZENBACH. No, sir; I don't think—you may be stating your case fairly broadly on this, Mr. Chairman, but I was interested yesterday in your quote from that *Polish Alliance* case. It fits with my view.

I don't think because Congress can constitutionally legislate something, it necessarily means that they should legislate that, and I don't think you think so either. There are many things that the Constitution does not require, that the Congress deem wise, and there is a leg slative judgment which doesn't depend on the Constitution.

In your quote on the *Polish Alliance* case of Mr. Justice Frankfurter in your statement yesterday, I looked up the quotation afterward, and I was interested in the way in which Mr. Justice Frankfurter went on after that quotation, because from the point where you stopped, he starts, and he says:

> On the other hand—

and then he proceeds to go on with the old admonition—

> Never become stale. This Court is concerned with the bounds of legal power and now with the bounds of wisdom in its exercise by Congress. When the conduct of an enterprise affects commerce among the States, it is a matter of practical judgment not to be determined by abstract motions. The exercise of this practical judgment the Constitution entrusts, primarily and very largely, to the Congress, subject to the latter's control by the electorate.
>
> Great power was thus given to the Congress, the power of legislation and thereby the power of passing judgment upon the needs of a complex society. Strictly confined, though far-reaching power was given to this Court, that of determining whether the Congress had exceeded limits allowable in reason for the judgment which it had exercised.
>
> To hold the Congress could not deem the activities here in question to affect what men of practical affairs call commerce, and to deem them related to such commerce, merely by gossamer threads and not by solid ties would be to disrespect the judgment that is opened to men who have the Constitutional power and responsibility to legislate for the Nation.

Mr. Justice Frankfurter it seems to me was agreeing with me, that the commerce power was extremely broad.

Senator ERVIN. I don't think that you and I and Mr. Justice Frankfurter disagree on that at all. In your statement you said something about interpenetrations in modern society, and I quoted a part of Justice Frankfurter's opinion to the effect that these interpenetrations in modern society have not wiped out State lines, and even though scholastic reasoning may prove no activity is entirely isolated within the boundaries of a single State, that cannot justify absorption by the legislative power of the United States over all activity.

Attorney General KATZENBACH. Then he went on to say how broad that power was.

Senator ERVIN. Yes; but he said also that it couldn't cover every activity. Now, frankly, I think that under judicial interpretations of the interstate commerce clause, the rule can be stated as follows: That Congress has the power to regulate interstate commerce, and it has the power to regulate intrastate activities as a part of its regulation of interstate commerce so far as such regulation is either necessary or appropriate to its effective regulation of interstate commerce. Of course, with hundreds and hundreds of cases dealing with interstate commerce, we sometimes are going to have Justices emulating Homer and nodding a bit, and I think they nodded very much when they said a man couldn't raise wheat on his own land for his own consumption. I don't see how that conclusion can exist under the due process clause of the fifth amendment, but the due process clause didn't seem to trouble the Court nevertheless.

I never did see any interstate commerce there. All I saw was the fellow moving his jaws when he consumed his wheat, and a like action on the part of his family and domestic animals.

I regret it takes time to present my point on this matter. It is not for any other purpose that I present this.

(Whereupon, Senator Javits entered the hearing room.)

Senator ERVIN. I want to call attention to the *Civil Rights Cases* of 1883, which are still, insofar as interstate is not affected, in effect, according to the opinion of Justice Stewart in the *Guest* case. He cites it to sustain his decision there.

The *Civil Rights Cases* reported in 109 U.S. at page 3, is often quoted, and it has a clear exposition of the point I wish to make, which I think is a correct interpretation of the words in the 14th amendment. Incidentally, I digress to say that these cases involved the Civil Rights Act of 1875. The opinion of the Court states, starting at page 10.

The first section of the Fourteenth Amendment (which is the one relied on), after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States. It declares that:

"No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation and State action of every kind which impairs the privileges and immunities of citizens of the United States or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the law.

It not only does this, but in order that the national will thus declared may not be a mere *brutum fulmem*, the last section of the amendment vests Congress with the power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition, to adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void and inoculous.

This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest the Congress with the power to legislate upon subjects which are within the domain of State legislation, but to provide modes of relief against State legislation or State action of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment.

Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed State laws or State proceedings and be directed to the correction of their operation and effect.

Now, I omitted some that is not particularly germane, and I continue on page 13:

And so in the present case, until some State law has been passed or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment nor any proceeding under such legislation can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority.

Of course, legislation may, and should be provided in advance to meet the exigency when it arrives; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, State laws or State action of some kind adverse to the rights of the citizens secured by the amendment.

Such legislation cannot properly cover the whole domain of right appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them.

It is absurd to affirm that because the rights of life, liberty and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part oft the Sates without due process of law, Congress may therefore provide due process of law for there is indication in every case; and that, because a denial by a State to any persons of the equal protection of the laws is prohibited by the amendment, therefore Congress may establish laws for their equal protection.

In time the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is such as may be necessary and proper for counteracting such laws as the States may adopt or enforce in which, by the amendment, they are prohibited from making law enforcing, or such acts and proceedings as the States may permit or take and which, by the amendment, they are prohibited from committing or taking.

and at page 14:

The truth is that the implication of a power to legislate in this manner is based upon the assumption that if the States are forbidden to legislate or act in a particular way on a particular subject and the powers conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such State legislation or action.

The assumption is certainly unsound. It is repugnant to the 10th amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people.

Attorney General KATZENBACH. I think, if I might comment on that——

Senator ERVIN. Yes, sir.

Attorney General KATZENBACH. It is important, Mr. Chairman, to remember that the issue before the Court in that case was the Public Accommodation Statute, and that the argument for its enforcement was based entirely on the 14th amendment.

I came and testified before with respect to these matters. I think the Department of Justice expressed, with respect to the public accommodations section, some reservations as to whether, in view of this, it could be justified on the 14th amendment. The Court there was talking about, at least in that context of time, were considered to be purely private rights. We are not talking about equal protection of the laws. We are not talking about that kind of situation.

It seems to me significant that even in the language which you read there, that it pointed out that even under the 14th amendment, that Congress was here not seeking to correct the effects of any past State action, and this was given some emphasis by the Court in there.

I think it is also important to note what Mr. Justice Brennan said about this in the *Guest* case. He said, and this is on page 9 of the opinion, Mr. Chairman:

I acknowledge that some of the decisions of this Court, most notably an aspect of the civil rights case 109 U.S. 311 have declared that Congress' power under Section 5 is confined to the adoption of "appropriate legislation for correcting the effect of prohibitive State laws and thus to render them effectually null, void, and inaccurate."

I do not accept that, and the majority of the Court today rejects this interpretation of Section 5. It reduces the legislative powers to enforcement provisions of the amendment to that of the judiciary, and it attributes a far too limited objective to the amendment's sponsors.

But, again, going back to title V itself, let's take the section which deals with schools, for example. I think it is clear, at least it is clear to me, Mr. Chairman, that one of the reasons that you have intimi-

dation, violence, threats, and so forthwith respect to integrated schooling or desegregated schooling is the fact that the segregated schools were maintained by State laws, so it does seem to me that in that regard it is pretty clear——

Senator ERVIN. And, also pursuant to the 14th amendment as it was interpreted from 1898 to 1954.

Attorney General KATZENBACH. Yes.

Senator ERVIN. Yes.

Attorney General KATZENBACH. And since. A long time after that segregation has continued to be maintained. But the point is whether or not they thought they were violating the Constitution at that point, irrespective of *Plessy* v. *Ferguson*, it seems to me that it would be accurate to say that a good many of the feelings in this regard, a good deal of the resistance to this stems from the system which the State had maintained and supported and indeed required.

Senator ERVIN. However; the crimes that are defined in title V are directed solely against the actions of individuals and not against State actions.

Attorney General KATZENBACH. Yes, sir.

Senator ERVIN. Yes.

Attorney General KATZENBACH. Yes, sir. I suggest that you would be much less likely to have that individual action, had it not been for the act of maintaining a segregated system in the schools for a long time.

Senator ERVIN. I might interject at this point that what intimidation is going now as far as the schools are concerned is being practiced by the Department of Health, Education, and Welfare.

Attorney General KATZENBACH. Senator, you know I disagree with that.

Senator ERVIN. Well, go down to North Carolina and you will find out they have agents down there almost telling every school district how to run the school.

Attorney General KATZENBACH. Senator, that is something of an overstatement.

Senator ERVIN. Very slightly.

Attorney General KATZENBACH. Well, I recognize we might differ about that, but I don't think that you are free from intimidation in the State of North Carolina with respect to the desegregation of the schools.

Senator ERVIN. If you don't accept the bribery you lose the funds. This is going on all through the South and I just wonder what is going on in that respect in the Northern States.

Attorney General KATZENBACH. The same law applies to everyone, north, south, east, and west. The same Constitution, Senator.

Senator ERVIN. Yes, but it is not being used equally. It is not used except in one area.

But I want to call attention to a few other cases. One, *Corrigan* v. *Buckley*, 271 U.S. 323, which was decided in 1926. I wish to invite your attention to this portion of the opinion. This is from page 330:

> And the prohibitions of the Fourteenth Amendment have reference to State action exclusively and not to any action of private individuals. It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment.

Attorney General KATZENBACH. I am not, frankly, familiar with that case, Senator. Was a statute involved in that, or is that simply a restatement which you and I agree about, about the first section of the 14th amendment?

Senator ERVIN. The statute involved was one in which an effort was made to invalidate certain restrictive racial covenants. It was held they were not reachable. This was a District of Columbia case and, of course, the equal protection of the laws doesn't apply to the District of Columbia, it not being a State. However, there are laws, in effect, which make the provisions applicable to the District of Columbia and the due process clause of the 5th amendment is held to embrace equal protection. Therefore the case has a relevancy on this point.

Attorney General KATZENBACH. It upheld the legally——

Senator ERVIN. Yes.

Attorney General KATZENBACH. It upheld the legality of racial covenants, but not the enforcement, is that right?

Senator ERVIN. It upheld both as far as that original case was concerned.

Attorney General KATZENBACH. Upheld the enforcement in State courts?

Senator ERVIN. Yes. Now, the one that raises the point you mentioned is *Shelley* v. *Kraemer*.

Attorney General KATZENBACH. Yes.

Senator ERVIN. That is 334 U.S. 1, and I want to read at page 13. This was the first case where it said it was State action for State courts to enforce restrictive racial covenants. This case originated in Missouri. I invite your attention to this portion of the opinion of Chief Justice Vinson on page 13:

> Since the decision of this Court in the *Civil Rights Cases* 109 U.S. 3 (1883), the principle has become firmly imbedded in our Constitutional law that the action prohibited by the first section of the 15th amendment is only such action as may fairly be said to be that of the States.
>
> That amendment erects no shield against merely private conduct, however discriminatory or wrongful. We conclude therefore that restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the 14th amendment so long as the purposes of these agreements are effectuated by voluntary adherence to their terms. It would appear that there has been no action by the State, and the provisions of the amendment have not been violated.

Attorney General KATZENBACH. Of course, that is the point on which we are not in any disagreement.

Senator ERVIN. It said in that case, private action couldn't be reached, that private action didn't violate the amendment.

Attorney General KATZENBACH. No, sir. I have attempted all along, Senator, to agree that the amendment without legislation does no more than prevent State action, so that we are accumulating precedent for both of us on that. The issue here is whether or not, under the legislation section, Congress can reach further than that.

As far as what the courts do, I agree that the courts on this are confined to what can properly be called State action. That isn't an issue between us.

My recollection in *Shelley* v. *Kraemer*, is that they expressly distinguished the *Corrigan* case on the grounds that I suggested, that their enforcement was not involved.

Senator ERVIN. I am inclined, I have an indistinct recollection that the *Corrigan* case went off on the question of the right of appeal.

Attorney General KATZENBACH. Yes.

Senator ERVIN. Now, the case of *Barrows* v. *Jackson*, 346 U.S. 249, which was handed down in 1953, held the same thing about restrictive racial covenants, that they did not violate the 14th amendment as long as they were carried out by voluntary action of individuals.

Over a very vigorous dissent from Chief Justice Vinson, the Court held that you could not recover damages for a breach of these restrictive covenants because to allow damages would be State action.

I might state there is a right interesting question on standing to sue, but it is not germane to what you and I are concerned with.

I would like to put this in the record, from *Barrows* v. *Jackson*, 346 U.S. 249 at page 253. This first part is from the quotation in the *Shelley* case:

> We would conclude therefore that restrictive agreements standing alone cannot be regarded as violative of any right guaranteed to petitioners by the 14th amendment as long as the purposes of these agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the amendment have not been violated.

Then after that quotation the Court continued:

> That is to say, the law applicable in this case did not make the covenant itself invalid. No one would be punished for making it and no one's constitutional rights were violated by the covenanter's voluntary adherence thereto. Such voluntary adherence would constitute individual action only.

Attorney General KATZENBACH. Again, there is no disagreement between us on that, Senator.

Senator ERVIN. Of course, our fundamental disagreement on that is this——

Attorney General KATZENBACH. Our fundamental disagreement is what the Congress can do under the legislative sections of that, not what the sections themselves do.

Senator ERVIN. We both agree that these decisions hold that the 14th amendment does not apply to anything except State action, and not to private action. We agree that far, I think, and these decisions certainly hold that.

Where we disagree, you say that although the amendment has nothing whatever to do with private action, it authorizes Congress to regulate private action, and to punish it, and that is our fundamental disagreement.

Attorney General KATZENBACH. I don't think you are quoting me on that, Senator. I don't think that is the way I expressed it.

Senator ERVIN. That is the impression your statement makes on my mind, and frankly, I am at a loss to understand how a constitutional provision, which doesn't even touch a subject, can be authority for Congress to legislate in respect to that subject. The 14th amendment doesn't touch private individual action, and it can't possibly authorize Congress to legislate in respect to private individual action.

Attorney General KATZENBACH. Senator, I think I can't do much better than restate what I have been restating, but it does seem to me, and I will repeat it, that the difficulty with your view is that it gives no operative scope to Congress in this, because you say it forbids, and I agree on its face, the State from doing anything.

I agree with that. And you are saying all Congress can do is keep legislating, forbidding the State from doing it. I say that the legislative provisions of these amendments were intended to make them effective, and I say that if they were not made effective, is those rights were not made effective by the States, that your capacity to enjoy a right that should be guaranteed you by a State is interfered with by private persons, that Congress can deal with that under section 5 of the 14th amendment and under section 2 of the 15th amendment.

Senator ERVIN. Which is exactly contrary, as I interpret the decisions, to what was held in the *Harris* case, the *Civil Rights Cases*, and the *Cruikshank* case.

Attorney General KATZENBACH. Which, as I said, I think are distinguishable, and I think if they are not distinguishable, which I believe them to be, that it is pretty clear that they are not the law today.

Senator ERVIN. I wish to call attention now to *Burton* v. *Wilmington Parking Authorities*, 365 U.S. 715, which was written by Justice Clark, and I read the statement from page 721:

> Civil Rights Cases 109 U.S. 3 (1883) imbedded in our Constitutional law the principle that the action inhibited by the first section, equal protection clause of the 14th amendment, is only such action as may be fairly said to be that of the State. That amendment erects no shield against merely private conduct however discriminatory or wrongful.

To my mind I can't reconcile that statement of Justice Clark with the statement in the *Guest* case.

Attorney General KATZENBACH. I think perhaps the reconciliation is there was no legislation involved in that case. There was legislation involved in the *Guest* case. That would be the distinction that would come to my mind, Mr. Chairman.

Senator ERVIN. Which, of course, comes right back to the same old proposition that a constitutional provision which gives Congress power to prohibit certain action on the part of the State is interpreted by you to give Congress power to regulate and punish the action of individuals not connected with States.

Attorney General KATZENBACH. Especially so, Mr. Chairman, in those instances where the evil sought to be cured is at least in part attributable to past State action, and at least in those cases where the State has not taken, over a long period of time, sufficient action to insure that those rights guaranteed to it, guaranteed to individuals, have been effectively guaranteed to it, and that is, of course, one of the ways in which I read the earlier cases, that there had been no opportunity for the States to take the necessary action, and indeed, in many of them, they have.

I think in the *Civil Rights Cases* themselves one of the things that the Court gave some emphasis to was the fact that there were many statutes on the books doing exactly this under State law, and I think that is one of the reasons why at that time and period in our history they felt that with respect to what they considered to be a private right, there was no power under section 5 of the 14th amendment.

(Whereupon, Senator Kennedy entered the hearing room.)

Senator ERVIN. I wish to invite attention to *Garner* v. *Louisiana*, 368 U.S. 157, and to read the following portions from the concurring opinion of Justice Douglas as it appears on pages 177 and 178:

It is of course State action that is prohibited by the Fourteenth Amendment, not the action of the individuals. So far as the Fourteenth Amendment is concerned, individuals can be as prejudiced and intolerant as they like. They may, as a consequence subject themselves to suit for assault, battery or trespass, but those actions have no footing in the Federal Constitution. The line of forbidden conduct marked by the equal protection clause of the Fourteenth Amendment is crossed only when a State makes prejudice and intolerance its policy and enforces it as was held in *Civil Rights Cases* 109 U.S. 3.

Mr. Justice Bradley, speaking for the Court, said "Civil rights such as guaranteed by the Constitution against State agression cannot be impaired by the wrongful act of individuals unsupported by State authority in the shape of laws, customs of judicial and executive proceedings.

That was a sit-in case, incidentally, in which the Court in the majority opinion nullified the conviction on the ground that there was no evidence to sustain the conviction, and therefore there was denial of due process in the trial.

Attorney General KATZENBACH. Essentially the same point again, I am making. I thought it was interesting that Mr. Justice Black, in the *Harper* case involving poll tax, made this distinction, because he made it clear in that decision where he dissented by saying the poll tax itself is not abolished by the equal protection clause, but he then went on to say he had no doubt in his mind whatsoever that Congress could have done it under section 5 of the 14th amendment, as you will recollect.

Senator ERVIN. There were several strange things said in that case. One of them gives me great discomfiture, and that is the statement which Justice Douglas gave to vindicate the majority opinion when he said, and I think I can quote him verbatim:

Notions of what constitutes equal treatment under the equal protection clause do change.

And he underlined the word "do." That statement is really the only reason he gives for the decision outside of a lot of legal mumbo-jumbo, which has no application to the case or to the opinion.

I picked up my dictionary and I looked up the definition of this word "notion," and it gave me much concern, because my dictionary says notions are "imperfect, general, vague conceptions or ideas of something."

It is a terrible thing to have two opinions by the Supreme Court of the United States and interpretations placed on the Constitution from 1868 down to date overruled on the idea that "notions of judges do change" and therefore the Constitution changes with them.

Attorney General KATZENBACH. Mr. Chairman, I can recollect a very distinguished former Justice of the Supreme Court of North Carolina, who said that he didn't think any case, any issue, was finally decided until it was decided rightly.

Senator ERVIN. Yes, that former judge of the Supreme Court of North Carolina said that and he sticks to it, but he says that nothing is ever decided right until it is decided in the right way by the one having the right to decide it. And I say that the Supreme Court of the United States doesn't have the power to amend the Constitution.

All I am trying to do is save some few remaining remnant of the Constitution for the benefit of future generations of American , and, I might add of all races.

I want to invite attention to the case of *Peterson* v. *City of Greenville* (373 U.S. 244), which was decided in 1963, and in which the

opinion was written by the Chief Justice. I invite attention particularly to this statement on page 247:

> It cannot be disputed that under our decisions private conduct abridging individual rights does no violence to the equal protection clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it.

Attorney General KATZENBACH. The same point, the same comment.

Senator ERVIN. Yes. How can Congress make acts of individuals crimes, when individuals do not violate the amendment, do not impinge upon the amendment and are not forbidden by the amendment from doing anything?

Attorney General KATZENBACH. By invoking its legislative powers under section 5.

Senator ERVIN. In other words, section 5, which merely authorizes Congress to enforce provisions which are binding only upon the States, gives Congress the legislative power to regulate actions of individuals.

Attorney General KATZENBACH. Where those rights, at least where those rights have not been effectively implemented by the States themselves.

Senator ERVIN. Well, despite the *oriber dicta* in the *Guest* case, I can't accept that as being valid, and I take consolation from the fact——

Attorney General KATZENBACH. I thought if you would, we could cut this hearing short, sir.

Senator ERVIN. One time a lawyer tried to set aside another lawyer's will owing to lack of testamentary capacity. The only evidence was that the testator had disagreed with certain decisions of the courts and it was held that that was not evidence of lack of testamentary capacity. I take consolation in that in my fight to try to preserve some parts of the Constitution for the people of America.

Attorney General KATZENBACH. I have no quarrel for disagreements with the decisions of the Court, Senator, but I don't think the fact that one disagrees with them somehow eliminates them from the law.

Senator ERVIN. No, that is a very unfortunate thing in this particular case. It is a very unfortunate thing for the Constitution really.

Attorney General KATZENBACH. You see, I disagree with some of the cases that you cited earlier, Mr. Chairman, but I didn't think the fact that I disagreed with those earlier decisions of the Supreme Court, that I think they are wrongly decided, kept them from being at that time the law of the land.

Senator ERVIN. Well, maybe you will agree with me on the proposition that the purpose of interpreting the Constitution is to ascertain and give effect to the intention of those who framed and ratified that document.

Attorney General KATZENBACH. Yes, sir.

Senator ERVIN. And that is certainly what Chief Justice Marshall said in the case of *Ogden*, which is one of the great cases of the country.

Attorney General KATZENBACH. I agree with you.

Senator ERVIN. And he also says that the people who wrote the Constitution must be deemed to have intended what they said.

On that point I would say that when the people who wrote the 14th amendment said that the only thing it did in the first section, so far as it was pertinent, was to prohibit certain specific actions on the parts of States, it meant exactly that, and not that the Court could construe those words to mean something else and give Congress power that the amendment doesn't give to it, but that is what we have been arguing about a good deal.

I want to read article V of the Constitution.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Do you know of any other provision in the Constitution that authorizes anybody to amend it?

Attorney General KATZENBACH. No, sir. I know of no other provision of the Constitution that authorizes anyone to amend it.

Senator ERVIN. And isn't there a fundamental distinction between interpreting the Constitution and amending the Constitution?

Attorney General KATZENBACH. Yes, sir; there is a fundamental distinction between the two. I know of nothing in the Constitution that says that one interpretation by the Supreme Court of the United States is inherently to be the law and to remain the law forever and ever, amen.

Senator ERVIN. Well, it does say by inference at least, the *Ogden* case says, if that interpretation happens to be a correct interpretation of the Constitution it's to be adhered to, until the Constitution is changed; that is the phraseology, is it not?

Attorney General KATZENBACH. Yes, sir; if it is a correct interpretation.

Senator ERVIN. So you still maintain that you can take words that only refer to States and infer from them that an interpretation which confines the power of Congress to deal only with those matters is an incorrect interpretation of the 14th amendment?

Attorney General KATZENBACH. Yes, sir, and I think I am supported even by the history of the 14th amendment in that regard. I think they intended Congress to have broad powers in that, and that view is, that I have, is shared by many members of the Supreme Court.

Senator ERVIN. And also is objected to by many other people, is it not?

Attorney General KATZENBACH. Yes, but I don't think that you decide these cases on a poll one way or another.

Senator ERVIN. Don't you know that there is a great deal of the history of the 14th amendment which shows that the reason they prohibited action on the part of the States, rather than action on the part of the individual, was because the men who wrote the 14th amendment did not wish to fundamentally change the nature of this country, and make the Federal Government a strong centralized power?

Attorney General KATZENBACH. Yes, sir.

Senator ERVIN. And they desired to leave the duty of protecting the rights of individuals to the States where they had originally rested.

Attorney General KATZENBACH. Yes, that has some support in debates, Mr. Chairman, but the very fact that they added section 5 on that amendment left the power with Congress, cuts to some extent the other way.

I don't think, Mr. Chairman, we have found a better way of deciding what the Constitution, the proper, correct interpretation of the Constitution, other than having, than letting the Supreme Court of the United States decide that issue—I don't think that going out and polling the populace as to what they think the Constitution means is a very good way. Lawyers differ about this. We have left it in our society virtually from the outset to the Supreme Court of the United States, and I don't know a better way.

Senator ERVIN. And you agree with me on the proposition that it is the duty of the Supreme Court to interpret that instrument so as to ascertain and give effect to the intention of the men who drafted it and the men who ratified it?

Attorney General KATZENBACH. Yes, sir; necessarily adjusted as it would have to be to the times and conditions of the present. It is a living Constitution.

Senator ERVIN. Well, it is not a living Constitution unless it retains its meaning, is it?

Attorney General KATZENBACH. Retains its basic fundamental meaning; yes, sir.

Senator ERVIN. In other words, if the Constitution is to be interpreted according to the notions of judges, as Justice Douglas suggested in *Katzenbach v. Virginia State Board of Elections*, then the Constitution is not a living document, but it is a dead document; isn't that true?

Attorney General KATZENBACH. No, sir, I don't, I can't agree with that statement, because I don't believe that is what Mr. Justice Douglas did in that statement. I can't accept your characterization of what he did.

If we were to agree that the Supreme Court was paying no attention to the Constitution, and deciding things in terms of their own preferences and prejudices, and so forth, that would be a very serious matter. I don't believe that that is what the Supreme Court is doing. I believe that every Justice on there, whether I agree with him or not, on any decision is being faithful to his oath.

Senator ERVIN. Didn't both the *Breedlove* case and the *Butler* case decide that a State poll tax, like that of Virginia, was valid?

Attorney General KATZENBACH. It is correct to say that those cases did not knock out a poll tax at that time on the arguments that were made.

Senator ERVIN. But, didn't they actually sustain it affirmatively as a valid exercise of legislative power of the State?

Attorney General KATZENBACH. Under the facts and arguments then presented. I don't think the issue was presented or argued as it was in the *Harper* case.

Senator ERVIN. Well, under the decision in that case, any State tax would be void, would it not, because Mr. Justice Douglas said

that the Virginia poll tax denied equal protection of the laws because it was harder for a poor man to pay his tax than it was for a man of affluence?

Attorney General KATZENBACH. Yes.

Senator ERVIN. Wouldn't that invalidate every State tax?

Attorney General KATZENBACH. Yes; every State tax——

Senator ERVIN. Every one without exception.

Attorney General KATZENBACH. Every State tax as a condition to exercising the vote.

Senator ERVIN. Well, the equal protection of the laws clause doesn't say anything about voting; does it? It has no reference to that. It invalidates every act which denies equal protection of the laws. Doesn't every State tax that is imposed put a heavier burden on a poor man than it does on a man of affluence?

Attorney General KATZENBACH. Not every State tax is a condition of a fundamental right to express yourself and to vote in a democracy, which is what the Court is talking about in that case. I just don't believe, Mr. Chairman, that you believe that the Supreme Court invalidated every tax and that you could successfully maintain an action not to pay a property tax, or cite that case as support for your position. You are much too able a lawyer to do that. You wouldn't do that.

Senator ERVIN. That is the reason I wondered why the Supreme Court would take an unsupportable position to invalidate a State law. They simply said that Virginia denied the equal protection of the laws because it was harder for a poor man to pay a tax than it was for a man of affluence.

Attorney General KATZENBACH. And because that was——

Senator ERVIN. And the tax, incidentally, was the amount of money that a man would earn working at the minimum wage for 72 minutes which is a terrible burden.

Let's see if we can agree on one or two other things. I think one of the ablest men that ever sat on the Supreme Court of the United States, and it is rather unfortunate he came to it at an advanced age rather than in his youth, was Justice Benjamin Cardozo, who, of course, acquired great fame as the Chief Judge of the New York Court of Appeals. He said in the case of *Sun Printing and Publishing Association* v. *Ceramic Paper & Power Co.*, 235 New York 337, 139 Northeastern 470, this:

"We are not at liberty * * *"—he was speaking of the New York Constitution—"We are not at liberty to revise while professing to construe."

Do you have any quarrel with that statement?

Attorney General KATZENBACH. No, sir; of course not.

Senator ERVIN. And Justice Sutherland had this to say in *West Coast Hotel Co.* v. *Paris*, 300 U.S. 379, 440, 81 L. Ed., 703, at 715:

> The judicial function is that of interpretation. It does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase, "supreme law of the land" stands for, and to convert what was intended as an inescapable and enduring mandate into mere moral reflections.

Do you have any quarrel with that statement?

Attorney General KATZENBACH. As a statement, I don't. He was dissenting in the case if I recollect. I would suspect his brethren in the majority would not have thought that it applied in that situation.

Senator ERVIN. But, you certainly agree that the judicial function is that of interpretation, and that it does not include the power of amendment under guise of interpretation, don't you?

Attorney General KATZENBACH. Of course; that is correct.

Senator ERVIN. And the fundamental difference between interpretation and amendment is this, is it not, that in the interpretation you ascertain and give effect to the intent of the document, and in amendments you change the meaning of the document?

Attorney General KATZENBACH. Yes; that would be a good definition.

Senator ERVIN. Well now, I am trying to find out whether you are a convert to this theory that judges have a right to amend the Constitution while they are professing to interpret it.

Attorney General KATZENBACH. No, of course, I don't think they have a right to amend the Constitution, and I don't think there is a Justice on the Supreme Court who thinks they have a right to amend the Constitution.

Senator ERVIN. But, nevertheless, the Constitution changes from time to time in its meaning, and has done so with great rapidity in recent years without any change in its phraseology being authorized by Congress and the States within the purview of the fifth article, isn't that true?

Attorney General KATZENBACH. No; I don't really think that is true, Senator. It might be true to say that the Supreme Court doesn't always interpret the Constitution the way you interpret the Constitution, or the way I interpret the Constitution.

Senator ERVIN. Or even like it interprets it.

Attorney General KATZENBACH. What?

Senator ERVIN. Or even the way it interprets it.

Attorney General KATZENBACH. Or even the way the Supreme Court has interpreted it itself in the past. I think it is possible for the Supreme Court to make mistakes. I think it is possible for them to correct those mistakes and still be perfectly true to its oath. I think it is possible for a court to overrule prior decisions, and I don't think when they overrule a prior decision which they believe was wrongly decided, that we should put the stigma upon them of saying, now they are amending the Constitution.

In general, they add here to precedent that gives a good deal of stability, if they do so from time to time. Cases are overruled in this regard, and that has caused a lot of debate among legal philosophers as to what the Constitution meant at one time after its interpretation and what it means another time and how many other angels can you dance on the head of that pin. But the fact of the matter is that sometimes what appears to some to be a change in the Court's interpretation is not really a change in the essential meaning, language, or anything else of the Constitution, but a change in the facts. I just offer, without going into it, it would seem to me clear that what the Congress could have regulated on the commerce clause 150 years ago may be different today than it was then.

One of the essential parts of that is that there is quite a bit of difference in commerce. Even if the Constitution has remained the

same, the basic factual ingredients that you are dealing with are very different.

It seems to me quite possible—it is a little artificial I think, Mr. Chairman, to say now what would the draftsmen of the Constitution have decided to do with respect to airplanes, simply because it is a kind of an artificial question to ask it in that way. I think you can look at what they did do with various things. You can look at their philosophy, their intents, their language, and, therefore, the Constitution can grow to adjust to the problems that we have in our society, as our society changes, without in any way changing the Constitution.

Senator ERVIN. I hate to quarrel with you again, but the power——

Attorney General KATZENBACH. I really thought you would agree with that.

Senator ERVIN. The power of Congress to regulate interstate commerce is a power which extends into the future, and, of course, it attached to the airplane just as soon as the airplane started crossing State lines, and so there is no change in the Constitution there at all. The grants of power under the Constitution extends to the future.

Attorney General KATZENBACH. Then we are in agreement really on that.

Senator ERVIN. I don't quarrel with the theory that the courts have a right to overrule decisions, but I think that Judge Learned Hand in a speech he made on the life of his colleague, Judge Thomas Swan, laid down the correct rule there. He spoke of the rule that Judge Thomas Swan applied to himself. He said first he would never overrule a prior decision unless he thought it was untenable when made; and second, even in that case he wouldn't overrule it if a large body of decisions based on it had accumulated.

In my opinion that is a rule which ought to be followed on overruling previous decisions. I will have to say that I can't agree with you that the Supreme Court of the United States during recent years hasn't changed the meaning of the Constitution, for all practical intents and purposes, on a number of occasions.

Now, maybe we can agree on this. Benjamin Cardozo said in his book on the nature of the judicial process:

> If the judges made a practice of substituting their personal notions for law when they made decisions, then the decisions we would have would be benevolent decisions if the judges happened to be benevolent men, but that such a course of action would mark the end of the reign of law.

Now, do you have any quarrel with Justice Cardozo's statement to that effect?

Attorney General KATZENBACH. No, I don't, and I don't have any quarrel with what Judge Hand said about Judge Swan, and it was a very beautifully written piece when he said it. It was a tribute, as I recall, to Judge Swan, and I think it appears in the Yale Law Journal of the year I edited it.

Senator ERVIN. Do you have some questions on title V?

Mr. AUTRY. Just a couple. Mr. Attorney General, I think part of your justification of the constitutionality of title V, as you said, is the alleged history of discrimination, State supported and private, in many of our States, which, if I understand you right, did not exist prior to the decisions in the *Harris* case, the *Cruikshank* case, and the *Civil Rights Cases*. Is that correct?

Attorney General KATZENBACH. That is essentially right. I didn't say that it depended on that. I don't think it does.

Mr. AUTRY. Not completely, I understand.

Attorney General KATZENBACH. I don't believe you can add to your argument by making that point.

Mr. AUTRY. It was my understanding from the legislative history of the 14th amendment that the reconstruction amendments were drafted not only to eliminate slavery, but also the black codes which had been enacted into the laws in many of the States, which were expressly overruled by the 14th amendment, and which constituted a much harsher history of discrimination for the consideration of the Court in the *Harris* case and the *Cruikshank* case.

For the record, the *Harris* case and *Civil Rights Cases* are still the law of the land, and *Civil Rights Cases* I think were mentioned specifically and confirmed again by the majority opinion in the *Guest* case. Isn't that right?

Attorney General KATZENBACH. I wouldn't say that the majority opinion expressly confirms the *Civil Rights Cases.*

Mr. AUTRY. It cited the *Civil Rights Cases.*

Attorney General KATZENBACH. It cited them but it said it didn't agree with them on this.

Mr. AUTRY. Without overruling the *Civil Rights Cases.*

Attorney General KATZENBACH. What?

Mr. AUTRY. Without overruling.

Attorney General KATZENBACH. They came precious close to overruling. I don't want to split a hair with you on that. It was clear that on the scope of section 5, at least Mr. Justice Brennan stated in that opinion that he did not agree with the *Civil Rights Cases* insofar—

Mr. AUTRY. The opinion of the Court which is Justice Stewart's opinion was the one I was speaking of. Possibly he didn't cite the *Civil Rights Cases.*

Senator ERVIN. Yes, he recites it.

Mr. AUTRY. It was my understanding that he did, and without overruling it, sir.

Senator ERVIN. He cites the divided position that the majority of the Court took.

Attorney General KATZENBACH. For the proposition that we agree about, he cited the *Civil Rights Cases.*

Mr. AUTRY. At least they have not been overruled yet.

Attorney General KATZENBACH. He cited it for common place, the rights under the equal protection clause itself, and this is the point on which the chairman and I have no disagreement about.

Senator ERVIN. Yes.

Mr. AUTRY. And the concurring opinions on which you reply for the constitutionality of legislation are not the law of the land at this point, in the sense that these earlier cases are.

Attorney General KATZENBACH. I rely on the 14th amendment itself, and that certainly is the law of the land.

Mr. AUTRY. In other words, Mr. Attorney General, you are predicting what the Court will hold on the basis of the concurring opinions.

Attorney General KATZENBACH. I would say that the concurring opinions would support my view that the 14th amendment, section 5 of the 14th amendment would permit title V, authorize title V of

this bill, as I pointed out before, I think many of the sections of it don't depend on the 14th amendment at all. Some of them, I acknowledge, do.

Mr. AUTRY. And you are not relying on the opinion of the Court, Justice Stewart's opinion?

Attorney General KATZENBACH. No. I don't think there is anything in Justice Stewart's opinion that would indicate the other.

Mr. AUTRY. Again, just for the record, Mr. Attorney General, on page 19 of your statement yesterday you said:

"Title V"—and this is about two-thirds of the way down in the page—"Title V would not require proof of specific intent as is required under 18 U.S.C. 241" and so on.

Intent is required to the extent, though, isn't it, that the crime must be committed on the basis of race or color?

Attorney General KATZENBACH. Yes.

Mr. AUTRY. That must be there. And the intent——

Attorney General KATZENBACH. Section 501(a) has to have a racial motivation related to these acts.

Mr. AUTRY. I understand. There must be racial motivation, as for instance, a white man killing a Negro.

Attorney General KATZENBACH. Or because of his activities on behalf of.

Senator ERVIN. But, if I may interrupt counsel, that is a limitation on what you say is a very broad power of Congress. The 14th amendment has no racial conditions in it. So anybody that interferes with State laws giving them equal protection of the law, due process, Congress could enact laws to make them criminals regardless of whether they had any racial motivation or not.

Mr. AUTRY. In other words, Mr. Attorney General, there is nothing in the 14th amendment, as there is in the 15th amendment, that the deprivation must be owing of race or color. So that in section 501(a), you could strike "race, color, religion, or national origin" and the constitutionality could still be sustained, in your opinion.

Attorney General KATZENBACH. I doubt it really. I doubt it. It seems to me that section 5 refers to appropriate legislation. The problem that Congress has before it here, and is dealing with, is the particular problem that has to do with denial of equal protection of the laws because of various racial problems that exist because of resistance to various laws that Congress has enacted, because of efforts to interfere with Negroes getting equal protection of the law.

So, I think in implementing the 14th amendment, it is important that the Congress, in doing this, act with respect to the problem, with respect to the interference that it sees with rights that are guaranteed under the 14th amendment, and as to which there is evidence before it.

I would have question in my mind, if I were to follow your suggestion, as to whether it would remain appropriate legislation under the 14th amendment, since it would be dealing with a whole group of problems that there is no evidence before Congress are in fact problems under equal protection of the law.

Mr. AUTRY. Mr. Attorney General, when a man—and I know you agree and I think you said this this morning—when a man is robbed or murdered, regardless of race, he is deprived of life, liberty, or property without due process. I take it from what you just said then that the Court would require a legislative history perhaps that lawlessness

exists in a certain area regardless of racial motivation, before Congress could come in and set up a Federal Code of Criminal Procedure? But that it could under those circumstances.

Attorney General KATZENBACH. It is hard for me to envision those circumstances. I would guess that if——

Mr. AUTRY. Assuming in the 1920's in Chicago, and I certainly wasn't there and I certainly don't claim that it existed, but assume that gangsters were not being prosecuted, police were not doing their jobs, then exclusive of any other Federal remedies that we might have, under the 14th amendment, could Congress pass legislation?

Attorney General KATZENBACH. I would doubt that the situation in Chicago would have been sufficient to have made that legislation——

Mr. AUTRY. Appropriate?

Attorney General KATZENBACH. Appropriate.

Mr. AUTRY. What makes it appropriate today in your opinion then is the history of State laws, section 5 of——

Attorney General KATZENBACH. I think the history of State laws and the facts of intimidation, threats, coercion by private groups, usually as a result of conspiracies, is what would justify Congress taking action here, in terms of the history of the 14th amendment. It is perfectly accurate for you to say that the 14th amendment does not itself deal exclusively with racial problems, in its much broader application. I don't think it would be correct to say that the 14th amendment at the time of its enactment, that there weren't an awful lot of racial problems on their minds at the time that they enacted it. But I don't think you can just sit and divorce it from the whole problem of slavery and race, and so forth, by saying, well, it just applies generally.

Mr. AUTRY. The explicit State laws that existed prior to ratification were much more stringent than any that existed subsequently. The earlier laws were the "Black Codes" which you talked about yesterday.

Attorney General KATZENBACH. Perhaps I could answer your question this way. As I believe, it probably would be constitutional for the Congress to implement the 14th amendment by enacting a law which defined what they meant by due process of law in connection with the arrest of various persons, the time of arraignment of those persons. I see no reason why Congress would not have the power to define due process of law in that way, and enact a Federal statute which dealt with aspects of police administration.

Mr. AUTRY. Mr. Attorney General, you, the chairman, and the President have all been concerned with the rising national crime problem. You have proposed several bills to correct this. If this problem became of such importance that you felt that the local officials were incapable of handling the situation, of prosecuting the guilty, of maintaining order, could Congress appropriately under the 14th amendment propose robbery statutes, assault and battery statutes?

Attorney General KATZENBACH. What kind of statutes?

Mr. AUTRY. Robbery—anything—enact a Federal Criminal Code applicable to States in other words?

Attorney General KATZENBACH. I would find it very difficult to envision the kind of situation that you indicate. I think, hypothetically, if a State were to abolish all its courts, all its police, say everybody is

on their own, and so forth, "we are not going to support any police, we are not going to protect anybody around here," I would think under those circumstances that it would be possible probably for the Federal——

Mr. AUTRY. You have testified on other occasions that in many instances the local police now need Federal help and training, that they aren't able to handle the situation on their own, that they need our assistance. The Judiciary Committee is considering bills now to accomplish this very purpose.

Attorney General KATZENBACH. I hadn't understood that this was in order to implement equal protection of the laws. I thought it was rather to solve the rising crime rate.

Mr. AUTRY. The rising crime rate deprives people of due process of law, of life, and liberty.

Mr. Attorney General, to go on to a technical question in title V, you said that there must be intent to commit a criminal act because of race, color, religion, or national origin. It is not necessary to have the intent, however, to deprive an individual of one of the rights protected by nine enumerated subsections?

Attorney General KATZENBACH. Yes.

Mr. AUTRY. So that if a man who despised another because of his race, happened to kill him while he was in the process of registering to vote, he could be found guilty under this statute, but if he killed him while he was standing on a street corner watching the girls go by, and he killed that man because of his race or color, he would not be guilty.

Attorney General KATZENBACH. If he killed him while he was acting, in the act of voting, because as you say he didn't like him, I don't think it would be a defense to this to say that "I killed him while he was voting because of his color, because I didn't like him."

Mr. AUTRY. In other words, you have to find only one thing—the intent on the basis of race or color.

Attorney General KATZENBACH. Race or color.

Mr. AUTRY. You don't have to find that he was trying to interfere with his Federal rights; is that correct?

Attorney General KATZENBACH. That is correct.

Senator ERVIN. Mr. Attorney General, I don't see where you can draw the line, if the 14th amendment empowers Congress to legislate in respect to crimes of individuals, I don't see where you can possibly draw the line of saying you can only legislate where the crime has a racial motivation, because the 14th amendment has been held in cases to apply to everybody regardless of what race they belong, and are entitled to exactly the same protection at the hands of the State. I think that on your theory, that there is no limit to the lengths that Congress could go, because the equal protection of the laws clause does not only refer to operation of schools, but it is also concerned with the sale of fishing licenses.

Attorney General KATZENBACH. Mr. Chairman, I——

Senator ERVIN. As well as every other thing that is done.

Attorney General KATZENBACH. Mr. Chairman, I didn't make the test of what Congress could do within the scope of the equal protection clause without more—I said that if Congress had the power to enact legislation, it had to be appropriate legislation. Therefore, I thought they should be dealing with the problem that existed, that

they believed existed and that they felt that this legislation was necessary and appropriate to cure. That would be my effort to draw the line. Now you say I can't draw the line. I guess I can't draw it to your satisfaction. I can draw it to mine.

Senator ERVIN. I don't think any line can be drawn, because Congress has the same obligation to see that everybody is not denied the equal protection of the laws. That is not a special privilege of people because they are Negroes. It belongs to members of the Caucasian race, and so if a problem exists, I don't see why under your theory Congress couldn't pass laws to take care of people that are being mistreated by gamblers, or even take Dr. Fell or the poet who said, "I do not love thee, Dr. Fell. The reason why, I cannot tell. But, this alone I know full well, I do not love thee, Dr. Fell."

I would say by the same token, if you are right in your position, that Congress can legislate about conspiracies that were directed against Dr. Fell merely because the man didn't like him, regardless of his race.

Attorney General KATZENBACH. Try it this way, Senator, to see if we can clarify.

Here we are dealing with certain rights that are specifically guaranteed by the Constitution, by appropriate legislation of Congress. We are dealing with right to vote, to go to school, to participate in programs, have equal employment. The substantive basis of those rights was that a certain group or class was being denied those rights. So we are quite narrowly hitting at these specific activities based on Federal rights or which need to be protected in order to effectively protect Federal rights.

Now, if you take what counsel suggested, gang murders in Chicago, it is very difficult from at least my recollection of them, and I stand to be corrected on this, I don't believe that they went to any particular class of people. I don't believe that it was a class of people that was entitled to a particular Federal right as these are. So what we are attempting to do here is to say, look, the Federal Government has by Federal law guaranteed to people certain rights, guaranteed some of these under the 14th amendment, but it is guaranteed to others under the commerce clause, under the raising and spending of money, Federal money, and so forth. It is guaranteed, these rights, to various people.

Now here we start with that. We are saying now, can Congress, in enforcing, in making sure that these rights are effective, can Congress prohibit private action with respect to interference with these activities based on Federal rights or so related to such rights as to make appropriate the punishment of interference with them.

My answer to that is "Yes." It seems to me the difficulty with other interpretations is that first of all you have got to have a federally guaranteed right on which Congress can itself legislate before we can then go into criminal sanctions against private individuals or conspiracies, attempting to deprive the class thus protected on that Federal right from enjoying that right.

Senator ERVIN. The thing you overlook so far as the 14th amendment is concerned is that under the 14th amendment whatever obligation rests upon the Federal Government to secure any guarantee

that is made goes to every person in the United States, regardless of his race, regardless of his sex, his or her sex, regardless of everthing else. It belongs to every human being. And I don't think you can say we can protect only Negroes and not protect everybody.

I am talking about the question of power. Of course, if the Congress wants to pick out one group of people and say "We are going to protect them and we don't care what happens to other people" it can do that. That is the exercise of power rather than the power, but I see absolutely no limitation upon the power of Congress to punish conspiracies and crimes of individuals on your theory, your interpretation of the 14th amendment. I think that is the great danger.

Attorney General KATZENBACH. I wouldn't want to be thought to be saying, as I think you indicated, that I thought that title V here applied to somebody, to a white threatening or intimidating a Negro from voting, and would not apply to a Negro threatening or intimidating a white from voting. I think that it will, although I think the problem we have been talking about has been more inclined to be around the other way.

Senator ERVIN. Yes, but why could you say a limitation based on race and not say that you wouldn't have the same power to legislate about a Republican interfering by conspiracy or otherwise with a Democrat, or vice versa? They are entitled to exactly the same protection under the 14th amendment that people are on the basis of race.

Attorney General KATZENBACH. I think this bill would apply to a Republican shooting a Democrat voting, or a Democrat shooting a Republican voting.

Senator ERVIN. Irrespective of the question of race?

Attorney General KATZENBACH. If it was because of his race, color, religion, national origin.

Senator ERVIN. Under your interpretation of the bill, as far as the Federal Government is concerned, Democrats can shoot Republicans without being subjected to any penalties by the Federal Government, and vice versa?

Attorney General KATZENBACH. Yes, sir.

Senator ERVIN. I just wonder why we are not as equally concerned about the protection of Democrats and even of Republicans as we are of people on the basis of race?

Attorney General KATZENBACH. Because the Democrats and Republicans, whether one was a Democrat or whether one is a Republican, has not to my knowledge been the subject of quite the same amount of concern in this country that the problem of securing the right to vote and the right to participate fully in our society has been with respect to our Negro citizens.

Senator ERVIN. Have you ever heard of Woodford County, Ky.? I think you will find there have probably been more murders over election there, irrespective of matters of race, than there have been in Mississippi on racial matters.

Mr. AUTRY. Mr. Attorney General, could I ask a question in regard to my earlier question concerning your objection to an amendment to title V? Suppose it were worded this way: "Whoever, whether or not acting under color of law by force or threats of force, (A) injures,

intimidates, or interferes with or attempts to injure, intimidate, or interfere with any person while engaging in any federally protected right."

All subsections and the mention of race and national origin would be deleted. Wouldn't that accomplish the same purpose?

Attorney General KATZENBACH. It would be very much like reenactment of section 241, making very clear that it was to apply to private groups. I think a far preferable way of doing it because the specific rights that are protected are set forth in the statute. That is an approach that could be taken. I think it would also have the effect of bringing back the notion that you had to show specifically what right it was he intended to interfere with. The difficulty I think would be obviated by specifying these particular rights that you don't have to go out of the bound of this statute to know what they are. So I would think as a matter of draftsmanship, and a matter of care, and as a matter of professionalism, that would be far less preferable. Nor do I think it would have the support of the chairman.

Mr. AUTRY. If we are to limit it then to race, creed, national origin, why would it not be preferable to take the amendment that the chairman offered this morning, which specifically limits it to those things, as the 14th amendment does not.

Attorney General KATZENBACH. The amendment that I thought the chairman offered this morning is an amendment to the Constitution.

Mr. AUTRY. That is right.

Attorney General KATZENBACH. I don't think that amendment to the Constitution is necessary.

Senator ERVIN. It would put a limitation on the power of Congress. It would have that advantage. It would restrict it to matters of race or religion or national origin.

Attorney General KATZENBACH. As I have said, Senator, I think the power of Congress is limited where it is appropriate in section 5 to deal with problems that are real, that are actual, to which there has been testimony, and I don't think anybody questions the fact that securing these rights, certainly nobody in my position would question the fact that in securing these rights it takes an awful lot of work and effort, and that there is a good deal of opposition to it.

It seems to me that guaranteeing these that have been there in the 14th amendment applicable to everyone for a long time has not been realized for Negroes. That was the purpose of the basic legislation. It was the purpose of the 1964 act. It was the purpose of the 1965 act. It is the purpose of this act, and it is the purpose of this title.

Mr. AUTRY. Mr. Attorney General, the Senator mentioned the Harlan footnote. I take it, for the record, you disagree with his reasoning that part 2 of the decision "seems to me to be, at the very least, it is extraordinary." This is Justice Harlan in the *Guest* case again.

Attorney General KATZENBACH. Yes; I disagree. I don't disagree with Justice Harlan having the right to say it, to express his view on it, but I disagree with the view.

Senator ERVIN. Thank you very much. We will recess now until 10:30 tomorrow morning.

Attorney General KATZENBACH. Thank you, Mr. Chairman.

Senator ERVIN. As far as I am concerned I can assure you that we nave disposed of title V.

Attorney General KATZENBACH. There are only four more titles, Senator.

(Whereupon, at 4:25 p.m., the subcommittee recessed until 10:30 a.m. Wednesday, June 8, 1966.)

CIVIL RIGHTS

WEDNESDAY, JUNE 8, 1966

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:30 a.m., in room 2228, New Senate Office Building, Senator Samuel J. Ervin, Jr., presiding.

Present: Senators Ervin, Kennedy (of Massachusetts), and Javits.

Also present: George Autry, chief counsel; H. Houston Groome, Jr., Lawrence M. Baskir, Lewis W. Evans, counsel; and John Baker, minority counsel.

Senator ERVIN. The subcommittee will come to order.

I would like to read the following from 16 Am. Jur. 2d, subject: Constitutional law, section 476 at page 831.

In all cases where the Constitution seeks to protect the rights of the citizens against discriminative and unjust laws of the state by prohibiting such laws, it does not denounce individual offenses, but the abrogation and denial of rights, for which it clothes Congress with the power to provide a remedy. The Fourteenth Amendment, therefore, does not authorize direct legislation by Congress to regulate the conduct of citizens among themselves, even though such individual conduct abridges the privileges and immunities of citizens of the United States. The legislation authorized to be adopted by Congress for enforcing the Fourteenth Amendment is not direct legislation on the matters respecting which the states are prohibited from making or enforcing certain laws or doing certain acts, but is corrective legislation, such as may be necessary or proper for counteracting and redressing the effect of such laws or acts; although the civil rights guaranteed by the Fourteenth Amendment cannot with impunity be impaired by the wrongful acts of individuals unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings, such impairment is simply a private wrong or a crime, and the rights thus violated remain in full force and may be vindicated by resort to the laws of the state for redress—the right itself is not destroyed by such state action as to permit Congress to intervene.

That deals with what legislative power Congress has under the privileges and immunities provision of the 1st section of the 14th amendment.

I now read from 16 Am. Jur. 2d, subject: Constitutional Law, section 545, at page 936, which has reference to the powers of Congress to legislate for the enforcement of the provisions of the 1st section of the 14th amendment insofar as it involves the guarantee against due process.

The Fourteenth Amendment did not invest and did not attempt to invest Congress with power to legislate upon subjects which are within the domain of state legislation. And the guaranty of due process adds nothing to the rights of one citizen as against another. It is a prohibition applicable to the acts of the state, and does not, of itself, secure to individuals whose rights may be transgressed by the state, a remedy by way of reparation.

(At this point Senator Kennedy entered the hearing room.)

Senator ERVIN. I now wish to read from 16 Am. Jur. 2d Series, subject: Constitutional Law, section 491, page 856, the following, which deals with the power of Congress to legislate for the enforcement of the provisions of the 1st section of the 14th amendment concerning the equal protection of the laws.

The equal protection clause was designed as a safeguard against acts of the state and not against the conduct of private individuals or persons. It does not add anything to the rights which one citizen has against another under the Constitution. Private conduct abridging individual rights does no violence to the equal protection clause unless to some significant extent the state in any of its manifestations has been found to have become involved in it.

I read part of footnote 15, which cites *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715.

The action inhibited by the equal protection clause of the Fourteenth Amendment is only such action as may fairly be said to be that of the states, but is state action of every kind, including state participation through any arrangement, management, funds, or property; the amendment erects no shield against merely private conduct, however discriminatory or wrongful, unless to some significant extent the state in any of its manifestations becomes involved in it.

Mr. Attorney General, I would like to make my position clear with respect to title V. I do not oppose Federal legislation which undertakes to punish the use of force or the threats of force, to deny any man a constitutional right where the right is not based upon the 14th amendment.

I do not favor title V in its present form, even with respect to interference with rights outside of the 14th amendment domain, for the very simple reason I do not believe that it is good policy for the Government to pick out one group of citizens and protect them and not protect all Americans.

In other words, I agree that it is within the legitimate domain of congressional power, and I would support exercise of such power were Congress to make it a Federal crime to forcibly interfere with a man's right to cast a ballot in a Federal election.

I do not believe, however, in restricting that crime to mere action based upon racial motivation. I think the Government ought to be equally concerned with the protection of all Americans, all 190 million of them, insofar as they are eligible to vote in Federal elections, and I think that if a party is assaulted to prevent him from voting in a Federal election, on account of the color of his necktie, that he is equally entitled to be protected as if the assault were based on the color of his skin. So if you amend title V along these lines I would support it.

Now my position on the 14th amendment is simply this: I am saying this by way of summary, and I hope I won't have to allude to it anymore, the 14th amendment, insofar as any relevant sections are concerned, authorizes Congress to deal only with action by a State which denies due process of law, or the equal protection of the laws, or deprives one of the privileges and immunities of national citizenship.

It is doing strange things to the language to maintain that a constitutional provision which only authorizes Congress to act in respect to State action also authorizes Congress to act with respect to individual action. I would go along with the constitutional amendment to allow legislation, and despite my feeling that all citizens are entitled to equal protection, I would even restrict it to racial motivation, simply

because, as a practical matter, the equal protection of the laws clause can apply conceivably to every transaction between a State or any of its officials down to the policeman or the constable. I would not want the Federal Government to assume responsibility on that broad a field for enforcement of criminal laws, or have that power.

Now, I recognize that six of the Justices in the *Guest* case have made an obiter dicta statement, which you and I interpret differently. I interpret those Justices to say if Congress shall pass a law such as the kind you suggest, and somebody shall hereafter violate that law, and the case involving that violation shall hereafter come before this Court, we promise here and now that we will adjudge the law valid before the law is passed, before the case arises, before the facts come into existence, and before we have heard argument.

I agree with the characterization of Justice Harlan that this *obiter dicta* is at the least extraordinary.

Now I recognize, and I say this with sadness, but I say it with all the sincerity of which I am capable, that these six Justices, as they have stated, are prepared to hold legislation of this kind constitutional. I, unfortunately but very sincerely, entertain the opinion that a majority of the Supreme Court as now constituted will undoubtedly uphold any act of Congress, no matter how inconsistent it may be with the words of the Constitution, and no matter how inconsistent it may be with the previous decisions of the Court, and no matter how inconsistent it may be, with the Federal system of Government set up by the Constitution, if it has the effect of concentrating further powers in the Federal Government, and diminishing the powers of the States and local government.

I hate to say that but that is my honest opinion, and I might add in this connection that I am not the only one who entertains this opinion. I would like to read from one of the opinions of the Supreme Court of the United States, volume 344, the concurring opinion of the late Justice Robert H. Jackson in *Brown* v. *Allen*, and I read from page 543:

> Rightly or wrongly the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law, but is guided in these matters by personal impressions which from time to time may be shared by a majority of the justices. Whatever has been intended, this Court also has generated an impression in much of the judiciary that regard for precedents and authorities is obsolete; that words no longer mean what they have always meant; that the law knows no fixed principles.

Justice Jackson added this on page 546:

> But I know of no way that we can have equal justice under law except we have some law.

Justice Jackson is not the only man that shares these opinions. As you undoubtedly know, on August 23, 1958, the State chief justices, that is, the presiding justices of the highest courts of the States of the Union, had a meeting in Pasadena, Calif., and adopted a resolution in which they pointed out many decisions of the Supreme Court which were incompatible, in their judgment, with the system of Federal Government established by the Constitution, and in which they took the unprecedented action of imploring the Supreme Court of the United States to exercise the very highest of all judicial virtues, namely the judicial virtue of self-restraint. I am not going to undertake to read what the chief justices of 36 States said. These chief justices came from States north, south, east, and west.

I call your attention to what they said in the fourth section of their resolution:

That this conference believes * * * that a fundamental purpose of having a written constitution is to promote the certainty and stability of the provisions of law set forth in such a constitution.

The entire resolution which appeared in U.S. News & World Report for October 3, 1958, will be printed at this point in the body of the record.

(The article follows:)

[From U.S. News & World Report]

WHAT 36 STATE CHIEF JUSTICES SAID ABOUT THE SUPREME COURT

FOR THE FIRST TIME, HERE IS FULL TEXT OF HISTORIC REPORT [1]

The chief justices of 36 States recently adopted a report critical of the Supreme Court of the United States, declaring that the Court "has tended to adopt the role of policy maker without proper judicial restraint."

This report, approved by the chief justices of three fourths of the nation's States, found that the present Supreme Court has abused the power given to it by the Constitution. The Court is pictured as invading fields of Government reserved by the Constitution to the States.

Full text of this historic document has not previously been given wide distribution. It is printed below, together with the formal resolution of approval by the Conference of State Chief Justices.

The Conference of Chief Justices, meeting in Pasadena, Calif., on Aug. 28, 1958, adopted a resolution submitted by its Committee on Federal-State Relationships as Affected by Judicial Decisions. Vote on the resolution was 36 to 8, with 2 members abstaining and 4 not present. Text of the resolution:

Resolved:

1. That this Conference approves the Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions submitted at this meeting.

2. That, in the field of federal-State relationships, the division of powers between those granted to the National Government and those reserved to the State Governments should be tested solely by the provisions of the Constitution of the United States and the Amendments thereto.

3. That this Conference believes that our system of federalism, under which control of matters primarily of national concern is committed to our National Government and control of matters primarily of local concern is reserved to the several States, is sound and should be more diligently preserved.

4. That this Conference, while recognizing that the application of constitutional rules to changed conditions must be sufficiently flexible as to make such rules adaptable to altered conditions, believes *that a fundamental purpose of having a written Constitution is to promote the certainty and stability of the provisions of law set forth in such a Constitution.*

[1] Report on high court: Who wrote it, who approved it:
These 10 State justices were members of the committee which drew up the report on the Supreme Court:
Frederick W. Brune, Chief Judge of Maryland, Chairman.
Albert Conway, Chief Judge of New York.
John R. Dethmers, Chief Justice of Michigan.
William H. Duckworth, Chief Justice of Georgia.
John E. Hickman, Chief Justice of Texas.
John E. Martin, Chief Justice of Wisconsin.
Martin A. Nelson, Associate Justice of Minnesota.
William C. Perry, Chief Justice of Oregon.
Taylor H. Stukes, Chief Justice of South Carolina.
Raymond S. Wilkins, Chief Justice of Massachusetts.
Also voting to approve the report were chief justices from 26 other States: Alabama, Arizona, Colorado, Delaware, Florida, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, South Dakota, Tennessee, Virginia, Washington, Wyoming.
Voting against the report were chief justices from seven States, one territory: California, New Jersey, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, Hawaii.
Abstaining: Nevada, North Dakota.
Not present: Arkansas, Connecticut, Indiana, Puerto Rico.

5. That this Conference hereby respectfully urges that the Supreme Court of the United States, in exercising the great powers confided to it for the determination of questions as to the allocation and extent of national and State powers, respectively, and as to the validity under the Federal Constitution of the exercise of powers reserved to the States, exercise one of the greatest of all judicial powers—*the power of judicial self-restraint*—by recognizing and giving effect to the difference between that which, on the one hand, the Constitution may prescribe or permit, and that which, on the other, a majority of the Supreme Court, as from time to time constituted, may deem desirable or undesirable, to the end that our system of federalism may continue to function with and through the preservation of local self-government.

6. That this Conference firmly believes that the subject with which the Committee on Federal-State Relationships as Affected by Judicial Decisions has been concerned is one of continuing importance, and that there should be a committee appointed to deal with the subject in the ensuing year.

Following is full text of the Committee's report as approved by the State chief justices:

FOREWORD

Your Committee on Federal-State Relationships as Affected by Judicial Decisions was appointed pursuant to action taken at the 1957 meeting of the Conference, at which, you will recall, there was some discussion of recent decisions of the Supreme Court of the United States and a resolution expressing concern with regard thereto was adopted by the Conference. This Committee held a meeting in Washington in December, 1957, at which plans for conducting our work were developed. This meeting was attended by Sidney Spector of the Council of State Governments and by Professor Philip B. Kurland of the University of Chicago Law School.

The Committee believed that it would be desirable to survey this field from the point of view of general trends rather than by attempting to submit detailed analyses of many cases. It was realized, however, that an expert survey of recent Supreme Court decisions within the area under consideration would be highly desirable in order that we might have the benefit in drafting this report of scholarly research and of competent analysis and appraisal, as well as of objectivity of approach.

Thanks to Professor Kurland and to four of his colleagues of the faculty of the University of Chicago Law School, several monographs dealing with subjects within the Committee's field of action have been prepared and have been furnished to all members of the Committee and of the Conference. These monographs and their authors are as follows:

1. "The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Court," by Professor Kurland;
2. "Limitations on State Power to Deal with Issues of Subversion and Loyalty," by Assistant Professor [Roger C.] Cramton;
3. "Congress, the States and Commerce," by Professor Allison Dunham;
4. "The Supreme Court, Federalism, and State Systems of Criminal Justice," by Professor Francis A. Allen; and

"The Supreme Court, the Congress and State Jurisdiction Over Labor Relations," by Professor Bernard D. Meltzer.

These gentlemen have devoted much time, study and thought to the preparation of very scholarly, interesting and instructive monographs on the above subjects. We wish to express our deep appreciation to each of them for his very thorough research and analysis of these problems. With the pressure of the work of our respective courts, the members of this Committee could not have undertaken this research work and we could scarcely have hoped, even with ample time, to equal the thorough and excellent reports which they have written on their respective subjects.

It had originally been hoped that all necessary research material would be available to your Committee by the end of April and that the Committee could study it and then meet for discussion, possibly late in May, and thereafter send at least a draft of the Committee's report to the members of the Conference well in advance of the 1958 meeting; but these hopes have not been realized.

The magnitude of the studies and the thoroughness with which they have been made rendered it impossible to complete them until about two months after the original target date and it has been impracticable to hold another meeting of this Committee until the time of the Conference.

Even after this unavoidable delay had developed, there was a plan to have these papers presented at a seminar to be held at the University of Chicago late in June. Unfortunately, this plan could not be carried through, either.

We hope, however, that these papers may be published in the near future with such changes and additions as the several authors may wish to make in them. Some will undoubtedly be desired in order to include decisions of the Supreme Court in some cases which are referred to in these monographs, but in which decisions were rendered after the monographs had been prepared. Each of the monographs as transmitted to us is stated to be in preliminary form and subject to change and as not being for publication.

Much as we are indebted to Professor Kurland and his colleagues for their invaluable research aid, your Committee must accept sole responsibility for the views herein stated. Unfortunately, it is impracticable to include all or even a substantial part of their analyses in this report.

BACKGROUND AND PERSPECTIVE

We think it desirable at the outset of this report to set out some points which may help to put the report in proper perspective, familiar or self-evident as these points may be.

First, though decisions of the Supreme Court of the United States have a major impact upon federal-State relationships and have had such an impact since the days of Chief Justice Marshall, they are only a part of the whole structure of these relationships. These relations are, of course, founded upon the Constitution of the United States itself. They are materially affected not only by judicial decisions but in very large measures by acts of Congress adopted under the powers conferred by the Constitution. They are also affected, or may be affected, by the exercise of the treaty power.

Of good practical importance as affecting federal-State relationships are the rulings and actions of federal administrative bodies. These include the independent-agency regulatory bodies, such as the Interstate Commerce Commission, the Federal Power Commission, the Securities and Exchange Commission, the Civil Aeronautics Board, the Federal Communications Commission and the National Labor Relations Board.

Many important administrative powers are exercised by the several departments of the executive branch, notably the Treasury Department and the Department of the Interior. The scope and importance of the administration of the federal tax laws are, of course, familiar to many individuals and businesses because of their direct impact, and require no elaboration.

Second, when we turn to the specific field of the effect of judicial decisions on federal-State relationships, we come at once to the question as to where power should lie to give the ultimate interpretation to the Constitution and to the laws made in pursuance thereof under the authority of the United States. *By necessity and by almost universal common consent, these ultimate powers are regarded as being vested in the Supreme Court of the United States.* Any other allocation of such power would seem to lead to chaos. See Judge Learned Hand's most interesting Holmes Lectures on "The Bill of Rights" delivered at the Harvard Law School this year and published by the Harvard University Press.

Third, there is obviously great interaction between federal legislation and administrative action on the one hand and decisions of the Supreme Court on the other, because of the power of the Court to interpret and apply acts of Congress and to determine the validity of administrative action and the permissible scope thereof.

Fourth, *whether federalism shall continue to exist and, if so, in what form is primarily a political question rather than a judicial question.* On the other hand, it can hardly be denied that judicial decisions, specifically decisions of the Supreme Court, can give tremendous impetus to changes in the allocation of powers and responsibilities as between the federal and State governments. Likewise, it can hardly be seriously disputed that on many occasions the decisions of the Supreme Court have produced exactly that effect.

Fifth, this Conference has no legal powers whatsoever. If any conclusions or recommendations at which we may arrive are to have any effect, this can only be through the power of persuasion.

Sixth, it is a part of our obligation to seek to uphold respect for law. *We do not believe that this goes so far as to impose upon us an obligation of silence* when we find ourselves unable to agree with pronouncements of the Supreme Court—even though we are bound by them—or when we see trends in decisions of that Court which we think will lead to unfortunate results.

We hope that the expression of our views may have some value. They pertain to matters which directly affect the work of our State courts. In this report *we urge the desirability of self-restraint on the part of the Supreme Court* in the exercise of the vast powers committed to it. We endeavor not to be guilty ourselves of a lack of due restraint in expressing our concern and, at times, our criticism in making the comments and observations which follow.

PROBLEMS OF FEDERALISM

The difference between matters primarily local and matters primarily national was the guiding principle upon which the framers of our national Constitution acted in outlining the division of powers between the national and State governments.

This guiding principle, central to the American federal system, was recognized when the original Constitution was being drawn and was emphasized by De Tocqueville [Alexis de Tocqueville, author of "Democracy in America"]. Under his summary of the Federal Constitution he says:

> "The first question which awaited the Americans was so to divide the sovereignty that each of the different States which compose the union should continue to govern itself in all that concerned its internal prosperity, while the entire nation, represented by the Union, should continue to form a compact body and to provide for all general exigencies. The problem was a complex and difficult one. It was as impossible to determine beforehand, with any degree of accuracy, the share of authority that each of the two governments was to enjoy as to foresee all the incidents in the life of a nation."

In the period when the Constitution was in the course of adoption, the "Federalist"—No. 45—discussed the division of sovereignty between the Union and the States and said:

"The powers delegated by the Constitution to the Federal Government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation and foreign commerce. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the internal order and prosperity of the State."

Those thoughts expressed in the "Federalist," of course, are those of the general period when both the original Constitution and the Tenth Amendment were proposed and adopted. They long antedated the proposal of the Fourteenth Amendment.

The fundamental need for a system of distribution of powers between national and State governments was impressed sharply upon the framers of our Constitution not only because of their knowledge of the governmental systems of ancient Greece and Rome. They also were familiar with the government of England; they were even more aware of the colonial governments in the original States and the governments of those States after the Revolution.

Included in government on this side of the Atlantic was the institution known as the New England town meeting though it was not in use in all of the States. A town meeting could not be extended successfully to any large unit of population, which, for legislative action, must rely upon representative government.

LOCAL GOVERNMENT: "A VITAL FORCE"

But it is this spirit of self-government, of *local* self-government, which has been a vital force in shaping our democracy from its very inception.

The views expressed by our late brother, Chief Justice Arthur T. Vanderbilt [of the New Jersey Supreme Court], on the division of powers between the national and State governments—delivered in his addresses at the University of Nebraska and published under the title "The Doctrine of the Separation of Powers and Its Present-Day Significance"—are persuasive.

He traced the origins of the doctrine of the separation of powers to four sources: Montesquieu and other political philosophers who preceded him; English constitutional experience; American colonial experience; and the common sense and political wisdom of the Founding Fathers. He concluded his comments on the experiences of the American colonists with the British Government with this sentence:

"As colonists they had enough of a completely centralized government with no distribution of powers and they were intent on seeing to it that they should never suffer such grievances from a government of their own construction."

His comments on the separation of powers and the system of checks and balances and on the concern of the Founding Fathers with the proper distribution of governmental power between the nation and the several States indicates that he treated them *as parts of the plan for preserving the nation on the one side and individual freedom on the other*—in other words, that the traditional tripartite vertical division of powers between the legislative, the executive and the judicial branches of government *was not an end in itself, but was a means toward an end;* and that the horizontal distribution or allocation of powers between national and State governments was also a means towards the same end and was a part of the separation of powers which was accomplished by the Federal Constitution. It is a form of the separation of powers with which Montesquieu was not concerned; but the horizontal division of powers, whether thought of as a form of separation of powers or not, was very much in the minds of the framers of the Constitution.

TWO MAJOR DEVELOPMENTS IN THE FEDERAL SYSTEM

The outstanding development in federal-State relations since the adoption of the National Constitution has been the expansion of the power of the National Government and the consequent contraction of the powers of the State governments. To a large extent this is wholly unavoidable and, indeed, is a necessity, primarily because of improved transportation and communication of all kinds and because of mass production.

On the other hand, our Constitution does envision federalism. The very name of our nation indicates that it is to be composed of States. The Supreme Court of a bygone day said in Texas v. White, 7 Wall 700, 721 (1868): "The Constitution, in all its provisions, looks to an indestructible Union of indestructible States."

Second only to the increasing dominance of the National Government has been the development of the immense power of the Supreme Court in both State and national affairs It is not merely the final arbiter of the law; it is the maker of policy in many major social and economic fields It is not subject to the restraints to which a legislative body is subject There are points at which it is difficult to delineate precisely the line which should circumscribe the judicial function and separate it from that of policy making.

Thus, usually within narrow limits, a court may be called upon in the ordinary course of its duties to make what is actually a policy decision by choosing between two rules, either of which might be deemed applicable to the situation presented in a pending case.

But, if and when a court in construing and applying a constitutional provision or a statue becomes a policy maker, it may leave construction behind and exercise functions which are essentially legislative in character, *whether they serve in practical effect as a constitutional amendment or as an amendment of a statute.* It is here that we feel the greatest concern, and it is here that we think the greatest restraint is called for. There is nothing new in urging judicial self-restraint, though there may be, and we think there is, new need to urge it.

It would be useless to attempt to review all of the decisions of the Supreme Court which have had a profound effect upon the course of our history. It has been said that the Dred Scott decision made the Civil War inevitable. Whether this is really true or not, we need not attempt to determine. Even if it is discounted as a serious overstatement, it remains a dramatic reminder of the great influence which Supreme Court decisions have had and can have.

As to the great effect of decisions of that Court on the economic development of the country, see Mr. Justice Douglas' Address on *"Stare Decisis" [to stand by decided matters]*, 49 Columbia Law Review, 735.

SOURCES OF NATIONAL POWER

Most of the powers of the National Government were set forth in the original Constitution; some have been added since. In the days of Chief Justice Marshall, the supremacy clause of the Federal Constitution and a broad construction of the powers granted to the National Government were fully developed and, as a part of this development, the extent of national control over interstate commerce became very firmly established.

The trends established in those days have never ceased to operate and, in comparatively recent years, have operated at times in a startling manner in the extent to *which interstate commerce has been held to be involved, as for example in the familiar case involving an elevator operator in a loft building.*

From a practical standpoint, the increase in federal revenues resulting from the Sixteenth Amendment—the income tax amendment—has been of great impor-

tance. National control over State action in many fields has been vastly expanded by the Fourteenth Amendment.

We shall refer to some subjects and types of cases which bear upon federal-State relationships.

THE GENERAL WELFARE CLAUSE

One provision of the Federal Constitution which was included in it from the beginning but which, in practical effect, lay dormant for more than a century, is the general-welfare clause. In United States v. Butler, 297 U.S. 1, the original Agricultural Adjustment Act was held invalid. An argument was advanced in that case that the general-welfare clause would sustain the imposition of the tax and that money derived from the tax could be expended for any purposes which would promote the general welfare.

The Court viewed this argument with favor as a general proposition, but found it not supportable on the facts of that case. However, it was not long before that clause was relied upon and applied. See Steward Machine Co. v. Davis, 301 U.S. 548, and Helvering v. Davis, 301 U.S. 690. In those cases the Social Security Act was upheld and the general-welfare clause was relied upon both to support the tax and to support the expenditures of the money raised by the Social Security taxes.

GRANTS-IN-AID

Closely related to this subject are the so-called grants-in-aid which go back to the Morrill Act of 1862 and the grants thereunder to the so-called land-grant colleges. The extent of grants-in-aid today is very great, but questions relating to the wisdom as distinguished from the legal basis for such grants seem to lie wholly in the political field and are hardly appropriate for discussion in this report.

Perhaps we should also observe that, since the decision of Massachusetts v. Mellon, 262 U.S. 447, there seems to be no effective way in which either a State or an individual can challenge the validity of a federal grant-in-aid.

DOCTRINE OF PRE-EXEMPTION

Many, if not most, of the problems of federalism today arise either in connection with the commerce clause and vast extent to which its sweep has been carried by the Supreme Court, or they arise under the Fourteenth Amendment. Historically, cases involving the doctrine of pre-emption pertain mostly to the commerce clause.

More recently the doctrine has been applied in other fields, notably in the case of Commonwealth of Pennsylvania v. Nelson, in which the Smith Act and other federal statutes dealing with Communism and loyalty problems were held to have pre-empted the field and to invalidate or suspend the Pennsylvania antisubversive statute which sought to impose a penalty for conspiracy to overthrow the Government of the United States by force or violence. In that particular case it happens that the decision of the Supreme Court of Pennsylvania was affirmed. That fact, however, emphasizes rather than detracts from the wide sweep now given to the doctrine of pre-emption.

LABOR-RELATIONS CASES

In connection with commerce-clause cases, the doctrine of pre-emption, coupled with only partial express regulation by Congress, has produced a state of considerable confusion in the field of labor relations.

One of the most serious problems in this field was pointed up or created—depending upon how one looks at the matter—by the Supreme Court's decision in Amalgamated Association v. Wisconsin Employment Relations Board, 340 U.S. 383, which overturned a State statute aimed at preventing strikes and lockouts in public utilities. This decision left the States powerless to protect their own citizens against emergencies created by the suspension of essential services, even though, as the dissent pointed out, such emergencies were "economically and practically confined to a [single] State."

In two cases decided on May 28, 1958, in which the majority opinions were written by Mr. Justice Frankfurter and Mr. Justice Burton, respectively, the right of an employe to sue a union in a State court was upheld. In International Association of Machinists v. Gonzales, a union member was held entitled to maintain a suit against his union for damages for wrongful expulsion. In International Union, United Auto, etc. Workers v. Russell, an employe, who was not a union member, was held entitled to maintain a suit for malicious interference with his

employment through picketing during a strike against his employer. Pickets prevented Russell from entering the plant.

Regardless of what may be the ultimate solution of jurisdictional problems in this field, it appears that, at the present time, there is unfortunately *a kind of no-man's land in which serious uncertainty exists.* This uncertainty is in part undoubtedly due to the failure of Congress to make its wishes entirely clear. Also, somewhat varying views appear to have been adopted by the Supreme Court from time to time.

In connection with this matter, in the case of Textile Union v. Lincoln Mills, 353 U.S. 448, the majority opinion contains language which we find somewhat disturbing. That case concerns the interpretation of Section 301 of the Labor-Management Relations Act of 1947.

Paragraph (a) of that section provides: "Suits for violation of contracts between an employer and a labor organization representing employes in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Paragraph (b) of the same section provides in substance that a labor organization may sue or be sued as an entity without the procedural difficulties which formerly attended suits by or against unincorporated associations consisting of large numbers of persons. Section 301(a) was held to be more than jurisdictional and was held to authorize federal courts to fashion a body of federal law for the enforcement of these collective-bargaining agreements and to include within that body of federal law specific performance of promises to arbitrate grievances under collective-bargaining agreements.

What a State court is to do if confronted with a case similar to the Lincoln Mills case is by no means clear. It is evident that the substantive law to be applied must be federal law, but the question remains: Where is that federal law to be found? It will probably take years for the development or the "fashioning" of the body of federal law which the Supreme Court says the federal courts are authorized to make. Can a State court act at all? If it can act and does act, what remedies should it apply? Should it use those afforded by State law, or is it limited to those which would be available under federal law if the suit were in a federal court?

It is perfectly possible that these questions will not have to be answered, since the Supreme Court may adopt the view that the field has been completely preempted by the federal law and committed solely to the jurisdiction of the federal courts, so that the State courts can have no part whatsoever in enforcing rights recognized by Section 301 of the Labor-Management Relations Act. Such a result does not seem to be required by the language of Section 301 nor yet does the legislative history of that section appear to warrant such a construction.

Professor Meltzer's monograph has brought out many of the difficulties in this whole field of substantive labor law with regard to the division of power between State and federal governments. As he points out, much of this confusion is due to the fact that Congress has not made clear what functions the States may perform and what they may not perform. There are situations in which the particular activity involved is prohibited by federal law, others in which it is protected by federal law, and others in which the federal law is silent. At the present time there seems to be one field in which State action is clearly permissible. That is where actual violence is involved in a labor dispute.

STATE LAW IN DIVERSITY CASES

Not all of the decisions of the Supreme Court in comparatively recent years have limited or tended to limit the power of the States or the effect of State laws. The celebrated case of Erie R.R. v. Tompkins, 304 U.S. 64, overruled Swift v. Tyson and established substantive State law, decisional as well as statutory, as controlling in diversity [of citizenship] cases in the federal courts. This marked the end of the doctrine of a federal common law in such cases.

IN-PERSONAM JURISDICTION OVER NONRESIDENTS

Also, in cases involving in-personam [against the person] jurisdiction of State courts over nonresidents, the Supreme Court has tended to relax rather than tighten restrictions under the due-process clause upon State action in this field. International Shoe Co. v. Washington, 326 U.S. 310, is probably the most significant case in this development.

In sustaining the jurisdiction of a Washington court to render a judgment in personam against a foreign corporation which carries on some activities within the State of Washington, Chief Justice Stone used the now-familiar phrase that there "were sufficient contacts or ties with the State of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to enforce the obligation which appellant has incurred there."

Formalistic doctrines or dogmas have been replaced by a more flexible and realistic approach, and this trend has been carried forward in subsequent cases leading up to and including McGee v. International Life Insurance Co., 355 U.S. 220, until halted by Hanson v. Denckla, 357 U.S. decided June 23, 1958.

TAXATION

In the field of taxation, the doctrine of intergovernmental immunity has been seriously curtailed partly by judicial decisions and partly by statute. This has not been entirely a one-way street. In recent years, cases involving State taxation have arisen in many fields. Sometimes they have involved questions of burdens upon interstate commerce or the export-import clause, sometimes of jurisdiction to tax as a matter of due process, and sometimes they have arisen on the fringes of governmental immunity, as where a State has sought to tax a contractor doing business with the National Government. There have been some shifts in holdings. On the whole, the Supreme Court seems perhaps to have taken a more liberal view in recent years toward the validity of State taxation than it formerly took.

OTHER FOURTEENTH AMENDMENT CASES

In many other fields, however, the Fourteenth Amendment has been invoked to cut down State action. This has been noticeably true in cases involving not only the Fourteenth Amendment but also the First Amendment guarantee of freedom of speech or the Fifth Amendment protection against self-incrimination. State antisubversive acts have been practically eliminated by Pennsylvania v. Nelson, in which the decision was rested on the ground of pre-emption of the field by the federal statutes.

THE SWEEZY CASE—STATE LEGISLATIVE INVESTIGATION

The manifestation of this restrictive action under the Fourteenth Amendment is to be found in Sweezy v. New Hampshire, 354 U.S. 234.

In that case, the State of New Hampshire had enacted a subversive-activity statute which imposed various disabilities on subversive persons and subversive organizations. In 1963, the legislature adopted a resolution under which it constituted the attorney general a one man legislative committee to investigate violations of that act and to recommend additional legislation.

Sweezy, described as a non-Communist Marxist, was summoned to testify at the investigation conducted by the attorney general, pursuant to this authorization. He testified freely about many matters but refused to answer two types of questions: (1) inquiries concerning the activities of the Progressive Party in the State during the 1948 campaign, and (2) inquiries concerning a lecture Sweezy had delivered in 1954 to a class at the University of New Hampshire.

He was adjudged in contempt by a State court for failure to answer these questions. The Supreme Court reversed the conviction, but there is no majority opinion. The opinion of the Chief Justice, in which he was joined by Justices Black, Douglas and Brennan, started out by reaffirming the position taken in Watkins v. United States, 354 U.S. 178, that legislative investigations can encroach on First Amendment rights. He then attacked the New Hampshire Subversive Activities Act and stated that the definition of subversive persons and subversive organizations was so vague and limitless that they extended to "conduct which is only remotely related to actual subversion and which is done free of any conscious intent to be a part of such activity."

Then followed a lengthy discourse on the importance of academic freedom and political expression. This was not, however, the ground upon which these four Justices ultimately relied for their conclusion that the conviction should be reversed. The Chief Justice said in part:

"The respective roles of the legislature and the investigator thus revealed are of considerable significance to the issue before us. It is eminently clear that the basic discretion of determining the direction of the legislative inquiry has been turned over to the investigative agency. The attorney general has been given such a sweeping and uncertain mandate that it is his discretion which picks out

the subjects that will be pursued, what witnesses will be summoned and what questions will be asked. In this circumstance, it cannot be stated authoritatively that the legislature asked the attorney general to gather the kind of facts comprised in the subjects upon which petitioner was interrogated."

Four members of the Court, two in a concurring opinion and two in a dissenting opinion, took vigorous issue with the view that the conviction was invalid because of the legislature's failure to provide adequate standards to guide the attorney general's investigation.

Mr. Justice Frankfurter and Mr. Justice Harlan concurred in the reversal of the conviction on the ground that there was no basis for a belief that Sweezy or the Progressive Party threatened the safety of the State and, hence, that the liberties of the individual should prevail.

Mr. Justice Clark, with whom Mr. Justice Burton joined, arrived at the opposite conclusion and took the view that the State's interest in self-preservation justified the intrusion into Sweezy's personal affairs.

In commenting on this case Professor Cramton says:

"The most puzzling aspect of the Sweezy case is the reliance by the Chief Justice on delegation-of-power conceptions. New Hampshire had determined that it wanted the information which Sweezy refused to give; *to say that the State has not demonstrated that it wants the information seems so unreal as to be incredible.* The State had delegated power to the attorney general to determine the scope of inquiry within the general subject of subversive activities.

"Under these circumstances, the conclusion of the Chief Justice that the vagueness of the resolution violates the due-process clause must be, despite his protestations, a holding that a State legislature cannot delegate such a power."

PUBLIC-EMPLOYMENT CASES

There are many cases involving public employment and the question of disqualification therefor by reason of Communist Party membership or other questions of loyalty.

Slochower v. Board of Higher Education, 350 U.S. 551, is a well-known example of cases of this type. Two more recent cases, Lerner v. Casey, and Beilan v. Board of Public Education, both in 357 U.S. and decided on June 30, 1958, have upheld disqualifications for employment where such issues were involved, but they did so on the basis of lack of competence or fitness.

Lerner was a subway conductor in New York and Beilan was a public-school instructor. In each case the decision was by a 5-to-4 majority.

ADMISSION TO THE BAR

When we come to the recent cases on admission to the bar, we are in a field of unusual sensitivity. We are well aware that any adverse comment which we may make on those decisions lays up open to attack on the grounds that we are complaining of the curtailment of our own powers and that we are merely voicing the equivalent of the ancient protest of the defeated litigant—in this instance the wail of a judge who has been reversed. That is a prospect which we accept in preference to maintaining silence on a matter which we think cannot be ignored without omitting an important element on the subject with which this report is concerned.

Konigsberg v. *State Bar of California*, 353 U.S. 252, seems to us to reach the high-water mark so far established by the Supreme Court in overthrowing the action of a State and in denying to a State the power to keep order in its own house.

The majority opinion first hurdled the problem as to whether or not the federal question sought to be raised was properly presented to the State highest court for decision and was decided by that court. Mr. Justice Frankfurter dissented on the ground that the record left it doubtful whether this jurisdictional requirement for review by the Supreme Court had been met and favored a remand of the case for certification by the State highest court of "whether or not it did in fact pass on a claim properly before it under the due-process clause of the Fourteenth Amendment." Mr. Justice Harlan and Mr. Justice Clark shared Mr. Justice Frankfurter's jurisdictional views. They also dissented on the merits in an opinion written by Mr. Justice Harlan, of which more later.

The majority opinion next turned to the merits of Konigsberg's application for admission to the bar. Applicable State statutes required one seeking admission to show that he was a person of good moral character and *that he did not advocate the overthrow of the National or State Government by force or violence.* The committee of bar examiners, after holding several hearings on Konigsberg's

application, notified him that his application was denied because he did not show that he met the above qualifications.

The Supreme Court made its own review of the facts.

On the score of good moral character, the majority found that Konigsberg had sufficiently established it, that certain editorials written by him attacking this country's participation in the Korean War, the actions of political leaders, the influence of "big business" on American life, racial discrimination and the Supreme Court's decision in Dennis v. United States, 341 U.S. 494, would not support any rational inference of bad moral character, and that his refusal to answer questions, "almost all" of which were described by the Court as having "concerned his political affiliations, editorials and beliefs" (353 U.S. 269), would not support such an inference either.

MEANING OF REFUSAL TO ANSWER

On the matter of advocating the overthrow of the National or State Government by force or violence, the Court held—as it had in the companion case of Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, decided contemporaneously—that past membership in the Communist Party was not enough to show bad moral character. The majority apparently accepted as sufficient Konigsberg's denial of any present advocacy of the overthrow of the Government of the United States or of California, which was uncontradicted on the record. He had refused to answer questions relating to his past political affiliations and beliefs, which the bar committee might have used *to test the truthfulness of his present claims.* His refusal to answer was based upon his views as to the effect of the First and Fourteenth Amendments. The Court did not make any ultimate determination of their correctness, but—at 353 U.S. 270—said that "prior decisions by this Court indicated that his objections to answering the questions—which we shall refer to below—were not frivolous.

The majority asserted that Konigsberg "was not denied admission to the California bar simply because he refused to answer questions."

In a footnote appended to this statement it is said, 353 U.S. 259:

"Neither the committee as a whole nor any of its members even intimated that Konigsberg would be barred just because he refused to answer relevant inquiries or because he was obstructing the committee. Some members informed him that they did not necessarily accept his position that they were not entitled to inquire into his political associations and opinions and said that his failure to answer would have some bearing on their determination whether he was qualified. But they never suggested that his failure to answer their questions was, by itself, a sufficient independent ground for denial of his application."

A "CONVINCING" DISSENT

Mr. Justice Harlan's dissent took issue with these views—convincingly, we think. He quoted lengthy extracts from the record of Konigsberg's hearings before the subcommittee and the committee of the State bar investigating his application. 353 U.S. 284–309. Konigsberg flatly refused to state whether or not at the time of the hearing he was a member of the Communist Party and refused to answer questions on whether he had ever been a Communist or belonged to various organizations, including the Communist Party.

The bar committee conceded that he could not be required to answer a question if the answer might tend to incriminate him; but Konigsberg did not stand on the Fifth Amendment and his answer which came nearest to raising that question, as far as we can see, seems to have been based upon a fear of prosecution for perjury for whatever answer he might then give as to membership in the Communist Party.

We think, on the basis of the extracts from the record contained in Mr. Justice Harlan's dissenting opinion, that the committee was concerned with its duty under the statute "to certify as to this applicant's good moral character"—p. 295—and that the committee was concerned with the applicant's "disinclination" to respond to questions proposed by the Committee—p. 301—and that the committee, in passing on his good moral character, sought to test his veracity—p. 303.

The majority, however, having reached the conclusion above stated, that Konigsberg had not been denied admission to the bar simply because he refused to answer questions, then proceeded to demolish a straw man by saying that there was nothing in the California statutes or decisions, or in the rules of the bar committee which had been called to the Court's attention suggesting that a failure

to answer questions "is *ipso facto* a basis for excluding an applicant from the bar, irrespective of how overwhelming is his showing of good character or loyalty or how flimsy are the suspicions of the bar examiners."

Whether Konigsberg's "overwhelming" showing of his own good character have been shaken if he had answered the relevant questions which he refused to answer, we cannot say. We have long been under the impression that candor is required if members of the bar and, prior to Konigsberg, we should not have thought that there was any doubt that a candidate for admission to the bar should answer questions as to matters relating to his fitness for admission, and that his failure or refusal to answer such questions would warrant an inference unfavorable to the applicant or a finding that he had failed to meet the burden of proof of his moral fitness.

Let us repeat that Konisgberg did not invoke protection against self-incrimination. He invoked a privilege which he claimed to exist against answering certain questions. These might have served to test his veracity at the committee hearings held to determine whether or not he was possessed of the good moral character required for admission to the bar.

The majority opinion seems to ignore the issue of veracity sought to be raised by the questions which Konigsberg refused to answer. It is also somewhat confusing with regard to the burden of proof. At one point—pp. 270–271—it says that the committee was not warranted in drawing from Konigsberg's refusal to answer questions any inference that he was of bad moral character; at another—p. 273—it says that there was no evidence in the record to justify a finding that he had failed to establish his good moral character.

Also at page 273 of 353 U.S., the majority said: "We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important to society and the bar itself that lawyers be unintimidated—free to think, speak and act as members of an independent bar."

The majority thus makes two stated concessions—each, of course, subject to limitations—one, that it is important to leave the States free to select their own bars and the other, that "a bar composed of lawyers of good character is a worthy objective."

AVOIDING "A TEST OF VERACITY"

We think that Mr. Justice Harlan's dissent on the merits, in which Mr. Justice Clark joined, shows the fallacies of the majority position. On the facts which we think were demonstrated by the excerpts from the record included in that dissent, it seems to us that the net result of the case is that *a State is unable to protect itself against admitting to its bar an applicant who, by his own refusal to answer certain questions as to what the majority regarded as "political" associations and activities, avoids a test of his veracity through cross-examination on a matter which he has the burden of proving in order to establish his right to admission to the bar.*

The power left to the States to regulate admission to their bars under Konigsberg hardly seems adequate to achieve what the majority chose to describe as a "worthy objective"—"a bar composed of lawyers of good character."

We shall close our discussion of Konigsberg by quoting two passages from Mr. Justice Harlan's dissent, in which Mr. Justice Clark joined. In one, he states that "this case involves an area of federal-State relations—the right of States to establish and administer standards for admission to their bars—into which this Court should be especially reluctant and slow to enter." In the other, his concluding comment—p. 312—says: "[W]hat the Court has really done, I think, is simply to impose on California its own notions of public policy and judgment. For me, today's decision represents an unacceptable intrusion into a matter of State concern."

The Lerner and Beilan cases, above referred to, seem to indicate some recession from the intimations, though not from the decisions, in the Konigsberg and Slochower cases. In Beilan, the schoolteacher was told that his refusal to answer questions might result in his dismissal, and his refusal to answer questions pertaining to loyalty matters was held relevant to support a finding that he was incompetent. "Incompetent" seems to have been taken in the sense of unfit.

STATE ADMINISTRATION OF CRIMINAL LAW

When we turn to the impact of decisions of the Supreme Court upon the State administration of criminal justice, we find that we have entered a very broad field. In many matters, such as the fair drawing of juries, the exclusion of forced confessions as evidence, and the right to counsel at least in all serious cases, we do not believe that there is any real difference in doctrine between the views held by the Supreme Court of the United States and the views held by the highest courts of the several States.

There is, however, a rather considerable difference at times as to how these general principles should be applied and as to whether they have been duly regarded or not. In such matters the Supreme Court not only feels free to review the facts, but considers it to be its duty to make an independent review of the facts. It sometimes seems that *the rule which governs most appellate courts in the view of findings of fact by trial courts is given lip service, but is actually given the least possible practical effect.*

Appellate courts generally will give great weight to the findings of fact by trial courts which had the opportunity to see and hear the witnesses, and they are reluctant to disturb such findings. The Supreme Court at times seems to read the records in criminal cases with a somewhat different point of view. Perhaps no more striking example of this can readily be found than in Moore v. Michigan, 355 U.S. 155.

In the Moore case the defendant had been charged in 1937 with the crime of first-degree murder, to which he pleaded guilty. The murder followed a rape and was marked by extreme brutality. The defendant was a Negro youth, 17 years of age at the time of the offense, and is described as being of limited education—only the seventh grade—and as being of rather low mentality.

He confessed the crime to law-enforcement officers and he expressed a desire to plead guilty and "get it over with." Before such a plea was permitted to be entered, he was interviewed by the trial judge in the privacy of the judge's chambers and he again admitted his guilt, said he did not want counsel and expressed the desire to "get it over with," to be sent to whatever institution he was to be confined in, and to be placed under observation. Following this, the plea of guilty was accepted and there was a hearing to determine the punishment which should be imposed.

About 12 years later the defendant sought a new trial, principally on the ground that he had been unfairly dealt with because he was not represented by counsel. He had expressly disclaimed any desire for counsel at the time of his trial. Pursuant to the law of Michigan, he had a hearing on this application for a new trial. In most respects his testimony was seriously at variance with the testimony of other witnesses. He was corroborated in one matter by a man who had been a deputy sheriff at the time when the prisoner was arrested and was being questioned.

The trial court, however, found in substance that the defendant knew what he he was doing when he rejected the appointment of counsel and pleaded guilty, that he was then calm and not intimidated, and, after hearing him testify, that he was completely unworthy of belief. It accordingly denied the application for a new trial. This denial was affirmed by the Supreme Court of Michigan, largely upon the basis of the findings of fact by the trial court.

The Supreme Court of the United States reversed.

The latter Court felt that counsel might have been of assistance to the prisoner, in view of his youth, lack of education and low mentality, by requiring the State to prove its case against him—saying the evidence was largely circumstantial—by raising a question as to his sanity, and by presenting factors which might have lessened the severity of the penalty imposed. It was the maximum permitted under the Michigan law—solitary confinement for life at hard labor.

The case was decided by the Supreme Court of the United States in 1957. The majority opinion does not seem to have given any consideration whatsoever to the difficulties of proof which the State might encounter after the lapse of many years or the risks to society which might result from the release of a prisoner of this type, if the new prosecution should fail. They are, however, pointed out in the dissent.

Another recent case which seems to us surprising, and the full scope of which we cannot foresee, is Lambert v. California, 355 U.S., decided Dec. 16, 1957. In that case a majority of the Court reversed a conviction under a Los Angeles ordinance which required a person convicted of a felony, or of a crime which would be felony under the law of California, to register upon taking up residence in Los Angeles.

Lambert had been convicted of forgery and had served a long term in a California prison for that offense. She was arrested on suspicion of another crime and

her failure to register was then discovered and she was prosecuted, convicted and fined.

The majority of the Supreme Court found that she had no notice of the ordinance, that it was not likely to be known, that it was a measure merely for the convenience of the police, that the defendant had no opportunity to comply with it after learning of it and before being prosecuted, that she did not act willfully in failing to register, that she was not "blameworthy" in failing to do so, and that her conviction involved a denial of due process of law.

"A DEVIATION FROM PRECEDENTS"

This decision was reached only after argument and reargument. Mr. Justice Frankfurter wrote a short dissenting opinion in which Mr. Justice Harlan and Mr. Justice Whittaker joined. He referred to the great number of State and federal statutes which imposed criminal penalties for nonfeasance and stated that he felt confident that "the present decision will turn out to be an isolated deviation from the strong current of precedents—a derelict on the waters of the law."

We shall not comment in this report upon the broad sweep which the Supreme Court now gives to habeas-corpus proceedings. Matters of this sort seem to fall within the scope of the Committee of this Conference on the Habeas Corpus Bill which has been advocated for some years by this Conference for enactment by the Congress of the United States, and has been supported by the Judicial Conference of the United States, the American Bar Association, the Association of Attorneys General and the Department of Justice.

We cannot, however, completely avoid any reference at all to habeas-corpus matters because what is probably the most far-reaching decision of recent years on State criminal procedure which has been rendered by the Supreme Court is itself very close to a habeas-corpus case. That is the case of Griffin v. Illinois, 351 U.S. 12, which arose under the Illinois Post Conviction Procedure Act.

The substance of the holding in that case may perhaps be briefly and accurately stated in this way: If a transcript of the record, or its equivalent, is essential to an effective appeal, and if a State permits an appeal by those able to pay for the cost of the record or its equivalent, then the State must furnish without expense to an indigent defendant either a transcript of the record at his trial, or an equivalent thereof, in order that the indigent defendant may have an equally effective right of appeal. Otherwise, the inference seems clear, the indigent defendant must be released upon habeas corpus or similar proceedings.

Probably no one would dispute the proposition that the poor man should not be deprived of the opportunity for a meritorious appeal simply because of his poverty. The practical problems which flow from the decision in Griffin v. Illinois are, however, almost unlimited and are now only in course of development and possible solution. This was extensively discussed at the 1957 meeting of this Conference of Chief Justices in New York.

We may say at this point that, in order to give full effect to the doctrine of Griffin v. Illinois, we see no basis for distinction between the cost of the record and other expenses to which the defendant will necessarily be put in the prosecution of an appeal. These include filing fees, the cost of printing the brief and of such part of the record as may be necessary, and counsel fees.

The Griffin case was very recently given retroactive effect by the Supreme Court in a *per curiam* [by the court as a whole] opinion in Eskridge v. Washington State Board of Prison Terms and Paroles, 78 S. Ct. 1061. In that case the defendant, who was convicted in 1935, gave timely notice of an appeal. His application then made for a copy of the transcript of the trial proceedings to be furnished at public expense was denied by the trial judge.

A statute provided for so furnishing a transcript if "in his (the trial judge's) opinion, justice will thereby be promoted." The trial judge found that justice would not be promoted, in that the defendant had had a fair and impartial trial, and that, in his opinion, no grave or prejudicial errors had occurred in the trial.

The defendant then sought a writ of mandate from the Supreme Court of the State, ordering the trial judge to have the transcript furnished for the prosecution of his appeal. This was denied and his appeal was dismissed.

In 1956 he instituted habeas-corpus proceedings which, on June 16, 1958, resulted in a reversal of the Washington court's decision and a remand "for further proceedings not inconsistent with this opinion." It was conceded that the "reporter's transcript" from the trial was still available. In what form it exists does not appear from the Supreme Court's opinion. As in Griffin, it was held that an adequate substitute for the transcript might be furnished in lieu of the transcript itself.

Justices Harlan and Whittaker dissented briefly on the ground that "on this record the Griffin case decided in 1956 should not be applied to this conviction occurring in 1935." This accords with the view expressed by Mr. Justice Frankfurter in his concurring opinion in Griffin that it should not be retroactive. He did not participate in the Eskridge case.

Just where Griffin v. Illinois may lead us is rather hard to say. That it will mean a vast increase in criminal appeals and a huge case load for appellate courts seems almost to go without saying. There are two possible ways in which the meritorious appeals might be taken care of and the nonmeritorious appeals eliminated.

One would be to apply a screening process to appeals of all kinds, whether taken by the indigent or by persons well able to pay for the cost of appeals. It seems very doubtful that legislatures generally would be willing to curtain the absolute right of appeal in criminal cases which now exists in many jurisdictions.

Another possible approach would be to require some showing of merit before permitting an appeal to be taken by an indigent defendant at the expense of the State.

Whether this latter approach, which we may call "screening," would be practical or not is, to say the least, very dubious. First, let us look at a federal statute and Supreme Court decisions thereunder. What is now subsection (a) of Section 1915 of Title 28, U.S.C.A. contains a sentence reading as follows: "An appeal may not be taken *in forma pauperis* [as a poor man] if the trial court certifies in writing that it is not taken in good faith."

This section or a precursor thereof was involved in Miller v. United States, 317 U.S. 192, Johnson v. United States, 352 U.S. 565, and Farley v. United States, 354 U.S. 521, 523. In the Miller case the Supreme Court held that the discretion of the trial court in withholding such a certificate was subject to review on appeal, and that, in order that such a review might be made by the Court of Appeals, it was necessary that it have before it either the transcript of the record or an adequate substitute therefor, which might consist of the trial judge's notes or of an agreed statement as to the points on which review was sought.

Similar holdings were made by *per curiam* opinion in the Johnson and Farley cases, in each of which the trial court refused to certify that the appeal was taken in good faith. In each case, though perhaps more clearly in Johnson, the trial court seems to have felt that the proposed appeal was frivolous, and hence not in good faith.

The Eskridge case, above cited, decided on June 16, 1958, rejected the screening process under the State statute there involved, and appears to require, under the Fourteenth Amendment, that a full appeal be allowed—not simply a review of the screening process, as under the federal statute above cited. The effect of the Eskridge case thus seems rather clearly to be that, unless all appeals, at least in the same types of cases, are subject to screening, none may be.

It would seem that it may be possible to make a valid classification of appeals which shall be subject to screening and of appeals which shall not. Such a classification might be based upon the gravity of the offense or possibly upon the sentence imposed. In most, if not all, States, such a classification would doubtless require legislative action. In the Griffin case, it will be recalled, the Supreme Court stated that a substitute for an actual transcript of the record would be acceptable if it were sufficient to present the points upon which the defendant based his appeal. The Supreme Court suggested the possible use of bystanders' bills of exceptions.

It seems probable to us that an actual transcript of the record will be required in most cases. For example, in cases where the basis for appeal is the alleged insufficiency of the evidence, it may be very difficult to eliminate from that part of the record which is to be transcribed portions which seem to have no immediate bearing upon this question. A statement of the facts to be agreed upon by trial counsel for both sides may be still more difficult to achieve even with the aid of the trial judge.

The danger of swamping some State appellate courts under the flood of appeals which may be loosed by Griffin and Eskridge is not a reassuring prospect. How far Eskridge may lead and whether it will be extended beyond its facts remain to be seen.

CONCLUSIONS: THE JUSTICES SUM UP

This long review, though far from exhaustive, shows some of the uncertainties as to the distribution of power which are probably inevitable in a federal system of government. *It also shows, on the whole, a continuing and, we think, an accelerating*

trend toward increasing power of the National Government and correspondingly contracted power of the State governments.

Much of this is doubtless due to the fact that many matters which were once mainly of local concern are now parts of larger matters which are of national concern. Much of this stems from the doctrine of a strong, central Government and of the plenitude of national power within broad limits of what may be "necessary and proper" in the exercise of the granted powers of the National Government which was expounded and established by Chief Justice Marshall and his colleagues, though some of the modern extensions may and do seem to us to go to extremes. Much, however, comes from the extent of the control over the action of the States which the Supreme Court exercises under its views of the Fourteenth Amendment.

We believe that *strong State and local governments are essential to the effective functioning of the American system of federal government;* that they should not be sacrified needlessly to leveling, and sometimes deadening, uniformity; and that, in the interest of active, citizen participation in self-government—the foundation of our democracy—they should be sustained and strengthened.

As long as this country continues to be a developing country and as long as the conditions under which we live continue to change, there will always be problems of the allocation of power depending upon whether certain matters should be regarded as primarily of national concern or as primarily of local concern. These adjustments can hardly be effected without some friction. How much friction will develop depends in part upon the wisdom of those empowered to alter the boundaries and in part upon the speed with which such changes are effected. Of course, the question of speed really involves the exercise of judgment and the use of wisdom, so that the two things are really the same in substance.

We are now concerned specifically with the effect of judicial decisions upon the relations between the Federal Government and the State governments. *Here we think that the over-all tendency of decisions of the Supreme Court over the last 25 years or more has been to press the extension of federal power and to press it rapidly.*

There have been, of course, and still are, very considerable differences within the Court on these matters, and there has been quite recently a growing recognition of the fact that our government is still a federal government and that the historic line which experience seems to justify between matters primarily of national concern and matters primarily of local concern should not be hastily or lightly obliterated. A number of Justices have repeatedly demonstrated their awareness of problems of federalism and their recognition that federalism is still a living part of our system of government.

The extent to which the Supreme Court assumes the function of policy maker is also of concern to us in the conduct of our judicial business. We realize that in the course of American history the Supreme Court has frequently—one might, indeed, say customarily—exercised policy-making powers going far beyond those involved, say, in making a selection between competing rules of law.

We believe that, in the fields with which we are concerned and as to which we feel entitled to speak, *the Supreme Court too often has tended to adopt the role of policy maker without proper judicial restraint.* We feel this is particularly the case in both of the great fields we have discussed—namely, the extent and extension of the federal power, and the supervision of State action by the Supreme Court by virtue of the Fourteenth Amendment. In the light of the immense power of the Supreme Court and its practical nonreviewability in most instances, no more important obligation rests upon it, in our view, than that of careful moderation in the exercise of its policy-making role. We are not alone in our view that *the Court, in many cases arising under the Fourteenth Amendment, has assumed what seem to us primarily legislative powers.* See Judge Learned Hand on the Bill of Rights.

We do not believe that either the framers of the original Constitution or the possibly somewhat less gifted draftsmen of the Fourteenth Amendment ever contemplated that the Supreme Court would, or should, have the almost unlimited policy-making powers which it now exercises.

It is strange, indeed, to reflect that, under a Constitution which provides for a system of checks and balances and of distribution of power between national and State governments, one branch of one government—the Supreme Court—should attain the immense and, in many respects, dominant power which it now wields. We believe that *the great principle of distribution of powers among the various branches of government and between levels of government has vitality today and is the crucial base of our democracy.*

We further believe that, in construing and applying the Constitution and laws made in pursuance thereof, this principle of the division of power based upon

whether a matter is primarily of national or of local concern should not be lost sight of or ignored, especially in fields which bear upon the meaning of a constitutional or statutory provision, or the validity of State action presented for review. For, with due allowance for the changed conditions under which it may or must operate, the principle is as worthy of our consideration today as it was of the consideration of the great men who met in 1787 to establish our nation as a nation.

"DOUBT" IN RECENT DECISIONS

It has long been an American boast that we have a government of laws and not of men. *We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast.* We find first that, in constitutional cases, unanimous decisions are comparative rarities and that multiple opinions, concurring or dissenting, are common occurrences.

We find next that divisions in result on a 5-to-4 basis are quite frequent. We find further that, on some occasions, a majority of the Court cannot be mustered in support of any one opinion and that the result of a given case may come from the divergent views of individual Justices who happen to unite on one outcome or the other of the case before the Court.

We further find that the Court does not accord finality to its own determinations of constitutional questions, or for that matter of others. We concede that a slavish adherence to *stare decisis* could at times have unfortunate consequences; but *it seems strange that under a constitutional doctrine which requires all others to recognize the Supreme Court's rulings on constitutional questions as binding adjudications of the meaning and application of the Constitution, the Court itself has so frequently overturned its own decisions thereon, after the lapse of periods varying from 1 year to 75, or even 95 years.* See the tables appended to Mr. Justice Douglas's address on *"Stare Decisis,"* 49 Columbia Law Review 735, 756–758.

The Constitution expressly sets up its own procedures for amendment, slow or cumbersome though they may be.

These frequent differences and occasional overrulings of prior decisions in constitutional cases cause us grave concern as to whether individual views of the members of the Court as from time to time constituted, or of a majority thereof, as to what is wise or desirable do not unconsciously override a more dispassionate consideration of what is or is not constitutionally warranted. We believe that the latter is the correct approach, and we have no doubt that every member of the Supreme Court intends to adhere to that approach, and believes that he does so.

It is our earnest hope, which we respectfully express, that that great Court exercise to the full its power of judicial self-restraint by adhering firmly to its tremendous, strictly judicial powers and by eschewing, so far as possible, the exercise of essentially legislative powers when it is called upon to decide questions involving the validity of State action, whether it deems such action wise or unwise. The value of our system of federalism, and of local self-government in local matters which it embodies, should be kept firmly in mind, as we believe it was by those who framed our Constitution.

At times the Supreme Court manifests, or seems to manifest, an impatience with the slow workings of our federal system. That impatience may extend to an unwillingness to wait for Congress to make clear its intention to exercise the powers conferred upon it under the Constitution, or the extent to which it undertakes to exercise them, and it may extend to the slow processes of amending the Constitution which that instrument provides.

The words of Elihu Root on the opposite side of the problem, asserted at a time when demands were current for recall of judges and judicial decisions, bear repeating: "if the people of our country yield to impatience which would destroy the system that alone makes effective these great impersonal rules and preserves our constitutional government, rather than endure the temporary inconvience of pursuing regulated methods of changing the law, we shall not be reforming. We shall not be making progress, but shall be exhibiting that lack of self-control which enables great bodies of men to abide the slow process of orderly government rather than to break down the barriers of order when they are struck by the impulse of the moment." Quoted in 31 "Boston University Law Review" 43.

We believe that what Mr. Root said is sound doctrine to be followed toward the Constitution, the Supreme Court and its interpretation of the Constitution. Surely, it is no less incumbent upon the Supreme Court, on its part, to be equally restrained and to be as sure as is humanly possible that it is adhering to the fundamentals of the Constitution with regard to the distribution of powers and the separation of powers, and with regard to the limitations of judicial power which

are implicit in such separation and distribution, and *that it is not merely giving effect to what it may deem desirable.*

We may expect the question as to what can be accomplished by the report of this Committee or by resolutions adopted in conformity with it. Most certainly some will say that nothing expressed here would deter a member or group of members of an independent judiciary from pursuing a planned course.

Let us grant that this may be true. The value of a firm statement by us lies in the fact that we speak as members of all the State appellate courts with a background of many years' experience in the determination of thousands of cases of all kinds. Surely there are those who will respect a declaration of what we believe.

And it just could be true that our statement might serve as an encouragement to those members of an independent judiciary who now or in the future may in their conscience adhere to views more consistent with our own.

Senator ERVIN. I just add this: I have taken an oath to uphold the Constitution according to the way I understand it, which is based upon the words of the Constitution and the decisions of the courts, from 1789 to date, and notwithstanding the fact, as you very emphatically state, that six Justices have agreed to decide that the 14th amendment means that Congress can reach individual action not connected with the State action under that amendment, despite the words of the amendment and despite an unbroken line of decisions to the contrary from 1868 to date, I am going to do the best I can to persuade Congress that it is its duty to stand by the Constitution, and reject those provisions of title V which offend the 14th amendment as it is worded, and as it has been interpreted.

I regret to take this action and to say these things, but I conceive it as my duty to my country and my fidelity to my oath to support the Constitution. I thank you for your patience.

STATEMENT OF HON. NICHOLAS deB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES; ACCOMPANIED BY DAVID SLAWSON, ATTORNEY ADVISER, OFFICE OF LEGAL COUNSEL, AND ALAN MARER, ATTORNEY, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE—Resumed

Attorney General KATZENBACH. Could I make a very brief comment, Senator?

Senator ERVIN. Just one minute. I want to put one other thing in. One of the most distinguished legal scholars in America is Professor Philip B. Kurland, of the Law School of the University of Chicago. I wish to put in the record at this point, in connection with Justice Jackson's remarks and the resolution of the 36 State chief justices, what Professor Kurland said about the action of the Supreme Court during recent years.

Attorney General KATZENBACH. Professor Kurland wrote that resolution.

Senator ERVIN. Yes.

(The information follows:)

THE COURT OF THE UNION OR JULIUS CAESAR REVISED

Mr. President, on February 29, 1964, Prof. *Philip B. Kurland* of the Law School of the University of Chicago made a most illuminating address before a conference upon the so-called Court of the Union Amendment at the Law School of the University of Notre Dame. He entitled his address "The Court of the Union or Julius Caesar Revised."

I have been privileged from time to time to read addresses and comments of Professor Kurland upon various constitutional and legal subjects. Such reading has convinced me that Professor Kurland possesses in the highest degree an understanding of the supreme values inherent in the primary purposes of our Constitution and the dangers posed to these primary purposes by impatient officials who would sacrifice their supreme values in their zeal to accomplish in haste temporary ends which they desire. For this reason, anything which Professor Kurland may say upon constitutional subjects merits wide dissemination and deep consideration by all persons interested in constitutional government.

As a consequence, I ask unanimous consent that Professor Kurland's speech be printed at this point in the body of the Record.

There being no objections, the speech was ordered to be printed in the Record, as follows:

[Speech of Prof. Philip B. Kurland]

THE COURT OF THE UNION OR JULIUS CAESAR REVISED

(By Philip B. Kurland, professor of law, the University of Chicago Law School)

(NOTE.—The paper which follows was delivered at a conference, held at the Law School of the University of Notre Dame on February 29. It will appear in a forthcoming issue of the Notre Dame Lawyer, and appears here with the permission of the editors of that journal and of the author.)

Dean O'Meara's subpena was greeted by honest protests from me that I had nothing to contribute to the great debate over the proposed constitutional amendments that are the subject of today's conference. The dean apparently of the belief that suffering might help this audience toward moral regeneration, suggested that I come anyway. I proceed then to prove my propostiion and to test his hypothesis.

I have chosen as a title for this small effort: "Julius Caesar Revised." "Revised" because, unlike Mark Antony, I have been invited here not to bury Caesar but to praise him. Our Caesar, the Supreme Court, unlike Shakespeare's Julius, does not call for a funeral oration, because the warnings of lions in the streets—instead of under the throne—were timely heeded as well as sounded. Caesar was thus able to rally his friends to fend off the death strokes that the conspirators would have inflicted. The conspiratorial leaders were the members of the Council of State Governments. The daggers they proposed to use were the chief justices of the various high State courts, to whom they would entrust, under the resounding label of "the Court of the Union," the power to review judgments of the Supreme Court of the United States whenever that tribunal dared to inhibit the power of the States. It should be made clear that the chief justices of the States would be the instruments of the crime and not its perpetrators. You will recall that when these chief justices spoke through their collective voice, the Conference, of Chief Justices, in condemnation of some of the transgressions of the Supreme Court, they asked only that the physician heal himself. They did not propose any organic changes, however little they like the Court's work. Their report stated:[1]

"When we turn to the specific field of the effect of judicial decisions on Federal-State relationships we come at once to the question as to where power should lie to give the ultimate interpretation to the Constitution and to the laws made in pursuance thereof under the authority of the United States. By necessity and by almost universal common consent, these ultimate powers are regarded as being vested in the Supreme Court of the United States. Any other allocation of such power would seem to lead to chaos."

Even in the absence of Caesar's murder, however, it is possible to pose the issue raised by Brutus: whether our Caesar has been unduly ambitious and grasping of power? And implicit in this question is a second: If Caesar's ambitions do constitute a threat to the republic, is assassination the appropriate method for dealing with that threat?

The second question is easier of answer than the first. Whether Caesar be guilty or not, it would seem patently clear this his murder, as proposed, must be resisted. Its consequences could only be costly and destructive civil conflict resulting in the creation of a new Caesar in the place of the old one, a new Caesar not nearly so well-equipped to perform the task nor even so benevolent as Julius himself.

[1] Report of the committee on Federal-State Relationships as Affected by Judicial Decisions, August 1958

It is probably because of the obvious absurdity of the method chosen for limiting the Supreme Court's powers that there is today even more unanimity in opposition to the proposal than existed when Caesar was last attacked—not by the current self-styled patricians, but by the plebeians under the leadership of Franklin Delano Roosevelt. For then it was only the conservatives that came to the defense of the Court; the liberals were prepared to destroy it. Today, as Prof. Charles Black has made clear, even if in rather patronizing tones, the conservatives are solidly lined up in defense of an institution many of whose decisions are repugnant to them.[3] The conservatives would seem to be concerned with the preservation of the institution; the liberals with the preservation of the benefits that the current Court has awarded them. For the latter the contents of Caesar's will appears to make the difference.

It would seem, therefore, that only those close to the lunatic fringe, the Birchers and the White Citizens Councils and others of their ilk, are prepared to support the purported court-of-the-union plan. Even in the Council of State Governments the proposed amendment was supported by a majority of only one vote. The few legislatures that have voted in support of this amendment are those normally concerened with their war on Robin Hood and similarly dangerous radicals. I do not mean to suggest that the Court is not in danger of being restrained. But I do think that the proposed method of destruction is not a very real threat unless this country is already closer to Gibbon's Rome than to Caesar's.

On the other hand, to say that the plan for a Court of the Union is an absurdity is not to answer the question whether Caesar suffers from an excess of ambitions. The great debate called for by the Chief Justice at the American Law Institute meeting last May has not really concerned itself with this problem. The great debate has taken the form of rhetorical forays. Each side argues that the proposed limitation on the powers of the Court would result in the removal of national power and the enhancement of the power of the States. The forces of Cassius and Brutus argue that this is a desirable result because the dispersal of government power is the only means of assuring that individual liberty will not be trodden under the tyrannous boots of socialist egalitarianism. Antony contends that the adoption of the proposal would be to return us to a fragmented confederation impotent to carry on the duties of government in the world of the 20th century. Roosevelt's words about a "horse and buggy era" are this time used in defense of the Court. With all due respect, I submit that the essential question remains unanswered. The Talmud tells us that ambition destroys its possessor. Does the Court's behavior invite its own destruction?

In what ways is it charged that this Caesar seeks for power that does not belong to him? Some such assertions can be rejected as the charges of disappointed suitors. But there are others that cannot be so readily dismissed on the ground of the malice of claimant. Allow me to itemize a few of the latter together with some supporting testimony:

Item. The Court has unreasonably infringed on the authority committed by the Constitution to other branches of the Government.

Listen to one of the recent witnesses:

"The claim for judicial relief in this case strikes at one of the fundamental doctrines of our system of government, the separation of powers, In upholding the claim, the Court attempts to effect reforms in a field which the Constitution, as plainly as can be, has committed exclusively to the political process.

"This Court, no less than all other branches of the Government, is bound by the Constitution. The Constitution does not confer on the Court blanket authority to step into every situation where the political branch may have fallen short. The stability of this institution ultimately depends not only upon its being alert to keep the other branches of Government within consitutional bounds but equally upon recognition of the limitations on the Court's own functions in the constitutional system."

This is not the charge of a Georgia legislator. These are the words of Mr. Justice Harlan, spoken as recently as last February 17, in *Wesberry* v. *Sanders*[4]

Item. The Supreme Court has severely and unnecessarily limited the power of the States to enforce their criminal laws.

Thus one recent critic had this to say:

" 'The rights of the States to develop and enforce their own judicial procedures, consistent with the 14th amendment, have long been recognized as essential to the concept of a healthy federalism. Those rights are today attenuated if not obliterated in the name of a victory for the 'struggle for personal liberty.' But

[3] Black, The Occasions of Justice 80 (1963).
[4] 376 U.S. xxx, at xxx (1964).

the Constitution comprehends another struggle of equal importance and places on (the Supreme Court) the burden of maintaining it—the struggle for law and order. I regret that the Court does not often recognize that each defeat in that struggle chips away inexorably at the base of that very personal liberty which it seeks to protect. One is reminded of the exclamation of Pyrrhus: 'One more such victory * * * and we are utterly undone.' "

This, I should tell you, is not the conference of Chief Justices complaining about the abuses of Federal habeas corpus practices; it is Mr. Justice Clark expressing his dissatisfaction in *Fay* v. *Noia*.[4]

Item. The Court has revived the evils of "substantive due process," the cardinal sin committed by the Hughes Court, and the one that almost brought about its destruction.

Here another expert witness has said:

"Finally, I deem this application of 'cruel and unusual punishment' so novel that I suspect the Court was hard put to find a way to ascribe to the framers of the Constitution the result reached today rather than to its own notions of ordered liberty. If this case involved economic regulation, the present Court's allergy to substantive due process would surely save the statute and prevent the Court from imposing its own philosphical predilections upon State legislatures or Congress. I fail to see why the Court deems it more appropriate to write into the Constitution its own abstract notions of how best to handle the narcotics problem for it obviously cannot match either the States or Congress in expert understanding."

This is the hand as well as the voice of Mr. Justice White in *Robinson* v. *California*.[5]

Item. The Court has usurped the powers of the National Legislature in rewriting statutes to express its own policy rather than executing the decisions made by the branch of Government charged with that responsibility.

Listen to two deponents whose right to speak to such an issue is not ordinarily challenged.

"What the Court appears to have done is to create not simply a duty of inspection, but an absolute duty to discovery of all defects; in short, it has made the B. & O. the insurer of the conditions of all premises and equipment, whether its own or others, upon which its employees may work. This is wholly salutary principle of compensation for industrial injury incorporated by workmen's compensation statutes, but it is not the one created by the FELA, which premises liability upon negligence of the employing railroad. It is my view that, as a matter of policy, employees such as the petitioner, who are injured in the course of their employment, should be entitled to prompt and adequate compensation regardless of the employer's negligence and free from traditional commonlaw rules limiting recovery. But Congress has elected a different test of liability which, until changed, courts are obliged to apply."

No, those are not the words of Mr. Justice Frankfurter, but those of his successor, Mr. Justice Goldberg, in *Shenker* v. *Baltimore & Ohio R. Co.*[6]

Listen to the same criticism in even more strident tones:

"The present case * * * will, I think, be marked as the baldest attempt by judges in modern times to spin their own philosophy into the fabric of the law, in derogation of the will of the legislature."

Here we have Mr. Justice Douglas in dissent from the opinion of Mr. Justice Black in *Arizona* v. *California*:[7]

Item. The Court writes or rewrites law for the purpose of conferring benefits on Negroes that it would not afford to others.

I offer here some testimony endorsed by Justices Harlan, Clarke, and Stewart, in *NAACP* v. *Button*:[8]

"No member of this Court would disagree that the validity of State action claimed to infringe rights assured by the 14th amendment is to be judged by the same basic constitutional standard whether or not racial problems are involved. No worse setback could befall the great principles established by *Brown* v. *Board of Education*, 347 U.S. 483, than to give fairminded persons reasons to think otherwise. With all respect, I believe that the striking down of this Virginia statute cannot be squared with accepted constitutional doctrine in the domain of State regulatory power over the legal profession."

[4] 372 U.S. 391, 446-47 (1963).
[5] 370 U.S. 660, 689 (1962).
[6] 374 U.S. xxx, at xxx (1963).
[7] 374 U.S. xxx, at xxx (1963).
[8] 371 U.S. 415, 448 (1963).

Item. The Court disregards precedents at will without offering adequate reasons for change.

Mr. Justice Brennan puts his charge in short compass in *Pan American Airways* v. *United States*: [9]

"The root error, as I see it, in the Court's decision is that it works an extraordinary and unwarranted departure from the settled principles by which the antitrust and regulatory regimes of law are accommodated to each other."

Item. The Court uses its judgments not only to resolve the case before it but to prepare advisory opinions or worse, advisory opinions that do not advise.

The testimony here includes the following:

"The Court has done little more today than to supply new phrases—imprecise in scope and uncertain in meaning—for the habeas corpus vocabulary for district court judges. And because they purport to establish mandatory requirements rather than guidelines, the tests elaborated in the Court's opinion run the serious risk of becoming talismanic phrases, the mechanistic invocation of which will alone determine whether or not a hearing is to be had."

"More fundamentally, the enunciation of an elaborate set of standards governing habeas corpus hearings is in no sense required, or even invited, in order to decide the case * * * and the many pages of the Court's opinion which set these standards forth cannot, therefore, be justified even in terms of the normal function of dictum. The reasons for the rule against advisory opinions which purport to decide questions not actually in issue are too well established to need repeating at this late date."

This is not the plea by academic followers of Herbert Wechsler for principled decisions nor even an argument by Wechsler's opponents for ad hoc resolutions. It is the view of Mr. Justice Stewart in *Townsend* v. *Sain*.[10]

Item. Not unrelated to the charge just specified is the proposition that the Court seeks out constitutional problems when it could very well rest judgment on less lofty grounds.

Here is the Chief Justice himself speaking in *Communist Party* v. *Subversive Activities Control Board*: [11]

"I do not believe that strongly felt convictions on constitutional questions or a desire to shorten the course of this litigation justifies the Court in resolving any of the constitutional questions presented so long as the record makes manifest, as I think it does, the existence of nonconstitutional questions upon which this phase of the proceedings should be adjudicated. I do not think that the Court's action can be justified."

Item. The Court has unduly circumscribed the congressional power of investigation.

The testimony I offer here is not that of the chairman of the House Un-American Affairs Committee nor that of the Birch Society. It derives from Mr. Justice White's opinion in *Gibson* v. *Florida Investigation Committee*: [12]

"The net effect of the Court's decision is, of course, to insulate from effective legislation the time-proven skills of the Communist Party in subverting and eventually controlling legitimate organizations. Until such a group, chosen as an object of Communist Party action, has been effectively reduced to vassalage, legislative bodies may seek no information from the organization under attack by duty-bound Communists. When the job has been done and the legislative committee can prove it, it then has the hollow privilege of recording another victory for the Communist Party, which both Congress and this Court have found to be an organization under the direction of a foreign power, dedicated to the overthrow of the Government if necessary by force and violence."

Item. I will close the list with the repeated charge that the due process clause of the 14th amendment as applied by the Court consists only of the "evanescent standards" of each judge's notions of "natural law." The charge is most strongly supported by the opinions of Mr. Justice Black in *Adamson* v. *California* [13] and *Rochin* v. *California*,[14] to which I commend you.

I close the catalog not because it is exhausted. These constitute but a small part of Brutus' indictment and an even smaller proportion of the witnesses prepared to testify to the Court's grasp for power. These witnesses are impressive, however, for they are not enemies of the Court but part of it. Moreover, their

[9] 371 U.S. 296, 319 (1963).
[10] 372 U.S. 293, 327 (1963).
[11] 367 U.S. 1, 116 (1961).
[12] 372 U.S. 539, 545 (1963).
[13] 332 U.S. 46, 68 (1947).
[14] 342 U.S. 165, 174 (1952).

depositions may be garnered simply by thumbing the pages of the recent volumes of the U.S. Reports, which is exactly the way that my partial catalog was created.

Let me make clear that this testimony does not prove Caesar's guilt, but only demonstrates that these charges cannot be dismissed out of hand. The fact that they are endorsed by such irresponsible groups as would support the proposed constitutional amendment does not add to their validity. But neither does such support invalidate them.

What then of Antony's defenses of Caesar?

First is the proposition that our Caesar has done no more than perform the duties with which he is charged. We have it from no less eminent an authority than Paul Freund that the Court has not exceeded its functions and he defines them thus: [15]

"First of all, the Court has a responsibility to maintain the constitutional order, the distribution of public power and the limitation on that power.

"A second great mission of the Court is to maintain a common market of continental extent against State barriers or State trade preferences.

"In the third place, there falls to the Court a vital role in the preservation of an open society, whose government is to remain both responsive and responsible. Responsive government requires freedom of expression; responsible government demands fairness of representation."

And so, Professor Freund suggests, the Court has done no more than its duty and he predicts that we shall be grateful to it: [16]

"The future is not likely to bring a lessening of governmental intervention in our personal concerns. And as science advances into outer and inner space—the far reaches of the galaxy and the deep recesses of the mind—as physical controls become possible over our genetic and our psychic constitutions, we may have reason to be thankful that some limits are set by our legal constitution. We may have reason to be grateful that we are being equipped with legal controls, with decent procedures, with access to the centers of decisionmaking, and participation in our secular destiny, for our days and for the days we shall not see."

It is not clear to me that the second defense is really different from the first. Here we are met with the proposition that the Court, politically the least responsible branch of government, has proved itself to be morally the most responsible. In short, the Court has acted because the other branches of government, State and National have failed to act. And a parade of horribles would not be imaginary that marched before us the abuses that the community has rained on the Negro; the evils of McCarthyism and the continued restrictions on freedom of thought committed by the National Legislature; the refusal of the States and the Nation to make it possible for the voices of the disenfranchised to be heard, either by preventing groups from voting, or by mechanisms for continued control of the legislature by the politically entrenched, including gerrymandering, and subordination of majority rule by the filibuster and committee control of Congress; the police tactics that violate the most treasured rights of the human personality, police tactics that we have all condemned when exercised by the Nazis and the Communists. This list, too, may be extended almost to infinity. There can be little doubt that the other branches of Government have failed in meeting some of their essential obligations to provide constitutional government.

The third defense is that which I have labeled the defense of Caesar's will. It is put most frankly and tersely by Prof. John Roche in this way.[17]

"As a participant in American society in 1963—somewhat removed from the abstract world of democratic political theory—I am delighted when the Supreme Court takes action against bad policy on whatever constitutional basis it can establish or invent. In short, I accept Aristotle's dictum that the essence of political tragedy is for the good to be opposed in the name of the perfect. Thus, while I wish with Professors Wechsler and Kurland, inter alios, that Supreme Court Justices could proceed on the same principles as British judges, it does not unsettle or irritate me when they behave like Americans. Had I been a member of the Court in 1954, I would unhesitatingly have supported the constitutional death sentence on racial segregation, even though it seems to me that in a properly ordered democratic society this should be a task for the legislature. To paraphrase St. Augustine, in this world one must take his breaks where he finds them."

There then are the pleadings. I do not pretend to a capacity to decide the case. It certainly isn't ripe for summary judgment or judgment on the pleadings. I am

[15] Freund, The Supreme Court Under Attack, 25 U. Pitt. L. Rev. 1, 5-6 (1963).
[16] Id., at p. 7.
[17] Roche, The Expatriation Cases: "Breathes There the Man With Soul So Dead?" 1963 Supreme Court Review, 325, 326 n. 4.

fearful only that if the case goes to issue in this manner, the result will be chaos whichever side prevails. For, like Judge Learned Hand, I am apprehensive that if nothing protects our democracy and freedom except the bulwarks that the Court can erect, we are doomed to failure. Thus, I would answer the question that purports to be mooted today, whether the court-of-the-union amendment should be promulgated, in the words of that great judge: [18]

"And so, to sum up, I believe that for by far the greater part of their work it is a condition upon the success of our system that the judges should be independent; and I do not believe that their independence should be impaired because of their constitutional function. But the price of this immunity, I insist, is that they should not have the last word in those basic conflicts of 'right and wrong—between those whose endless jar justice resides.' You may ask then what will become of the fundamental principles of equity and fairplay which our constitutions enshrine; and whether I seriously believe that unsupported they will serve merely as counsels of moderation. I do not think that anyone can say what will be left of those principles; I do not know whether they will serve only as counsels; but this much I think I do know—that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thursting upon the courts the nurture of that spirit, that spirit in the end will perish."

I find then that I have come neither to praise nor to bury Caesar. I should only remind those who would destroy Caesar of the self-destruction to which the noble Brutus was brought; nor can the Antonys among us—who would use Caesar for their own ends—rejoice at his ultimate fate. For Caesar himself, I should borrow the advice given Cromwell by Wolsey: "I charge thee, filing away ambition: By that sin fell the angels."

Attorney General KATZENBACH. Could I say this first, Senator; I have never doubted the sincerity of your views even though I have disagreed with them. I have never doubted the sincerity of your feelings about the Constitution even where I am in disagreement with your interpretation of it.

Secondly, I think it is very helpful that in your statement this morning, at least a large part of title V you recognize is supportable outside of the 14th amendment so that many of the provisions of title V you would not regard as being unconstitutional even if you would regard them as being unwise.

Third, with respect to your statement about making it apply to everbody equally, I think this ought to be said. To a large extent, I deplore the need for Federal intervention in matters that I think the States could and should uphold themselves, and for that reason I think it is important in terms of protecting our system of federalism that the Federal Government, despite its constitutional powers, intrude to the minimum extent that it can to solve a particular problem.

I think we have had particular problems in the racial area, and I think those problems reflect the need for Federal intervention in those areas at this time, and it is for that reason that it has been narrowed down, and for that reason that I would not support a far broader Federal intervention into matters which I think the States deal with under their obligations to the Federal Constitution realistically and effectively. I think it is important for Congress to confine its legislation to those matters which it believes it is necessary to have Federal intervention and Federal law.

For that reason we narrowed this to racial matters, not to give any particular group any particular rights over anyone else, but because that is where the problem has been. That is where State law enforcement has repeatedly fallen down.

Senator ERVIN. I can appreciate the reasons for your position on that. In fact, somewhat similar reasons prompted me, in the con-

[18] Hand, The Spirit of Liberty 104 (2d ed. 1953).

stitutional amendment I propose, to make a restriction. My restrictions are different, however, in that the rights secured by the Constitution are not nearly as numerous as the questions that arise under the equal protection of the law clause, because, as I have stated, and I think you agree, such questions can conceivably arise whenever State action of any character, legislative, executive, or judicial touches any individual. Thank you.

Senator Kennedy, do you have any questions?

Senator KENNEDY of Massachusetts. Thank you very much, Senator.

I just have two very brief questions, Mr. Attorney General. I, first of all, want to state that I think you have made a very compelling argument about the constitutionality of title V of this legislation. I think your statements with regard to the majority of six in the *Guest* case concerning their view relative to the protections guaranteed under the Constitution and the 14th amendment are sufficient to assure the Members of the Congress that they can support this legislation.

In your title V as you have presented it to the committee, you mention that it includes action under color of law by force or by threat of force. It lists down through a number of different paragraphs and subparagraphs.

I know that you had language similar to that under the voting rights legislation. I understand as well that under the voting rights legislation that this language was broadly enough interpreted to include economic coercion. If, for example, an individual was either thrown out of his house or fired from his job as a result of trying to exercise his right to vote it would be violative of the Voting Rights Act.

I am wondering now under title V of this legislation, whether or not this language is to be interpreted broadly enough as to provide not only protection from force or threat of force, but also from economic coercion.

Attorney General KATZENBACH. I would not think that title V as it is drafted here would include economic intimidation, unless this was conceivably of the most blatant kind on the particular facts. That does exist presently in the law with respect to certain of these rights. So I would think that the answer to your question here would be that the intimidation that is primarily being talked about here is the intimidation of force and not the intimidation of economic intimidation.

However, economic intimidation is included as far as title IV is concerned, as far as housing is concerned; is included as far as schools are concerned. It is included as far as public accommodations are concerned. It is included as far as voting is concerned by existing provisions of the law. So, it would cover most of these under separate provisions.

Senator KENNEDY of Massachusetts. Don't you feel that the same reasons which justified the inclusion of economic coercion under those sections compel the inclusion of economic coercion under this section as well?

Attorney General KATZENBACH. I am satisfied as far as the criminal law is concerned, making something a crime. I think we should confine it to the kind of breadth, force, and physical violence, and so forth, that is included here.

I think as far as civil remedies are concerned, that there should be a remedy against economic intimidation. I think that ought to be, and that is dealt with in existing law, or in this statute in another section, section 405 of this statute, for example, with respect to housing.

I think if we are going to deal with economic intimidation, Senator, it ought to be dealt with really civilly rather than try to deal with it as a criminal matter. I think as a practical matter on economic intimidation you are going to have a very difficult time proving a case to 12 jurors that satisfies them that a man should be punished criminally for this act.

Senator KENNEDY of Massachusetts. In a different area, the Civil Rights Commission offered an amendment to 42 U.S.C. 1983, to make the local government that employes the officials who deprive people of the rights protected by 1983 jointly liable. You spoke briefly on this subject yesterday or the day before.

This amendment was recommended by the Civil Rights Commission in 1961 and again in 1965. Would you give us the benefit of your thought as to why you would not make the officials jointly liable under this provision, or why we shouldn't consider amending the legislation to include that?

Attorney General KATZENBACH. I have no great objections to that. I doubt that it would prove to be a particularly effective remedy, but I am not opposed to it.

Senator KENNEDY of Massachusetts. So, it is really a question of its effectiveness and whether it can be successfully applied?

Attorney General KATZENBACH. Yes.

Senator KENNEDY of Massachusetts. What is your——

Attorney General KATZENBACH. I think it would be very difficult to recover damages.

Senator KENNEDY of Massachusetts. Against any——

Attorney General KATZENBACH. In suits. I think it is sometimes a mistake, and I don't say this in opposition, I say this more generally, Senator, sometimes it is a mistake to write provisions in the law when they really can't be made effective to do what one would hope they would accomplish. I think this can sometimes add to frustrations.

I know, to go back to the economic intimidation case, they are extremely difficult to prove, and to get hard evidence that is going to satisfy people with respect to that. Yet people will have views about it. So I am put in the position of saying you are not enforcing the law when really what I can't do is get the evidence and have it hard enough to do it. But I don't have any opposition to that, if that is what the committee should wish to do.

Senator KENNEDY of Massachusetts. Your Section 501(a)(7) makes criminal any interference with a person using a highway or road in interstate commerce. This is limited to a common carrier?

Attorney General KATZENBACH. Yes.

Senator KENNEDY of Massachusetts. Therefore, it wouldn't reach a situation such as that involving Lemuel Penn on a Georgia highway; or would you interpret the language to include such a situation?

Attorney General KATZENBACH. No. That particular section wouldn't deal with the *Penn* case. I think that the section here, section b(2), it is really (b)(1), "injuries, intimidates, or interferes with or attempts to injure, intimidate, or interfere with any person to dis-

courage such person or any other person or any class of persons from participating in or seeking to participate in these benefits."

The reason for this provision was, if you take a Klan-inspired activity, where incidents similar to the *Penn* case occur, where there is just a senseless shooting, knifing, beating up of a Negro for the purpose of making him an example to others, and thus creating some fear within the community of what will happen to you, that is what we are trying to cover there.

While I don't want to go deeply into the *Penn* case itself, it seems to me that the facts in the *Penn* case might support that sort of reading of the action there, simply going out on the highway and shooting somebody because he is a Negro, in that total context of that particular part of the State of Georgia.

Senator KENNEDY of Massachusetts. Are you satisfied that this would——

Attorney General KATZENBACH. I am satisfied that the would be covered, but not under the section that——

Senator KENNEDY of Massachusetts. Thank you very much.

Senator ERVIN. Mr. Attorney General, when the law undertakes to punish the people of a community by immersing them in damages for the wrongful act of an individual, it certainly is an efficacious way of inflicting the sins of the guilty upon the innocent, isn't it?

Attorney General KATZENBACH. I didn't have the exact language that was proposed. I would suppose that in terms of making them jointly liable, that it might well be that it would require some allegation of failure to carry out their duties within that community.

Senator ERVIN. Yes, and——

Attorney General KATZENBACH. I don't know exactly what Senator Kennedy was proposing.

Senator ERVIN. Of course, when we get into the civil rights field, a lot of people put it in a different classification. A lot of people are sort of like the fellow who received a telegram which said, "Your mother-in-law died today, shall we cremate or bury?" He wired back and said, "Take no chances, cremate and bury."

Don't you agree with the general proposition that laws, generally speaking, ought to be uniform and apply alike to all people in like circumstances? That is a good fundamental principle, isn't it?

Attorney General KATZENBACH. Yes, sir.

Senator ERVIN. Now, if you are going to provide for indemnification by immersing in damages people in a community for a civil rights violation, by the same token you should immerse in damages people generally for other violations of law, should you not?

Attorney General KATZENBACH. I think I stated yesterday, or the day before, I thought that was one of the difficulties with indemnification was including a certain group. I was then talking about a somewhat different proposal than that which I think Senator Kennedy had in mind. But, I would say treating like people in like circumstances, that I would think the justification for what I understand Senator Kennedy to be suggesting here, the justification would be that other people are not in those circumstance because the facts have indicated or the experience has been a failure on the part of at least a number of local law enforcement agencies to carry out protection with respect to Negro citizens.

I also understood, I think I understood that the proposal was to make the officials liable for this, not to make the State liable for it. I think there are problems in making the State or the municipality liable for it.

Senator ERVIN. It is pretty hard to make the official who doesn't participate in the thing liable for it, it seems to me. I think that you get into a dangerous field there.

For example Massachusetts was unable to catch a man who strangled five women, I believe that was the number.

Senator KENNEDY of Massachusetts. Fourteen.

Senator ERVIN. Fourteen. I think to make the people of Mississippi responsible for a crime of violence, and not make the people of Massachusetts——

Attorney General KATZENBACH. I had not understood that it was a police official that did that strangling, and I think that is the situation Senator Kennedy is talking about, is where the employee of the municipality——

Senator KENNEDY of Massachusetts. Under the color of law.

Attorney General KATZENBACH. Under the color of law does do this. He is now liable under 1983.

Senator KENNEDY of Massachusetts. You would make that as applicable to Massachusetts as it is any——

Attorney General KATZENBACH. Yes; just as applicable there. The idea would be to make the municipality liable in similar circumstances, and I think most municipalities could be made so liable. There is something of an 11th amendment problem conceivably at some point here. It certainly is if you make the State liable.

Senator ERVIN. If my recollection serves me right, Blackstone points out in his commentaries on the law of England that that is the way they used to vindicate wrongs. They punished everybody in the community where the wrong occurred, but as soon as the world reached the first dawn of civilization they quit punishing the innocent for the sins of the guilty.

Attorney General KATZENBACH. Yes, sir; but there is nothing particularly offensive, to me at least, in the idea that I employ somebody and vest him with the powers of authority in the State, that I then become responsible when he misuses those powers.

I see arguments on both sides about this, but I don't think that is an inherently offensive idea, that the municipality takes responsibility for the misconduct of its officials.

Senator ERVIN. Mr. Attorney General, I don't think you can justly restrict legislation of that kind to civil rights cases. If an alderman of the city of Chicago were to employ a policeman who wrongfully shoots anybody, I think that by the same token the city of Chicago should be held responsible.

Attorney General KATZENBACH. If I understood Senator Kennedy's proposal, it would apply equally to the city of Chicago.

Senator ERVIN. If you are going to have a rule of *respondeat superior* written into Federal law, all of the superiors ought to respond in like manner. I think you are going into a very dangerous field there.

Attorney General KATZENBACH. 1983 applies in 50 States to denial of civil rights, and we have had investigations in many States where people have been allegedly picked up by the police and beaten or coerced and this sort of thing.

I don't think there is intention to apply it only to a particular section of the country.

Senator KENNEDY of Massachusetts. Mr. Attorney General, wouldn't you say that the area of civil rights has been selected by the passage of 1983 as an area which will be protected?

As you have so well stated, it is a suggestion which would apply to Chicago, Massachusetts, or any place. That is, if it were determined from the evidence that under color of law there has been a series of abuses by local authority, then the best way to remedy this situation is to provide for joint liability. I think that certainly we want to make this protection of civil rights applicable wherever there is injustice—in Boston, in my own State, and in every other part of the country. And I think that this area of civil rights has been identified in 1983, and it was the suggestion that this amendment be considered to be an amendment to that section, which would be applicable to the 50 States.

Attorney General KATZENBACH. It would find a deeper pocketbook.

Senator ERVIN. Mr. Attorney General, changing the subject to another phase, in my State there have been threats to deny medicare benefits in hospitals.

Now I propose to offer an amendment to this bill providing that:

> No hospital, nursing home, or other health care facility shall, for purposes of this title, be regarded as receiving Federal financial assistance for any program or activity by reason of the fact that such hospital, nursing home, or other facility participates in any program, which is administered by an agency or instrumentality of the United States or which receives Federal financial assistance, if such program is designed to assist individuals who are the beneficiaries thereof in obtaining or in meeting the costs of health care services, and if the participation in such program by such hospital, nursing home, or other facility consists (in toto or in principal part) of an undertaking by such hospital, nursing home, or other institution to provide, for a consideration paid by or under such program, health care services to such individuals.

That is what a layman might call some legal gobbledygook but it was drawn at my request by the legislative counsel of the Senate for the purpose of establishing the principle that the medicare program, insofar as it rests upon social security, is an insurance program and to establish the principle that a man has an absolute right to receive the benefits of the medicare program insofar as it is based upon the social security system, without interference on the part of the Federal Government.

I would like to ask you your opinion—I realize that this is something on the spur of the moment and you may want to answer the question later by a letter, but do you think that the medicare program, insofar as it rests upon social security can be properly classified as a Federal financial program or activity, rather than an insurance program?

Attorney General KATZENBACH. Yes, sir.

Senator ERVIN. You say it can?

Attorney General KATZENBACH. Yes, sir.

Senator ERVIN. And that is the position of the administration?

Attorney General KATZENBACH. Yes. I think it is covered by title VI as it now exists. I take it the purpose of your legislation would be to remove it from the coverage of title VI. I would be opposed to that.

Senator ERVIN. Doesn't title VI expressly exempt insurance programs from its operation?

Attorney General KATZENBACH. Title VI? It speaks about "other than a contract of insurance or guarantee." It talks about a contract of insurance or guarantee. I don't think the medicare program is a contract of insurance or guarantee.

Senator ERVIN. It is called old age and survivors insurance isn't it and a man pays a premium for it, does he not?

Attorney General KATZENBACH. He pays for it and there is a contribution by the Government at the same time.

Senator ERVIN. Do you think that a man who is suffering and who has paid social security upon the assurance of the Government that he has an old age and survivors insurance, to which he is entitled as a matter of right, should be denied the right to go to a hospital in his community simply because that hospital doesn't satisfy the notions of the Department of Health, Education, and Welfare as to what it should do in racial matters?

Attorney General KATZENBACH. I think so; yes, Senator. I think the objective here in the medicare program is to get adequate medical facilities for everyone. I think you would agree with me there ought to be adequate medical facilities irrespective of race or color. I think the only way that that really can be achieved is by hospitals participating in this, if they are presently discriminating, to stop discriminating. It is the hospital that does it.

Let me just turn your case around and let's make it apply to a Negro who is then prevented, although joining this program, prevented from getting into these medical facilities by the actions of the hospital. I think the argument that you make cuts equally the way I would support it and the way you do.

Senator ERVIN. In other words, because the hospital may discriminate against a colored man, it should allow me to remain out and die.

Attorney General KATZENBACH. They may be allowing that colored man to remain out and die. That is my point.

Senator ERVIN. I know. I am talking about——

Attorney General KATZENBACH. That is my point.

Senator ERVIN. I am talking about the individual. I don't know any hospital in my State that doesn't receive patients of all races.

Attorney General KATZENBACH. It may be that——

Senator ERVIN. I was told by one hospital in North Carolina that they were instructed by the representative of the Department of Health, Education, and Welfare that in assigning patients to rooms and wards, they should ignore the wishes of the patients and assign them to rooms and wards in such a manner as to produce the maximum racial integration. Otherwise, they would be denied Federal funds.

Attorney General KATZENBACH. One of the difficulties of this whole business, Senator, is that somebody says that somebody said something to him in that regard. Now that is not the policy of HEW. The policy of HEW in this regard is simply that patients coming into a hospital, irrespective of color, should be given the same facilities assigned in the same manner, that other patients are assigned, and that manner should not be a manner which says, Negro patients go to this ward, white patients go to this ward. They should all be treated alike in that regard.

Now I can't say that out of some 2,000 people in HEW that are trying to work this out with hospitals, I can't obviously say that

no representative of HEW didn't say something that he shouldn't have said. He may have said that.

It has also been my experience in this that sometimes the remarks of the Federal representative in this regard are occasionally overstated or exaggerated for purposes of showing how horrible the program is and how unreasonable the Federal Government is. There has been a good deal of misunderstanding of HEW's "guidelines" in schools. There has been a good deal of misunderstanding with respect to the hospital program. But the fact is that in most areas the hospitals are coming in, are participating in that program, and are willing to treat everybody alike.

So I don't think the amendment that you suggest here would be a step forward in this regard. I think it would prevent, deter the purposes of medicare, the great purposes of medicare to provide older people with adequate medical attention and medical facilities, clearly irrespective of their race, religion, color, sex.

(At this point Senator Javits entered the hearing room.)

Senator ERVIN. The trouble is, Mr. Attorney General, the information I receive comes from the most highly reputable people in North Carolina, and it is that the Department of Health, Education, and Welfare sends out representatives to these hospitals who make oral statements, and when you write HEW about these things, after about 3 months, if you are lucky, you get an answer in which they disclaim it. But I have been told this by highly reputable people who said they heard the conversation.

Now to me, any person who has paid his social security tax in equity and good conscience should have an absolute right to receive the hospital, the medical, and the nursing home benefits that the law says he is entitled to. That individual ought not to be penalized and ought not to be denied the necessary care and treatment because of a disagreement between the officials of the hospital and HEW as to certain racial policies.

It just means that the administration apparently would rather a man to die than to be cured in a segregated ward, even though he has paid for treatment and is entitled to treatment under the law. And even though he has nothing whatever to do with any discrimination.

Senator JAVITS. Would the Chair yield on that?

Senator ERVIN. Yes.

Senator JAVITS. Mr. Chairman, I recall that in the debate on title VI, that is exactly what was argued, and it was frankly faced that the greatest good of the United States required that this policy be pursued. We couldn't tolerate Federal funds being used to aid and abet racial segregation in hospitals, and we would rather run the risk that this might conceivably result in someone not getting treatment who urgently needed and desired it, because the greater good to the greatest number of those in the United States requires that at long last we come abreast of this policy of not using Federal funds in violation of the Constitution.

My understanding of the vote was that it was taken in contemplation of those arguments, and my judgment is that the guilt is on the head of the hospital which segregates and not on the United States which refuses to aid it, because the hospital violates the laws and the Constitution.

Senator ERVIN. The guilt is on the Federal Government. If the Federal Government, like the priest and the Levite, passed by and walked on leaving the man lying stricken there and denied him necessary medical care simply because of the policy of a hospital he has no control over, I say the guilt is on the head of the Federal Government. I don't think that it is more important to integrate than to alleviate and cure human suffering.

Senator JAVITS. I think there is untold human suffering caused by discrimination and segregation for a century and it is time we got over it.

Senator ERVIN. These are not Federal funds at all but they are funds that the man has paid for health insurance and he is to be denied necessary hospitalization simply because of a disagreement between the Federal Government and the policymakers of the hospital concerned with which this man has no connection and no control.

Attorney General KATZENBACH. Don't you think that whether he is white or Negro he is entitled to the same treatment? I don't see why we should leave the Negro out.

Senator ERVIN. I agree.

Attorney General KATZENBACH. In order to save the white man.

Senator JAVITS. This is exactly the point.

Senator ERVIN. I agree with you absolutely but I think it is more important to cure the white man or the Negro than it is to see to it that they both have to sleep in adjoining beds. I think the fundamental purpose of a hospital is to alleviate or cure human suffering, and not to integrate the races. Under the policy of the Department of Health, Education, and Welfare as it is apparently being administered, integration is put ahead of alleviation or cure.

Attorney General KATZENBACH. They simply say, let's treat every person in the same way.

Senator JAVITS. But if the Chair would yield, there are cases of untold numbers of Negroes who have died and who have been ill and who have not been treated because they have not been admitted to hospitals which had a "white only" policy. And what about them? I thoroughly agree with the Attorney General on that.

Senator ERVIN. I would like to put in the record at this point a statement made by the Attorney General on December 2, 1963, in response to a request of Chairman Celler of the House Judiciary Committee about the meaning of title VI. I am not going to take the trouble to read it at this time but I would say that although medicare had not yet been passed I construe that letter to say that it would not apply to a program of that kind, because that is something a man has paid for himself and it is not from Federal funds.

(The statement referred to follows:)

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., December 2, 1963.

Congressman EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives,
Washington, D.C.

DEAR MR. CELLER: This is in response to your request for a list of programs and activities which involve Federal financial assistance within the scope of title VI of the proposed civil rights bill, H.R. 7152.

For the reasons outlined below, it has been found to be impossible to compile any list which is accurately responsive to your request or satisfactorily

representative of the amounts of Federal financial assistance which potentially could be affected by the provisions of title VI. The list attached should not, therefore, be taken at face value or used without an understanding of its limitations.

Title VI, as set forth in Committee Print No. 2, dated October 30, 1963, provides in part:

"SEC. 601. Notwithstanding any inconsistent provision of any other law, no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

"SEC. 602. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity by way of grant, contract, or loan, shall take action to effectuate the provisions of section 601 with respect to such program or activity. * * *"

Title VI would apply to programs and activities which receive Federal financial assistance, by way of grant, contract, or loan. I attach a list of appropriations, revolving funds, and trust funds, part or all of which may involve such Federal financial assistance. The list is keyed to line items in the 1964 budget, and is based on financial data furnished by the Bureau of the Budget. The following, however, were omitted: (1) New programs which, although listed in the budget, are not yet authorized and are the subject of proposed legislation and (2) programs which were in liquidation after fiscal year 1962. A program description for each item can be found in the appendix to the 1964 budget on the page indicated after the program title on the attached list.

The dollar figures in the table are the preliminary actual expenditures for the fiscal year 1963 as reported by the Treasury Department. In the case of revolving and trust funds, the expenditures shown are on a net basis except in the case of two trust funds indicated by footnotes in the attached table, which are shown on a gross expenditure basis in the Budget and Treasury reports. Minus figures indicate net revenues.

The following comments and observations are applicable to the attached table.

1. Activities wholly carried out by the United States with Federal funds, such as river and harbor improvements and other public works, defense installations, veterans' hospitals, mail service, etc. are not included in the list. Such activities, being wholly owned by, and operated by or for, the United States, cannot fairly be described as receiving Federal "assistance." While they may result in general economic benefit to neighboring communities, such benefit is not considered to be financial assistance to a program or activity within the meaning of title VI.[1]

For similar reasons, ordinary Government procurement is not considered to be subject to title VI. All such direct activities of the Federal Government are, of course, subject to the constitutional requirement of nondiscrimination embodied in the fifth amendment; in addition, contracting related to them is subject to the nondiscrimination requirements of Executive Order 10925 and would be subject to the authority conferred by section 711(b) of H.R. 7152.

2. A number of programs administered by Federal agencies involve direct payments to individuals possessing a certain status. Some such programs may involve compensation for services rendered, or for injuries sustained, such as military retirement pay and veterans' compensation for service-connected disability, and perhaps should not be described as assistance programs; others, such as veterans' pensions and old-age, survivors and disability benefits under title II of the Social Security Act, might be considered to involve financial assistance by way of grant. But to the extent that there is financial assistance in either type of program, the assistance is to an individual and not to a "program or activity" as required by title VI. In any event, title VI would not substantially affect such benefits, since these payments are presently made on a nondiscriminatory basis, and since discrimination in connection with them is precluded by the fifth amendment to the Constitution, even in the relatively few instances in which they are not wholly federally administered. Accordingly, such programs are omitted from the list. For similar reasons, programs involving direct Federal furnishing of services; such as medical care at federally owned hospitals, are omitted.

3. Programs of assistance to foreign countries, to persons abroad, and to unincorporated territories and possessions of the United States, are omitted, since

[1] Reclamation projects have, however, been included because they may include construction under contract of some facilities which will be operated and ultimately owned by non-Federal entities, and may to that extent be considered to involve a form of financial assistance to such entities.

the application of title VI is limited to persons in the United States. Programs of assistance to Indians are also omitted. Indians have a special status under the Constitution and treaties. Nothing in title VI is intended to change that status or to preclude special assistance to Indians. Programs which involve Federal payments to regular school districts which provide education to Indians as well as non-Indians have, however, been included since such programs can be regarded as a form of assistance to the school district.

4. The dollar amounts shown do not in each case afford a reliable indication of the magnitude of the assisted program or activity. In a number of cases, the total Federal expenditures for a given line item in the budget have been shown even though only a small portion or aspect of the program covered by that line item might involve financial assistance within the scope of title VI.[3] On the other hand, certain very large items which may involve relatively very small amounts of Federal financial assistance have been omitted to avoid undue distortion. Examples include: AEC, a small part of whose expenditures may have been spent on assistance payments to States, localities, and private entities; research and development activities related to national defense and other direct governmental functions, a small part of which involve grants, fellowships, and other assistance payments; and procurement, some part of which may possibly be considered to involve special assistance to contractors. Similarly, while programs involving donation of commodities, in kind, would appear to be within the scope of title VI, and such programs have been included in the attached list where clearly identifiable, no attempt has been made to identify, or place a dollar figure on, all programs involving donation of property, or disposition at less than fair value.

5. It should not be assumed that each program shown on the attached list will be significantly affected by the enactment of title VI. Title VI expresses a general, across-the-board Government policy, which has potential impact on a great number and variety of programs. The attached list attempts to identify those programs which might potentially be affected, although some may have been overlooked. In fact, however, title VI is expected to have little practical impact on many of the programs listed, for the reason that they are now being administered in a manner which conforms with the policy declared by title VI. Indeed, explicit nondiscrimination policies have been adopted by executive action in recent years in many areas, including housing, airports, and employment on federally assisted construction, while other programs either do not present practical possibilities for discrimination, or have long been administered in ways which preclude discrimination.

The impact of title VI is further limited by the fact that it relates only to participation in, receipt of benefits of, or discrimination under, a federally assisted program. As to each assisted program or activity, therefore, title VI will require an identification of those persons whom Congress regarded as participants and beneficiaries, and in respect of whom the policy declared by title VI would apply. For example, the purpose of benefit payments to producers of agricultural commodities, under 7 U.S.C. 608, is to "establish and maintain * * * orderly marketing conditions for agricultural commodities in interstate commerce" (7 U.S.C. 602). The act is not concerned with farm employment. As applied to this Federal assistance program, title VI would preclude discrimination in connection with the eligibility of farmers to obtain benefit payments, but it would not affect the employment policies of a farmer receiving such payments.

The effect of title VI, on most of the programs shown on the attached list, will be to provide statutory support for action already being taken to preclude discrimination, to make certain that such action is continued in future years as a permanent part of our national policy, and to require each department and agency administering a program which may involve Federal financial assistance to review its administration to make sure that adequate action has been taken to preclude discrimination and to take any action which may be shown to be necessary by such review.

In addition, title VI will override those provisions of existing Federal law which contemplate financial assistance to "separate but equal" facilities. Assistance to such facilities appears to be contemplated under the Hill-Burton Act (42 U.S.C. 291e(f)—hospital construction), the second Morrill Act (7 U.S.C.

[3] For example, the item listed as "forest protection and utilization" under the Department of Agriculture is shown at its total 1963 expenditure of $197,242,562 although only a small amount of that total is to be spent for State and local grants which come within the scope of title VI. Costs of administration have also been included except where they appear as a separate line item in the budget.

323—land-grant colleges) and Public Law 815 (20 U.S.C. 636(b)(F)—school construction). The U.S. Court of Appeals of the Fourth Circuit has recently held the "separate but equal" provision of the Hill-Burton Act unconstitutional. *Simkins* v. *Moses Cone Memorial Hospital*, decided November 1, 1963. Title VI would override all such "separate but equal" provisions without the need for further litigation, and would give, to the Federal agencies administering laws which contain such provisions, a clear directive to take action to effectuate the provisions of title VI.

I regret that it is impossible to supply more meaningful dollar figures with respect to programs of assistance potentially affected by title VI. As indicated, the amounts set out in the accompanying chart are almost all total expenditure figures, rather than the considerably smaller portions thereof which could be affected by title VI. Of course, most of the programs of Federal assistance included on the list are already administered on a nondiscriminatory basis, and, thus, though within the literal scope of title VI and included on the list would not be affected by enactment of the title. I particularly stress the regrettable, though unavoidable, difficulties inherent in the attached list in order to forestall any misunderstanding or distortion of its significance or meaning by either proponents or opponents of the legislation.

Sincerely yours,

NICHOLAS DEB. KATZENBACH,
Deputy Attorney General.

Programs which may involve Federal financial assistance

	1963 expenditures
Executive Office of the President:	
Office of Emergency Planning: State and local preparedness (p. 52)	0
Funds appropriated to the President:	
Disaster relief: disaster relief (p. 59)	$30,802,990
Expansion of defense production: Revolving fund, Defense Production Act (p. 60)	−56,513,274
Public works acceleration: Public works acceleration (p. 86)	61,843,808
Transitional grants to Alaska: Transitional grants to Alaska (p. 87)	3,110,295
Department of Agriculture:	
Cooperative State Experiment Station Service: Payments and expenses (p. 95)	37,992,460
Extension Service: Cooperative extension work, payments and expenses (p. 96)	74,687,584
Soil Conservation Service:	
Watershed protection (p. 100)	53,092,516
Flood prevention (p. 103)	26,488,410
Great Plains conservation program (p. 104)	9,747,075
Resource conservation and development (p. 105)	0
Agricultural Marketing Service:	
Payments to States and possessions (p. 113)	1,432,763
Special milk program (p. 113)	95,369,634
School lunch program (p. 114)	169,597,189
Removal of surplus agricultural commodities (p. 116)	131,805,115
Agricultural Stabilization and Conservation Service:	
Expenses, Agricultural Stabilization and Conservation Service (p. 122)	87,415,517
Sugar Act program (p. 125)	76,929,888
Agricultural conservation program (p. 125)	211,194,214
Land-use adjustment program (p. 127)	2,000,000
Emergency conservation measures (p. 127)	2,701,427
Conservation reserve program (p. 127)	304,342,305
Commodity Credit Corporation:	
Price support and related programs and special milk (p. 132)	3,486,356,042
National Wool Act (p. 137)	69,164,861
Rural Electrification Administration: Loan authorizations (p. 148)	331,656,082

Programs which may involve Federal financial assistance—Continued

	1963 expenditures
Department of Agriculture—Continued	
Farmers Home Administration:	
Rural housing grants and loans (p. 151)	$184, 203, 524
Rural renewal (p. 153)	0
Direct loan account (p. 153)	58, 948, 965
Emergency credit revolving fund (p. 156)	7, 888, 613
Rural housing for the elderly revolving fund (p. 155)	0
Forest Service:	
Forest protection and utilization (p. 170)	197, 242, 562
Assistance to States for tree planting (p. 176)	1, 203, 697
Payments to Minnesota (Cook, Lake, and St. Louis Counties) from the national forests fund (p. 177)	125, 366
Payments to counties, national grasslands (p. 177)	303, 074
Payments to school funds, Arizona and New Mexico, act of June 10, 1910 (p. 177)	80, 462
Payments to States, national forests fund (p. 177)	27, 235, 140
Department of Commerce:	
Area Redevelopment Administration:	
Grants for public facilities (p. 188)	476, 848
Area redevelopment fund (p. 188)	−499, 532
Office of Trade Adjustment: Trade adjustment assistance (p. 202)	2, 820
Maritime Administration:	
Ship construction (p. 223)	107, 483, 152
Operating-differential subsidies (p. 224)	220, 676, 686
Maritime training (p. 227)	3, 297, 777
State marine schools (p. 227)	1, 420, 724
Bureau of Public Roads:	
Forest highways (p. 237)	38, 525, 999
Public lands highways (p. 239)	2, 128, 990
Control of outdoor advertising (p. 239)	0
Highway trust fund (p. 241)	[1] 3, 017, 268, 879
Department of Defense:	
Military personnel:	
National Guard personnel, Army (p. 253)	212, 109, 751
National Guard personnel, Air Force (p. 254)	45, 366, 036
Operation and maintenance:	
Operation and maintenance, Army National Guard (p. 267)	174, 059, 283
Operation and maintenance, Air National Guard (p. 268)	193, 258, 395
National Board for Promotion of Rifle Practice, Army (p. 269)	650, 368
Military construction:	
Military construction, Army National Guard (p. 306)	18, 383, 216
Military construction, Air National Guard (p. 306)	21, 912, 946
Civil defense:	
Operation and maintenance, civil defense (p. 313)	34, 457, 221
Research and development, shelter, and construction, civil defense (p. 314)	11, 810, 129
Civil functions: Payments to States, Flood Control Act of 1954 (p. 378)	1, 613, 757

[1] This amount is on a checks-issued (gross) basis. Receipts (collections deposited) totaled $3,292,965,983 in fiscal year 1963.

Programs which may involve Federal financial assistance—Continued

	1963 expenditures
Department of Health, Education, and Welfare:	
Office of Education:	
Promotion and further development of vocational education (p. 402)	$34, 330, 192
Further endowment of colleges of agriculture and mechanic arts (p. 402)	11, 950, 000
Grants for library services (p. 402)	7, 256, 890
Payments to school districts (p. 402)	276, 910, 035
Assistance for school construction (p. 403)	66, 241, 942
Defense educational activities (p. 404)	198, 335, 518
Expansion of teaching in education of the mentally retarded (p. 406)	959, 631
Expansion of teaching in the education of the deaf (p. 406)	1, 382, 635
Cooperative research (p. 406)	5, 015, 385
Foreign language training and area studies (p. 407)	0
Colleges of agriculture and mechanic arts (p. 408)	2, 550, 000
Promotion of vocational education, act of Feb. 23, 1917 (p. 409)	7, 144, 113
Office of Vocational Rehabilitation:	
Grants to States (p. 409)	70, 651, 560
Research and training (p. 410)	24, 145, 307
Public Health Service:	
Accident prevention (p. 415)	3, 679, 047
Chronic diseases and health of the aged (p. 416)	16, 303, 114
Communicable disease activities (p. 417)	10, 749, 235
Community health practice and research (p. 419)	23, 946, 767
Control of tuberculosis (p. 420)	6, 813, 635
Control of venereal diseases (p. 420)	7, 843, 535
Dental services and resources (p. 421)	2, 603, 482
Nursing services and resources (p. 422)	8, 373, 620
Hospital construction activities (p. 423)	187, 432, 190
George Washington University Hospital construction (p. 424)	0
Aid to medical education (p. 424)	0
Environmental health sciences (p. 425)	0
Air pollution (p. 425)	10, 100, 876
Milk, food, interstate and community sanitation (p. 426)	8, 723, 615
Occupational health (p. 427)	4, 059, 384
Radiological health (p. 428)	13, 466, 288
Water supply and water pollution control (p. 429)	22, 554, 121
Grants for waste treatment works construction (p. 430)	51, 738, 090
National Institutes of Health (pp. 435–444)	723, 597, 285
Social Security Administration:	
Grants to States for public assistance (p. 460)	2, 723, 677, 540
Training of public welfare personnel (p. 463)	0
Assistance for repatriated U.S. nationals (p. 464)	412, 044
Grants for maternal and child welfare (p. 465)	76, 057, 662
Cooperative research or demonstration projects in social security (p. 468)	952, 654
Assistance to refugees in the United States (p. 469)	52, 902, 237
American Printing House for the Blind: Education of the blind (p. 472)	718, 707
Gallaudet College: Salaries and expenses (p. 474)	1, 458, 615
Howard University:	
Salaries and expenses (p. 475)	8, 362, 261
Construction (p. 476)	2, 687, 024
Office of the Secretary:	
Juvenile delinquency and youth offenses (p. 480)	4, 473, 623
Educational television facilities	1, 818

Programs which may involve Federal financial assistance—Continued

	1965 expenditures
Department of the Interior:	
Bureau of Land Management:	
Payments to Oklahoma (royalties) (p. 491)	$6, 214
Payments to Coos and Douglas Counties, Oreg., from receipts, Coos Bay Wagon Road grant lands (p. 491)	697, 449
Payments to counties, Oregon and California grant lands (p. 491)	15, 400, 136
Payments to States (grazing fees) (p. 492)	917
Payments to States (proceeds of sales) (p. 492)	249, 328
Payments to States from grazing receipts, etc., public lands outside grazing districts (p. 492)	183, 632
Payments to States from grazing receipts, etc., public lands within grazing districts (p. 492)	200, 446
Payments to States from grazing receipts, etc., public lands within grazing districts, miscellaneous (p. 492)	3, 902
Payments to States from receipts under Mineral Leasing Act (p. 492)	47, 147, 555
Payments to counties, national grasslands (p. 492)	92, 255

Senator ERVIN. Do you have questions, Senator Javits?

Senator JAVITS. Yes, I do; on title V. Section 502, Mr. Attorney General, provides changes in the penalties for violation of title 18 of sections 241 and 242. Long terms are provided if death results, but no intermediate penalties are available in the case of serious injury. Under section 242, for example, the penalty is $1,000 or 1 year for any offense where death does not result. Why is there not, for example, a greater penalty for cases of serious injury, aggravated assault, et cetera?

I have offered that kind of provision and I just wondered why the administration didn't?

Attorney General KATZENBACH. The reason for that, it is extremely difficult, Senator, in many instances, to get a grand jury in parts of the country, despite what I would hope would happen as a result of the enactment of this, to hand down an indictment in these intermediate cases, and the reason that we did this, if my recollection is correct, is to preserve the policy of being able to proceed by information which we can on the lower penalty.

Senator JAVITS. Wouldn't the same purpose be served, Mr. Attorney General, if you had a maximum and minimum penalty in those cases? It seems to me that——

Attorney General KATZENBACH. Putting an intermediate step in here?

Senator JAVITS. Yes. I will tell you why I say that. It seems to me that if you seek to make the punishment more adequately fit the crime, and that is what you are doing in death cases, and I think that is eminently preserved, then you have to follow through because you have no assurance, even in death cases, that there are going to be convictions, but you do want an overhanging high penalty so that a potential criminal has at least got to stare that in the face. He is gambling that the jury is going to let him off. I think the same argument, and I would hope that you would give that consideration, would apply to these so-called intermediate cases.

Attorney General KATZENBACH. I would point out, I know you are aware of it, Senator, but, of course, in the specific instance covered here in section 501, whether or not he was a police official, if it was in connection with any of these, he could be so charged.

Senator JAVITS. Yes. He could be charged under another statute in that case.

Attorney General KATZENBACH. Yes; 501 of this rather than 242.

Senator JAVITS. I realize that. But I submit that to you and I hope you will give it some study.

The other question I would like to ask you is in reference to what we saw on the Meredith situation, to wit, the matter of walking on the highway. I went over these categories of interference with civil rights very carefully in section 501, and I must say I found it difficult to find a category in which you could fit the Meredith case.

Now it may very well be that you would equate that with the Penn case. You understand I was upstairs in an executive session of Labor on the minimum wage bill so I couldn't be here through your earlier testimony. Please correct me if I am wrong, but I understand that you found applicability to the Penn case, that is, traveling on a public highway, under section 501 (b)(1), and I think it would be valuable to have your opinion as to where, if at all, the Meredith case, assuming the prima-facie case, would fit under 501.

Attorney General KATZENBACH. It is a little difficult in the present state of the facts to answer that because I have too little information with respect to the alleged person who did this or what his motivation and so forth may have been.

Since Meredith had made quite public his purpose of going down there was to encourage—that is, to urge and aid—people to vote, it might fit under section 501(b)(1). It might also fit under section 501(b)(2) if this did in fact, which I don't know, have any connection with retribution for his integration of "Ole Miss." And if the act was done to discourage others from voting or engaging in any other or all of the activities described in section 501(a), then it would violate section 501(b)(1).

Again, to some extent you have to know what if anything the motivation with respect to this was.

Senator JAVITS. In view of the popularity of these marches, would you be good enough to have your people consider expanding or revising clause 7 to include traversing the public highway.

Attorney General KATZENBACH. Yes.

Senator JAVITS. That certainly is, of course, unquestionably within the interstate commerce clause. This section now relates to motor, rail, water, or air vehicle terminal facilities. Well, if you use your legs I suppose it could certainly qualify. The popularity of these marches, the shoving and the pushing and all the things we have read even this morning, point up a significant area of activity, and it is always best to have it covered if it is perfectly within the principle.

Attorney General KATZENBACH. There is no question about the fact that it could be covered. Indeed, to be perfectly frank, Senator, in earlier drafts we did cover it. One of the difficulties with it is that it gets into, when you talk about anything on the public highway, it gets into an awfully broad area of jurisdiction, and we quite frankly thought that the sort of activities you are talking about were covered by (b)(2) here when we are talking about rights of peaceful assembly and so forth, to discourage people from doing that. That was the reason. The reason we did not propose this was because we thought its coverage was perhaps broader than it ought to be. We made an effort to deal with the situations you are talking about in the language

with respect to participating or seeking to participate in speech, lawful assembly, peaceful assembly or any denial of the opportunity to so participate, or urging or aiding others to do so. We thought this would pick up those cases.

There is always, even when we drafted this, we wondered whether something would occur immediately and it would be something that we hadn't covered in it, because it is difficult in exercising this Federal power, to pinpoint it to the places it needs to be pinpointed, without covering the whole "waterfront" at the same time.

It is difficult as a drafting proposition. That is what I am saying. I don't have any great feeling about including public highways on it. It brings in a bunch of situations that have no, that may have no particular significance. But I don't have any feelings about it. It might be a good idea.

Senator JAVITS. Yesterday you told us that the Federal Government and you personally as the Attorney General believed that there was enough basis for looking into the situation of whether a Federal crime was committed by Meredith's assailant.

Attorney General KATZENBACH. Yes.

Senator JAVITS. So that your office would move into it.

Attorney General KATZENBACH. Yes.

Senator JAVITS. And I assume it has.

Attorney General KATZENBACH. Yes, sir.

Senator JAVITS. And I assume there is no change in that situation since yesterday.

Attorney General KATZENBACH. No, sir.

Senator JAVITS. Now, under those circumstances, are you prepared now to tell us, or would you rather submit a statement for the record, whether the provisions of section 501 as they are contained in this bill would cover the situation which occurred when James Meredith, Dr. King, and others paraded, as they have and are today, down a highway within a State, in pursuance of some civil rights activity, or in aid of some civil rights activity?

Attorney General KATZENBACH. No; I believe that would be covered.

Senator JAVITS. You believe it would be covered?

Attorney General KATZENBACH. By section 501.

Senator JAVITS. No amendment is necessary?

Attorney General KATZENBACH. I am quite confident of that; yes.

Senator JAVITS. And no amendment is necessary?

Attorney General KATZENBACH. No.

Senator JAVITS. This is the authoritative statement of the Attorney General?

Attorney General KATZENBACH. Yes, sir.

Senator JAVITS. That is what I wanted you to say, because I think it would be an important factor, if there should be a court case, and this were not amended.

Attorney General KATZENBACH. But I have to assume in answering that, that it would be covered, assuming what I think would be the reasonable facts on some incident occurring, that it would have some racial motivation.

Senator JAVITS. Yes.

Attorney General KATZENBACH. It is almost impossible for me to conceive that it would not.

Senator JAVITS. Yes.

Attorney General KATZENBACH. But I am making that assumption when I make that flat statement.

Senator JAVITS. I think that is a perfectly proper assumption. Thank you, Mr. Chairman. Those are all the questions I have on title V.

Senator ERVIN. Do you have any idea what percentage of crimes in the United States today are committed on public highways and on public roads?

Attorney General KATZENBACH. Interstate or locally?

Senator ERVIN. All kinds.

Attorney General KATZENBACH. An awful lot. We refer to a lot of street crimes.

Senator ERVIN. Yes.

Attorney General KATZENBACH. I suppose there are a good deal.

Senator ERVIN. Practically all crimes connected with motor-vehicle transportation happen on highways.

Attorney General KATZENBACH. But I understand Senator Javits to be leaving in my qualification that it had a racial motivation.

Senator JAVITS. Entirely.

Attorney General KATZENBACH. Which would eliminate a good many of those crimes.

Senator ERVIN. But in States where there is a strong mixture of the races, every time an interracial crime happened on the highway, the Federal Government would prima-facie have jurisdiction, wouldn't it?

Attorney General KATZENBACH. Yes, sir.

Senator ERVIN. You would have to try them the first time in a Federal court, and then if the jury found there was no racial motivation, they would have to be acquitted, and sent back to the State court to be tried a second time. So even with that motivation being required, you would still have quite a problem.

Attorney General KATZENBACH. That was the difficulty that I attempted to express to Senator Javits in just including public highways. It might be picking up a lot more than there was a need for the Federal Government to pick up. It was our judgment we had picked up the cases that Senator Javits is concerned about without doing this.

Senator ERVIN. Yes.

Senator JAVITS. Mr. Chairman, as bearing upon the support for this amendment, I ask unanimous consent that I may include in the record a statement by the Library of Congress entitled "Recent Murders of Persons Working for, or Exercising, Civil Rights," and a statement which I introduced as my own statement, published as part of a magazine called the New South issued by the Southern Regional Council, November 1965, issue entitled "Some Race Related Deaths in the United States, 1955 to 1965." [1]

Senator ERVIN. That will be put in the record.

(The statements referred to follow:)

[1] Submitted to reporter.

Some Race Related Deaths in the United States (1955-65)

These are cases involving violent death between the races in the South. The list is of course not complete; it is not restricted to cases involving civil rights. It is compiled from newspaper accounts, and in some instances, where cooperation could be obtained, reports from officials.

Freddie Lee Thomas (N) 9-3-65: Near Greenwood, Miss. Body found on highway. Thomas' half brother claimed victim was slain to deter voter registration efforts. Coroner's inquest ruled hit-and-run accident. No arrests.

Thad Christian (N) 8-28-65: Near Anniston, Ala. Allegedly shot by white man while fishing. Suspect charged with murder in arrest warrant.

Perry Smau (N) 8-27-65: Greensboro, Ala. The 87-year-old victim had voiced opposition to demonstrations. He was beaten and tongue cut out. Civil Rights groups denied complicity. Two Negro suspects in custody, one indicted on murder charge. Victim was robbed of $26.

Arthur James Hill (N) 8-20-65: Villa Rica, Ga. Shot during argument with whites. One white suspect held for grand jury action on voluntary manslaughter charge.

Jonathan M. Daniels (W) 8-20-65: Hayneville, Ala. Episcopal seminarian slain after release from jail for civil rights demonstration. White man, member of prominent family, accused of shooting that killed Daniels and wounded a a Catholic priest.

8-22-65: Suspect Tom L. Coleman, arraigned for murder and assault with intent to kill; jailed for 11 hours, released on bonds of $10,000 and $2,500. Grand jury brought indictment for manslaughter, and assault and battery. Defendant acquitted of manslaughter charge.

Johnny Queen (N) 8-8-65: Fayette, Miss. White off-duty constable named in the pistol slaying, which was not connected with any arrest.

Andrew Whatley Jr. (W) 7-29-65: Americus, Ga. Shot from passing car during racial disturbance. Two Negro men indicted by grand jury as murder suspects.

Robert Wilder (N) 7-18-65: Ruston, La. White policeman accused in pistol slaying. Coroner's jury ruled justifiable homicide.

Willie Brewster (N) 7-15-65: Anniston, Ala. Shot while driving home from work. Three white men indicted by grand jury on murder charges. Shooting climaxed a week of anti-Negro rallies by National States Rights Party. One of the men, Hubert Damon Strange, was convicted of second degree murder and given a ten (10) year prison sentence. All-white jury. The other two, Johnny Ira DeFries and Lewis Blevins, still face murder charges.

James Waymers (N) 7-10-65: Allendale, S.C. White man charged with murder in shotgun slaying. Area was scene of recent civil rights demonstrations. Accused acquitted Oct. 21, 1965, after entering a plea of self-defense.

O'Neal Moore (N) 6-2-65: Bogalusa, La. Victim was one of city's first two Negro deputy sheriffs and was shot by a white man while walking beat in Negro community. Suspect charged with murder, released on bail.

Frederick L. Humphrey (W) 3-26-65: Hattiesburg, Miss. Shot after the victim, a constable, stopped car of Negro suspect during racial unrest. Murder charge pending.

Mrs. Viola Gregg Liuzzo (W):

3-25-65: Shot on Hwy. 80 between Selma and Montgomery, Ala. Detroit housewife returning to Montgomery to transport civil rights marchers. Three klansmen charged with murder.

10-2-65: Collie Leroy Wilkins tried for murder. Jury hung. Mistrial declared.

10-19-65: In a second trial Wilkins acquitted. Charges still pending against other two suspects, William O. Eaton and Eugene Thomas. All three received 10 year sentences for conspiracy to violate Federal civil rights statute. Bond set at $10,000. The three will appeal. All-white jury.

Rev. James Reeb (W) 3-12-65: Selma, Ala. Four white men accused in bludgeon death of white civil rights sympathizer; three indicted on murder charges. Three defendants acquitted.

Jimmie Lee Jackson (N) 2-18-65: Marion, Ala. Slain by white state trooper as victim, according to witnesses, tried to shield his mother from beating during demonstration. No arrest. Grand jury cleared trooper, identified only by surname.

Ollie W. Shelby (N) 1-22-65: Jackson, Miss. White sheriff's deputy accused of shooting 18-year-old Negro in prison. Corner's jury ruled justifiable homicide.

Frank Morris (N) 12-10-64: Ferriday, La. Died of burns suffered when his shoe repair shop was fired by arsonists in area of racial unrest. No arrests.

Frank Andrews (N) 11-28-64: Lisman, Ala. Choctaw County. Shot in back by white sheriff's deputy. County solicitor said victim was attacking another deputy. No arrests.

Charles Sammie Marrow, Jr. (N) 10-29-64: Chattanooga, Tenn. Shot in back by a white man reportedly "to protect an attractive white waitress in a downtown restaurant." Acquitted in criminal court.

Hubert Orsby (N) 9-9-64: Near Pickens, Miss. Body of 14-year-old youth found in Big Black River wearing CORE T-shirt. Coroner's jury ruled death by accidental drowning.

James Andrew Miller (N) 8-30-64: Jackson, Ga. Shot by white man during racial flare-up. Victim had been beaten by whites a few days prior to shooting. Coroner's jury ruled slaying a case of self-defense. Shooting suspect cleared.

Billy Wayne Wallace (W) 8-9-64: Dallas, Tex., Shot during racial row in city park. Two Negroes arrested. One indicted for murder with court action pending; the other suspect was no-billed by the grand jury on same charge.

Charles E. Moore (N) 7-12-64, Henry Hezekiah Dee (N); Meadville, Miss., near Tullalah, La. Both bodies multiated. Recovered from Mississippi River. Had been missing since May 2, 1964. Charges against two white men dismissed without prejudice Jan. 12, 1965. Prosecution said lacked enough evidence.

Lemuel Penn (N) 7-11-64: Near Colbert, Ga. Victim was Washington, D.C., educator. Shot by whites while returning from Army reserve duty at Fort Benning, Ga. Four Klansmen arrested; three indicted for murder; two tried and acquitted. Federal indictments against six white men charging conspiracy to deprive Penn of civil rights dismissed in district court, appealed to U.S. Supreme Court.

James E. Chaney (N) 6-21-64, Andrew Goodman (W), Michael H. Schwerner (W): Philadelphia, Miss. Three civil rights workers slain after their release from jail. 21 white men arrested, charges dismissed by U.S. Commissioner. Federal grand jury later indicted 18 white men on felony and misdemeanor charges of conspiring to violate the victims' civil rights. Federal judge voided felony charges against 17. Misdemeanor charges pending. Justice Department is appealing the rulings. Trial of the 18th suspect pending in federal court in Atlanta.

Mrs. Johnnie Mae Chappell (N) 3-23-64: Jacksonville, Fla. Shot while walking along street during racial unrest. Young white man sentenced to 10 years in the shooting.

Louis Allen (N) 2-1-64: Liberty, Miss. Civil rights worker slain some time after testifying against a white man charged with killing another Negro. No arrests.

William Kinard (W) 10-18-63: St. Augustine, Fla. Victim slain as he and two other whites drove with shotgun through Negro area. Two Negroes arrested on murder charges. Court action pending.

E. B. Bryant (W) 10-18-63: Jackson, Miss. White gas station attendant slain after squirting water from hose on Negro drinking from "white" fountain. Negro suspect charged with murder, sentenced to life imprisonment.

Virgil Ware (N) 9-15-63: Birmingham Ala. Thirteen-year-old youth killed by two white teen-agers while riding his bicycle in suburban area following downtown church bombing. Defendants received probated seven-month sentences and a stern lecture on second-degree manslaughter charges.

Johnny Robinson (N) 9-15-63: Birmingham, Ala. Killed by police after church bombing and rioting. No arrests.

Denise McNair (N), age 11, 9-15-63, Addie Mae Collins (N) age 14, Cynthia Wesley (N), age 14, Carol Robertson (N), age 14: Birmingham, Ala. Killed while attending Sunday School by exploding bomb at church where civil rights rallies were held. No arrests.

John L. Coley (N) 9-4-63: Birmingham, Ala. Suffered fatal wounds from shotgun pellets during rioting after a race bombing. No arrests.

Andrew Lee Anderson (N) 7-17-63: Near Marion, Ark. Slain by group of white citizens and sheriff's deputies after white woman said he had molested her 8-year-old daughter. Coroner's jury ruled justifiable homicide. No arrests.

Medgar W. Evers (N) 6-12-63: Jackson, Miss. Shot in back as he arrived home from civil rights rally. / He was field secretary for NAACP. White man tried twice, but hung juries brought mistrials. Accused Byron de le Beckwith now free.

Frank G. Link (W) 6-7-63: Lexington, N.C. Killed during rioting. Three Negroes convicted—one sentenced to serve four to seven years for second-degree murder, and two sentenced to six-month terms on charges of engaging in a riot.

William L. Moore (W) 4-23-63: Near Attalla, Ala. Mailman from Baltimore, Md., making one-man protest march across Alabama slain by bullet. Grand jury failed to indict white suspect.

Paul Guihard (W) 10-30-62, Ray Gunter (W): Oxford, Miss. Guihard (news reporter from France) and Gunter (local TV repairman) slain during white rioting over admission of James Meredith to University of Mississippi. No arrests.

Leroy Parks (W) 9-6-62: Dallas, Ga. Victim was among masked nightriders calling on a Negro woman who was charged in the slaying. Coroner's jury ruled shooting justifiable homicide. Suspect moved North after release from jail.

Cpl. Roman Ducksworth Jr. (N) 4-9-62: Taylorsville, Miss. Shot by white policeman when the Negro refused to move to rear of interstate bus. No arrests.

Eli Brumfield (N) 10-31-61: McComb, Miss. Shot by policeman during racial unrest. No arrests.

Herbert Lee (N) 9-25-61: Liberty, Miss. Civil rights worker shot by a white state legislator. Coroner's jury ruled justifiable homicide.

Frank Coleman Dumas (W) 6-1-61: Shot to death in his home. Preston Cobb, Jr., 15 year old Negro, found guilty of murder Aug. 16, 1961, and sentenced to die. Case retried, ending in sentence to life imprisonment. Motion for new trial pending.

William Nance (N) 8-26-60: Near Winchester, Tenn. Body found in Lakeview Lake with slugs from three different guns and weighted with large rock. No arrests.

Albert Pitts (N) 7-23-60, David Pitts (N), Ernest McPharland (N), Marshall A. Johns (N): Monroe, La. White employer arrested, then released in the shooting of five of his employees; four died Victims accused of making threats. Records of Dist. Court, Parish of Ouachita, Monroe, La., reveal that no bill of indictment or information was ever filed.

Mrs. Mattie Greene (N) 5-20-60: Ringgold, Ga. Died under falling debris when her home was dynamited. No arrests.

William Roy Prather (N) 11-1-59: Corinth, Miss. The 15-year-old boy was killed in anti-Negro "Halloween prank." Eight white youths charged with the slaying, six of whom were turned over to juvenile court. One indicted on manslaughter charge.

Tommy Dwight (N) 6-13-59: Dalton, Ga. Four white men fired supposedly over the heads of a group of Negroes intending to "scare" them, but four fatal buckshots hit the 11-year-old victim. The four were indicted on charges of involuntary manslaughter. Charges reduced to misdemeanor and three of the men sentenced to serve one year. One of these permitted to serve the year outside jail.

Jonas Causey (N) 5-10-59: Clarksdale, Miss. NAACP requested investigation and action against 15 policemen accused of the slaying. No arrests.

Mack Charles Parker (N) 4-25-59: Poplarville, Miss. Abducted from unguarded jail cell and shot to death. No arrests.

James Henry Ellison (N) 9-20-58: Chattanooga, Tenn. Shot from a passing car occupied by two white couples. No arrests.

Ernest Hunter (N) 9-13-58: St. Mary's, Ga. Slain while in jail. White policeman accused of shooting reported that he and victim engaged in a struggle. No arrests.

Joe Franklin Jeter Sr. (N) 9-13-58: Atlanta, Ga Shot by white policeman who said victim was resisting arrest. Grand jury returned "no bills" on three charges.

Richard Lillard (N) 7-26-58: Nashville, Tenn. Died after a beating in local workhouse by three white guards. They were indicted on murder charges on Aug. 15, 1958. Each was acquitted on Jan. 16, 1959.

Woodrow Wilson Daniels (N) 7-1-58: Water Valley, Miss. Died of brain injury nine days after beating. White sheriff acquitted of manslaughter charge.

Willie Countryman (N) 5-25-58: Dawson, Ga. Shot in his backyard by white policeman. Federal grand jury failed to indict the policeman, who had been accused in another death one month earlier.

John Larry Bolden (N) 5-3-58: Chattanooga, Tenn. The 15-year-old boy was shot by white policeman. No court action.

James Brazier (N) 4-25-58: Dawson, Ga. Victim died a few days after beating at hands of white policemen. Federal grand jury refused to indict four accused officers.

George Love (N) 1-8-58: Ruleville, Miss. Killed by 25-man posse. No arrests.

Willie V. Dunigan (N) 11-18-57: Lomax, Ala. Shot by sheriff's deputies outside his home. Deputies were looking for person(s) who earlier wounded another deputy. No arrests.

Charles Brown (N) 6-25-57: Near Yazoo City, Miss. White man charged with shooting the victim, a young airman, who was visiting at the home of the suspect's sister.

James Hollis (N) 2-3-57: Griffin, Ga. The 17-year-old boy was slain and a white housewife wounded by husband who found them together partially clothed in his home. A grand jury failed to indict the husband.

Mrs. Maybelle Mahone (N) 12-5-56: Near Molena, Ga. Shot by white man for "sassing" him. The 71-year-old suspect was first given a life sentence on a murder charge, Aug. 1, 1957, but was found "not guilty for reasons of insanity" the following March 21, 1958.

Mrs. Bessie McDowell (N) 6-14-56: Andalusia, Ala. Killed by white father and son, who were indicted on first and second degree murder counts.

Rev. C. H. Baldwin (N) 4-22-56: Near Huntsville, Ala. Victim struck by heavy rock. White man convicted of second-degree manslaughter, sentenced to 12 months at hard labor.

Dr. Thomas H. Brewer (N) 2-18-56: Columbus, Ga. Prominent physician and NAACP leader shot by white man. Grand jury refused to indict.

Milton Russell (N) 1-21-56: Belzoni, Miss. Burned to death in his home. Whites suspected of foul play. No arrests.

Richard King (N) 1-6-56: Eufaula, Ala. White man given life sentence for pistol slaying. He was later paroled, violated his parole and "might be back in prison," according to Barbour County's court clerk.

Edward Duckworth (N) 1-56: Raleigh, Miss. White man reportedly admitted the shooting but claimed self defense. Suspect died of heart ailment while awaiting grand jury action.

James E. Evanston (N) 12-24-55: Near Drew, Miss. Body of school principal found in Long Lake with neck broken and no water in lungs to indicate drowning. Negro press called it civil rights slaying. Death officially ruled suicide.

Clinton Melton (N) 12-3-55: Glendora, Miss. White suspect was indicted on a murder charge and later acquitted.

John Earl Reese (N) 10-22-55: Near Longview, Tex. The 16-year-old boy died of injuries from shotgun blast into cafe from a moving car. Two whites indicted for murder, one given a five year suspended sentence.

Emmett Till (N) 8-28-55: LeFlore County, Miss. The 14-year-old boy from Chicago was slain after "smart-alec" talk to a Mississippi white woman. Body found in a river, beaten and shot. Two white men indicted for murder and acquitted.

Lamar Smith (N) 8-7-55: Brookhaven, Miss. Victim was shot down on lawn of county courthouse in broad daylight. A grand jury failed to indict three accused white men.

Rev. George W. Lee (N) 5-7-55: Belzoni, Miss. Killed by a shotgun blast from a car carrying several whites. No arrests.

THE LIBRARY OF CONGRESS,
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Washington, D.C., April 7, 1966.

RECENT MURDERS OF PERSONS WORKING FOR, OR EXERCISING, CIVIL RIGHTS

1963

William L. Moore (white); Attalla, Alabama, April 23, 1963; Etowah County jury refused to indict suspect, September 14.

Medgar W. Evers (Negro); Jackson, Mississippi, June 12; Hinds County jury twice refused to convict accused man, second mistrial declared, April 17, 1964.

1964

Mrs. Johnnie Mae Chappell (Negro); Jacksonville, Florida, March 23; no further report found in the *New York Times.*

Michael H. Schwerner (white), Andrew Goodman (white), James E. Chaney (Negro); Philadelphia, Mississippi, June 21, 1964; Nesheba county did not indict any persons; Federal jury indicted suspects for plotting to murder; Federal court dismissed felony charges against 17, upheld indictments against sheriff, deputy sheriff, policeman for violating civil rights under color of law, and upheld indictments against all 17 for conspiracy to violate rights, February 25, 1965; Supreme Court reinstated Federal criminal charges against 17 men, March 28, 1966.

Charles Moore and Henry H. Dee (both Negro); bodies found in Mississippi River, July; charges against two men were dismissed in a Mississippi court, January 11, 1965.

Lemuel A. Penn (Negro); Athens, Georgia, July 11; two accused men acquitted by Georgia jury, September 5; Federal court dismissed charges against six men of conspiracy to violate civil rights, December 29; Supreme Court reinstated Federal charges, March 28, 1966.

1965

Jimmie Lee Jackson (Negro); Marion, Alabama; shot February 18, died February 26; no charges brought.

James J. Reeb (white); Selma, Alabama; attacked March 9, died March 11; three accused men acquitted by Alabama jury, December 10; the three have been charged with violation of Federal law, but have not been indicted.

Mrs. Viola G. Liuzzo (white); between Selma and Montgomery Alabama, March 25; Wilkins, one of three Klansmen accused, acquitted by Alabama jury, October 22; three Klansmen convicted by Federal jury of conspiracy to violate civil rights, December 3; Eaton, Thomas still faces murder charges by State.

O'Neal Moore (Negro); Bogalusa, Louisiana, June 2, 1965; no further report found in *New York Times.*

Jonathan M. Daniels (white); Hayneville, Alabama, August 20; accused man acquitted by Lowndes County jury, September 29.

1966

Samuel L. Younge (Negro); Tuskegee, Alabama; January 3; suspect arrested by Alabama, January 4.

Vernon Dahmer (Negro); Hattiesburg, Mississippi, January 10; FBI arrested 13 members of White Knights of KKK, March 28, on charges of violating civil rights. Fourteenth KKK member charged by FBI surrendered himself, March 31.

PAUL M. DOWNING,
Government and General Research Division.

Senator ERVIN. Do you have anything else?

Senator JAVITS. That is all on title V, thank you, Mr. Chairman.

Senator ERVIN. Mr. Attorney General, referring to our colloquy about hospitals, I want to put in the record at this point an editorial from the Greensboro Daily News, Greensboro, N.C., May 28, 1966, and have it printed in the record in full, but I will read only this part. The editor expressed the opinion that:

* * * there can be no case for denying a private citizen his lawful right under a program into which he may well have paid hundreds of dollars in premiums.

(The editorial referred to follows:)

[From the Greensboro Daily News, May 28, 1966]

"RACIAL BALANCE" IN THE HOSPITALS

The mounting frenzy over the preparedness of the nation's hospital beds—woefully short in any case—has been needlessly complicated by the decision of Health, Education and Welfare officials to use Medicare payments as a lever to force their own program of anti-discrimination.

We have no brief here for local hospital boards that needlessly defy national policy; and like it or not, Congress and the courts have established the principle that federal funds are not to be used to perpetuate racial discrimination.

But the issue raised here is more than a simple collision between stubborn local boards and federal bureaucrats over that principle.

The rationale of Medicare under Social Security, due to go into effect July 1, is that a citizen 65 or over shall enjoy its benefits as a matter of right—not as a beneficence of public or private charity that can be given or withheld on the basis of a means test or any other test. Social Security is not a tax program; it is a program of social insurance. And ideally the fact that it is government-operated should be as incidental and as unobtrusive as possible. It should be as uncomplicated and as accessible as a private insurance policy.

In the present encounter, however, we have an arbitrary decision by well-meaning but short-sighted officials in Washington to complicate the administration of this social insurance by linking it with an antidiscrimination policy. And however desirable that policy in itself, it should take a back seat to problems of acute illness.

Even assuming that the use of social insurance as a wedge is wise or just in this instance—and we think not—the precedent is dangerous. Do the officials at HEW seriously say that if ordinary monthly Social Security payments to the elderly should run athwart a federal policy, they could feasibly suspend those payments—perhaps depriving citizens of food, clothing and shelter? We doubt it. And yet what they propose to do to some of the elderly with respect to Medicare is identical in principle.

After all, Social Security is a buttress of the welfare of the private citizen, not of institutions such as hospitals—which as many of the holdouts show could very well do without Medicare payments. The denial of a citizen's right is no proper way, practically or ethically, to discipline the policies of an institution, especially when some hospital boards are only too anxious for a pretext to sabotage Medicare anyway.

There may be a case under Title VI for withholding other forms of federal subsidy—for hospital buildings, say—as a policy lever. But there can be no case for denying a private citizen his lawful right under a program into which he may well have paid hundreds of dollars in premiums.

Further, the Department of Health, Education and Welfare would do well to ponder the practical implications of this policy.

Is it now to be the case, as we feared when Title VI and its powers of blackmail were written into a civil rights bill with many good points, that every single program—educational, medical or otherwise—is to be ensnarled by the discrimination issue? Especially, one might add, when the policies or "guidelines" laid down for compliance reflect no specific directive of Congress and are subject to whimsical change from year to year?

If so, the day is foreseeable when Congress, under popular pressure, will shy from almost every piece of social legislation, however desirable, because it threatens to create another administrative nightmare.

Somehow a balance must be struck and struck soon between the demands of racial engineering and the practical demands of the citizen for education, health care and basic security. Certainly that balance is not being struck in the present hospitals imbroglio.

Senator ERVIN. I know of no hospital in North Carolina which does not receive people of all races, and undertake to give them necessary medical attention. And none of these cases arise where that is a denial, so far as I know, of the admission of anybody of any race to a hospital.

They arise out of controversies between representatives of HEW and hospital authorities concerning HEW's insistence that integration shall be the main object of the hospital rather than the alleviation of patients. That is a very unfortunate situation.

Do you have anything further?

Senator KENNEDY of Massachusetts. Not at this time.

Senator ERVIN. Mr. Attorney General, to go to title I, so far as I am individually concerned, I have no major objection to title I. But what does raise a question in my mind is why the proposed legislation embodied in title I was not submitted to the Judicial Conference so that we might have the benefit of the thoughts of the Judicial Con-

ference and the thoughts of the American Law Institute and the thoughts of the American Bar Association on the matter?

Attorney General KATZENBACH. It is not to my knowledge customary to refer all legislative proposals that this committee or this subcommittee has to groups of distinguished lawyers. I think it would be fine to get their views upon this if they wished to give any views upon this. The Judicial Conference from time to time proposes legislation. That is perfectly true. But not all legislation that affects the administration of justice is put to the Judicial Conference.

We did in drafting of this legislation have the benefit of a study done by the Judicial Conference some years ago. We made use of that in drafting it. We certainly did consult with a number of judges with respect to this.

We did our own surveys of practices and got our U.S. attorneys, who are quite familiar with the jury selection processes in various places.

I am satisfied that as drafted this is a necessary piece of legislation, and I see no reason why we should delay its enactment.

If there are things with respect to this that we are unable or you gentlemen in your deliberations are unable to predict, if there is any adverse consequences of anything, this is a relatively simple thing to amend. Beyond that, I would say that while, of course, this has to do with the conduct of the courts and the way they administer things, it also embodies another extremely important principle in it, which I believe in deeply and strongly, and that is that this is the right of people to serve on juries, the right and duty of people throughout the United States to serve on juries.

One of the reasons we took this approach was to put that fundamental obligation of citizenship, and I think right of citizenship, and to put that equally with a scheme of fair trial.

It is possible obviously to have fair trials without taking a broad selection of jurors but that doesn't give the opportunity privilege and duty of people to participate in the process, and I think the legislation is needed and necessary now, and I don't think it should be delayed for that purpose.

The American Bar Association is perfectly capable of commenting on this. The American Law Institute rarely comments on legislation. I am surprised that that suggestion——

Senator ERVIN. I am under the impression from many years' service on the Senate Judiciary Committee that virtually all proposed legislation which the committee considers, which has to do with matters of court procedure and the like, are considered by the Judicial Conference before we are requested to act upon it.

Attorney General KATZENBACH. Well, they often are, and if they have views on this, then I think the committee should hear their views. I don't know of an instance where it has been submitted to the American Law Institute.

Mr. AUTRY. Mr. Attorney General, this was the suggestion of the Chief Justice as quoted in the New York Times and was placed in the record on the first day by Senator Kennedy.

Attorney General KATZENBACH. I don't think that is an accurate statement, counsel. I don't believe that the Chief Justice suggested that this committee should submit legislation. I think he suggested that the American Law Institute might well look at a number of pro-

posals that were there. That was what he suggested. I don't think he suggested this committee should submit it.

Mr. AUTRY. That is right.

Senator ERVIN. It is somewhat difficult to say what——

Attorney General KATZENBACH. I have never seen the American Law Institute do this frankly. They decided their projects that they are going to work on, and I have never known them to comment on other pieces of legislation. They comment on things, the drafts that that are preparing, the model codes that they are doing, the restatements, and so forth. That has been their activity rather than commenting on legislation. So I thought it was rather an innovation that they should even consider it.

Senator ERVIN. I will renew my disclaimer of having any authority to speak for the Chief Justice or to interpret the meaning of his remarks. But the New York Times for May the 19th does state that:

> Chief Justice Earl Warren warned today that "ill-advised" proposals pending in Congress to bar racial discrimination in the selection of juries could, if enacted, encroach on the rights of the States.
>
> Speaking before the annual meeting of the American Law Institute, the Chief Justice of the United States departed from his prepared text to note his apprehension over some of the 34 bills being considered by Congress.
>
> "Some of them go a long way and may radically change the relationship between the Federal and State Governments," he said.
>
> Although he assured the lawyers that the bills would be "carefully scrutinized and studied" by the committees of Congress and the Judicial Conference, he suggested that the institute might also study the subject.
>
> Otherwise, he said, he is "apprehensive that some legislation might go through and at the same time be ill-advised."
>
> The Chief Justice declined later to elaborate on his statement or to indicate which of the pending bills might have caused his apprehension.

Attorney General KATZENBACH. Don't you think it is a fair statement, Mr. Chairman, to state that the provisions of title I having to do with the selection of Federal juries could scarcely encroach upon the rights of the States?

Senator ERVIN. I agree with you as to title I.

Attorney General KATZENBACH. Yes. I think at least we could agree that he wasn't talking about title I.

Senator ERVIN. Well, I would agree with you in that observation, but in order that we might have this historical remark preserved for future reference, we will put it in full in the record.

(The article referred to follows:)

[The New York Times, May 19, 1966]

WARREN DISCERNS STATE RIGHTS PERIL IN JURY BIAS BILL

(By Fred P. Graham)

WASHINGTON, May 18.—Chief Justice Earl Warren warned today that "ill-advised" proposals pending in Congress to bar racial discrimination in the selection of juries could, if enacted, encroach on the rights of the states.

Speaking before the annual meeting of the American Law Institute, the Chief Justice of the United States departed from his prepared text to note his apprehension over some of the 34 bills being considered by Congress.

"Some of them go a long way and may radically change the relationship between the Federal and state governments," he said.

Although he assured the lawyers that the bills would be "carefully scrutinized and studied" by the committees of Congress and the Judicial Conference, he suggested that the institute might also study the subject.

Otherwise, he said, he is "apprehensive that some legislation might go through and at the same time be ill-advised."

The Chief Justice declined later to elaborate on his statement or to indicate which of the pending bills might have caused his apprehension.

Observers assumed that he was not referring to the jury provision of the Administration's proposed Civil Rights bill of 1966, which has been attacked by liberals as being too soft on the states.

PROVISIONS IN '66 BILL

The Administration bill requires that Federal juries be selected from lists that include a cross-section of the community. It leaves state jury-selection methods untouched unless racial discrimination is proved.

In such cases it authorizes the Attorney General to request a Federal court order to eliminate the discrimination.

Some liberals have criticized the lack of an automatic "trigger" to allow the Federal Government to move to end jury discrimination in states.

Representative William F. Ryan, Democrat of Manhattan, has led this group. Mr. Ryan has called for a law what would allow Federal jury commissioners to take over the preparation of state jury lists if the Attorney General found that Negroes were being excluded.

After the Chief Justice's speech the institute turned to its second day of debate on the controversial model code of prearraignment procedure.

The discussion brought a degree of agreement on the sensitive issue of police interrogations and confessions, which had been the center of the heated controversy that proceeded the meeting.

The draftsmen of the model code agreed to defer any vote on the sections involving the rights of newly arrested suspects until next year's meeting, when the Supreme Court will have handed down its decisions in six pending confessions cases.

This concession came in response to pleas by Dean Louis H. Pollack of the Yale Law School, John P. Frank of Arizona and others that the interrogation procedures in the model code would be unconstitutional under the forthcoming high court rulings.

The model code requires the police to warn suspects of their rights, but allows four hours of interrogation before suspects must be brought before a judge. Suspects would be allowed to see lawyers or friends but indigent suspects would not be provided lawyers by the state.

A possible area of compromise on the touchy confessions issue came to light when Prof. Jack B. Weinstein of Columbia Law School proposed that all arrested persons be brought immediately before a judge, but that the judge be authorized to remand the suspect back to the police for questioning.

This would preclude "dragnet" arrests because the judge would immediately release anyone whom the police did not have probable cause to hold. The judge would also satisfy himself that the suspect understood his rights.

This procedure is not feasible in most states now because suspects have a right to post bail as soon as they are charged before a judge.

PRAISE FOR PROPOSAL

Federal Appellate Judge George Edwards of Michigan, one of the institute's most eloquent opponents of the model code, surprised many of the participants by praising this proposal.

Judge Edwards said confessions obtained in questioning both before and after the judge's warning would be constitutional, as long as there was no unreasonable delay in bringing a suspect before the judge.

Long applause followed a statement by Federal Appeals Judge Henry J. Friendly of New York when he indicated that he spoke for the majority when he said the law must preserve "legitimate, noncoercive questioning."

If the courts cut off all questioning of suspected criminals, Judge Friendly said, "that is not a rule that society will long endure."

In the morning session the institute overwhelmingly endorsed, in principle, a model "stop and risk" law by a 164-to-40 vote. This approved in general, a proposal that would allow the police to stop and search suspects on the street, and question them for up to 20 minutes.

James Vorenberg, principal draftsman of the model code, said he would consider limiting this power to violent crimes and threatened escapes.

Opponents said it should exclude from evidence any "windfall" evidence resulting from such searches, to discourage capricious searching.

The institute, composed of 1,800 of the country's leading judges, lawyers and legal scholars, is devoted to the clarification and improvement of the law.

Mr. AUTRY. Mr. Chairman, the official transcript which we had requested just came in this morning.

Senator ERVIN. We might read that into the record at this point.

Senator KENNEDY of Massachusetts. I think we asked that the whole transcript be included.

Senator ERVIN. Yes; but I will read the remarks alluded to in the New York Times and let that be put in separately for emphasis and then put the whole transcript in.

As evidence of the general interest in this subject, there are no less than 31 bills now pending in the House of Representatives and three bills in the Senate affecting jury selection. Undoubtedly these proposals will be carefully scrutinized and studied by the committees of Congress and by the Judicial Conference of the United States and might well be the subject of a study also by the American Law Institute.

Many of these suggestions made to the Congress at this particular time may be appropriate, but in just surveying them generally, it seems to me that some of them go a long ways and would very radically change the relationship between our Federal and State Governments, and for that reason alone should receive the most careful consideration, and unless the bench and the bar and our learned societies such as this become thoroughly interested in the matter and debate the changes that are suggested, I'm apprehensive that some legislation might not go through and at the same time be ill advised.

There seems to be a slight discrepancy in the phraseology in the newspaper and that in the speech.

Attorney General KATZENBACH. Some people have that experience.

Senator ERVIN. Yes; let the whole speech be printed at this point in the record.

(The speech referred to follows:)

THE AMERICAN LAW INSTITUTE,
Philadelphia, Pa., June 7, 1966.

Hon. SAM J. ERVIN, Jr.,
Chairman, Committee on the Judiciary Subcommittee on Constitutional Rights, U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: Pursuant to your request of June 6, I am pleased to enclose a transcript of the address to The American Law Institute on May 18, 1966, by the Chief Justice of the United States.

Yours truly,

PAUL A. WOLKIN,
Assistant Director.

President DARRELL. Gentlemen, the Chief Justice has arrived. We will continue this after he has finished his Address.

[The meeting rose and applauded.]

Our speaker this morning, as you have just so clearly demonstrated, is an old friend of the Institute who for the thirteenth time comes to address us on the state of the courts and judicial administration.

As I announced at the opening session yesterday, his appearance before us, which usually occurs at that session, was postponed at his request until today due to an unexpected development.

Since his last appearance before us something has happened to the Chief. He experienced his first birthday party, widely noted in the press, upon reaching the distinguished age of threescore and fifteen. We congratulate you, Mr. Chief Justice. We welcome you here. We are honored by your presence. You will have our full attention. [Applause]

The Honorable Chief Justice of the United States EARL WARREN. Mr. President, Ladies and Gentlemen: I hope there is nothing auspicious about this being my thirteenth time here, but I'm happy to be here, and I want to make an apology at the beginning. It wasn't an absolutely unavoidable thing that took me away from here yesterday, but I did have an opportunity to go down to Cape Kennedy and see what we thought was going to be a great space exploration, and because

those things happen so seldom when I can go, and because this was the first real invitation that I had to do it, I just played hookey and went down there and saw it. [Laughter] But I'm sure, except for the fact that it disarranged your program, there will be nothing lost, because there is nothing that I have to say or would have said yesterday that can't just as well be said today.

Now, following my usual custom I'll present a report on the general condition of the business in the several federal courts. Once again I must report a continuing rise in the number of cases filed in both district courts and courts of appeals with a growing lag in dispositions.

Taking the courts of appeals first, as of March 31, 1966, the number of cases docketed reached 5,343 for the first nine months of the fiscal year as compared with 4,945 for the comparable period last year. This is an increase in new appeals of 8 percent. During the same period terminations in the courts of appeals did increase from 4,014 to 4,682 this year, but, because the increase in filings was so much larger than the increase in terminations, the number of cases pending rose to 5,436 on last March 31, as against 4,711 on that date in the year preceding. The increase pending in the courts of appeals is 15 percent.

Looking further back in point of time, it appears that since 1961 the number of appeals filed has increased 61 per cent while the number of appeals pending has risen by 101 per cent. The courts which in 1965 had the greatest increase in the number of appeals filed were the Ninth Circuit, where the appeals docketed increased by 35 per cent, the Fourth Circuit with an increase of 31 per cent, and the Sixth Circuit with an increase of 23 per cent.

In the district courts there has been a small decrease during the last year in the number of new criminal cases. The total number of criminal cases during the first nine months of this present fiscal year was 23,741 as compared with 24,491 cases during the same period of the year preceding. A comparison of the criminal cases terminated, however, shows 22,072 cases closed as compared with 22,103 a year ago. As of March 31, 1966, criminal cases pending in the district courts had increased to a total of 12,503 cases as compared with 11,848 pending the year before.

With respect to the civil cases in the district courts, I must report an even greater increase in both filings and cases pending at the end of the year.

During the first nine months of the current fiscal year the total of civil cases filed in the district courts reached 52,292 as against 50,142 filed during the comparable period of time. This represents a 4 per cent increase in the number of civil filings in one year. The number terminated was 47,682 as compared with 47,815 in the comparable period of the prior year—a decrease in terminations. On March 31, 1966, the number of civil cases pending in the district courts had reached the total of 79,005, an increase of almost 5,000 over the prior year—and by far the highest figure on record.

The trend in bankruptcy cases is similar. The number of new bankruptcy cases docketed during the nine months of the present fiscal year rose to 141,515 over 131,927 the year before, an increase of 7.3 per cent. Bankruptcy dispositions also rose during this same period to 133,418, a new record for dispositions, but the pending bankruptcy caseload as of March 31, 1966 also reached a new high of 170,469 as compared with 164,500 pending a year before.

In giving significance to these figures, however, it must be borne in mind that business bankruptcies constitute a very small fraction of the total of bankruptcy cases filed; in fact, only 8.9 per cent. The bulk of the cases are individual bankruptcies. There has been no significant increase during the past year in the number of business bankruptcies filed, so I should say that because the individual bankruptcies are rather simple as a rule—most of them wage earner's bankruptcies—that there has been no significant increase or loss in the bankruptcy area.

In the Supreme Court there has also been a marked increase in the cases on the dockets during the past term both on the appellate docket and on the Court's miscellaneous docket. The total cases at this point in the current term is 3,012 as against 2,514 at this time last year. The regular appellate docket has risen to 1,317 over 1,173 last year, and the miscellaneous docket has risen to 1,695 cases over 1,341 cases a year ago.

The Supreme Court, however, has been able to keep abreast of its work. This term the Court has heard arguments in 131 cases in a period of 192 hours as compared with 122 cases in 177 hours last term. This year on both of its dockets the Supreme Court has disposed of 2,145 cases as compared with 1,921 cases at this point in 1965. We are current. We have heard all the cases that are ready to be argued this term and we have every reason to believe that all of our opinions will be ready to hand down in time for normal adjournment.

The Congress has been prompt to recognize that the Federal Judiciary is losing ground in the stream of new litigation in spite of the sizable increase in the number of judgeships authorized by the Congress only five years ago.

Since I last reported to you, Congress has enacted into law a new Omnibus Judgeship Bill authorizing 45 additional federal judgeships, 10 being on the courts of appeals and 35 on the district courts. The new judgeships were recommended to the Congress by the Judicial Conference of the United States after a painstaking analysis of the judicial workload in each district and each circuit, and Congress is to be commended for acting promptly and providing the additional judgeships when the need became apparent rather than letting judicial business bog down. The Judicial Conference is no longer waiting until there are emergency demands for additional judgeships but is reviewing at least every two years the current requirements for judgeships. Through its Statistics Committee the Judicial Conference conducts a continual study of the needs of the courts.

The increase of 45 additional judgeships will undoubtedly, and in the course of time, have a favorable impact on the administration of justice in the federal system. But the question is: How much difference will it make? We must not be lulled into thinking that this increase in judgeships will solve our problem. It hasn't in the past. The experience of the past has demonstrated that increasing the number of judges is no more than a partial solution of the problems of judicial administration. It is up to us, judges and the bar, to meet our responsibilities in making our courts efficient and effective institutions. To do this we must together find better ways of disposing of judicial business. The need for new tools is, of course, a familiar theme.

In connection with this subject, I am glad to be able to report the substantial progress that has been made in the area of court rules of practice and procedure.

Last September the Judicial Conference of the United States approved and sent to the Supreme Court proposed amendments to the Rules of Civil Procedure and the Rules of Criminal Procedure. The Court approved these proposed amendments and transmitted them to the Congress on February 28 and, unless Congress takes some action with regard to them, they will become effective on July 1 of this year. As you know, these amendments are the product of more than four years of effort and consideration. The proposals were twice circulated to the bench and bar for study and criticism and the resulting comments were given most thorough analysis by the members of the committees.

The amendments make many important changes, but I think that undoubtedly the outstanding achievement is the merger of the Rules of Admiralty Procedure with the Rules of Civil Procedure. This monumental step was taken with the full cooperation of the Admiralty bar and is one which will be observed carefully by the members of the Advisory Committee on Admiralty Rules who will review the operation of these amendments thoroughly after they have been in effect for a period of time in order to give consideration to further modifications or improvements as may be deemed necessary.

Both the Advisory Committee on Civil Rules and the Advisory Committee on Criminal Rules are also continuing committees and, in fact, each of them is meeting again within the coming week.

The Advisory Committee on Appellate Rules has completed a large portion of its work. The Judicial Conference has recommended to the Congress implementing legislation to authorize the Supreme Court to promulgate uniform appellate rules as it does the civil and criminal rules. Bills to accomplish this are now pending in the House and Senate.

Last year I reported to you the formation of an Advisory Committee on Uniform Rules of Evidence. This committee now has held several meetings, but, by the very nature of its task, it must be anticipated that this committee will be at work for a long time. As in the case of the other committees, all of its proposals, when ready, will be circulated to the bar and ample time and opportunity for comment will be afforded.

The Advisory Committee on Bankruptcy Rules also has the major portion of its task still ahead of it. You will recall that legislation enacted in October, 1964 enlarged the scope of this committee's activity to include rule-making authority and, accordingly, the committee during the past year has begun work on this new task which should prove a significant forward step in the administration of bankruptcy.

I take every opportunity that I can to observe these committees at work and I can report to you that I have never seen more dedicated, hard-working men than the members of these advisory committees. They are an honor to the profession—every judge and every lawyer owes a debt of gratitude to them for a

record of public service that is hard to surpass. Much of the credit for these accomplishments is also due to the members of the standing Committee of the Judicial Conference and its distinguished Chairman, Judge Albert B. Maris, who has given leadership to the entire program.

The work of the rules committees is undoubtedly a vital and major contribution in improving and promoting the efficiency of the federal court system. But our rules and procedures are the product of judges, lawyers, and scholars working together within the limits of ancient and traditional mechanical systems for handling legal work. The clerk's office is an illustration of what I have in mind.

The office of the clerk came into being at a very early date and in largest part to meet the need of having a place and a person where legal proceedings could be presented, recorded, and preserved in the form of materials on which judicial action could be based and reviewed. The mechanics involved paper, pen, and ink, and somebody to do the filing and storage. Instead of pen and ink we are today, in most cases, suing typewriters and duplicating equipment in place of scriveners, but the basic process is not substantially different. We use this system of recording, retrieving and presenting facts and information in legal causes because we have always done it that way and because it has not occurred to us, or at least to very many of us, that there might be in the modern world quicker and more accurate ways of carrying on the mechanical part of the business of the courts.

It seems to me there is a definite need for thorough analysis and study of the mechanics—in its physical aspects—of carrying on the business of our courts. I am led to this belief by the accomplishments of new data processing methods employed in other fields—medicine, for example. The use of data processing has enormously increased the accuracy, speed, and efficiency of medical diagnosis. Today it is not only possible but is common medical practice for a physician with a patient having puzzling symptoms to feed the data into a machine, receiving back, with no loss of time wheatever, complete information on all the other recorded cases exhibiting any such combination of symptoms.

There is no magic in this. It is all done by the basic process of recording and storing information and having it readily available for subsequent use. What makes this modern miracle possible is that the medical profession is no longer using just pen and ink for these purposes.

Now, why should not the mechanics of legal business be analyzed and studied from this same point of view? I would not venture to foretell the outcome of such a study, but in view of what has happened in medicine and science it would be surprising to me, indeed, if tremendous improvement in judicial administration did not result.

I hope I shall not be misunderstood on this subject. I do not mean to suggest that there should be any change at all in the judging process. But we do need, I daresay, new tools and new methods for recording, retrieving, and presenting the factual and procedural information upon which judicial judgments are based.

I suggest that as a profession we are not giving this possibility of improvement the attention that it deserves. It fully justifies the careful study by the bar and the law schools and, above all, by the research foundations with their resources for practical experiment and testing. The potential from such studies is so great and so attractive to the bar, as well as to the judiciary, that it seems to me we should all do our best to stimulate interest and action in such an undertaking.

It may be that there are some of you who believe that, mechanically speaking, everything is up to date in the federal system just as, in the words of the song, everything's supposed to be up to date in Kansas City. Let me tell you of the condition in the clerk's office of a federal court in one of our large metropolitan areas. Because this court was very far behind in its dockets and was having obvious administrative difficulties, the judges requested the Administrative Office to survey the court's practices and procedures, including the operations in the office of the clerk. In the course of this survey it was observed that one of the deputy clerks whose desk was next to the wall made frequent trips, disappearing into the corridor, and it was then observed that these trips appeared to be in response to a knocking on the other side of the wall. In due course the reason for this mysterious conduct was disclosed. On the other side of the wall was the probation office which had a telephone, while there was no telephone in the clerk's office. [Laughter.] Consequently, knowledgeable lawyers who needed to telephone to the clerk's office would call the probation officer, who would knock on the wall so that the deputy clerk would come to answer the telephone. [Laughter]

This strange practice arose because the clerk did not permit a telephone in the office. He said he was opposed to the telephone on principle. [Laughter]

I want to say to you that this incident is not from the dark ages. It happened in 1958, and in one of the greatest metropolitan centers in this country.

Now, even in the Supreme Court we haven't kept pace with the times, and I want to state our deficiency also, because it's in line with what I have just said. For instance, when I became Chief Justice in 1953, the docket entries were still being made in longhand, and it wasn't until 1957, four years later, that we began using a typed loose-leaf docket, which simplified the work and the manpower in the office very greatly, and the speed also, of course.

Incidents such as this—and there are others—of themselves suggest the need for a thorough systems analysis of the mechanical operations involved in our court system.

The Criminal Justice Act became effective August 20, 1965, and is of special interest to all members of the bar since, for the first time, it provides at least some remuneration for lawyers appointed by the court to represent defendants in federal criminal cases.

The statute is administered under a variety of plans adopted in the district courts with the approval of the judicial councils of the circuits, although the claims for compensation are paid centrally by the Administrative Office.

The number of counsel appointed between the effective date of the Act, August 20, 1965, and April 30, 1966, has reached 12,383, and it is now believed by the Judicial Conference Committee on the administration of the Criminal Justice Act and the Administrative Office that the number of counsel appointed in the federal courts per term is not likely to exceed 20,000, unless the statute is amended to cover postconviction proceedings and other cases which are not now included.

There is, of course, a considerable interval between the time of appointment and the presentation of claims on completion of service, so it is understandable that the volume of claims has not yet reached the Administrative Office and that it is still too early to estimate the costs of carrying out the statute. The report to the Judicial Conference last March indicates, however, that, in general, the statute is being administered with restraint and judicial discretion. This is a tribute to appointed counsel, to the appointing judges, and also to the careful planning of the Conference committee under the chairmanship of Chief Judge John S. Hastings of the Seventh Circuit.

I have in previous years expressed my concern over the costs of administration in bankruptcy proceedings. The Judicial Conference and the Administrative Office have been pursuing a two-pronged effort during the past two years to effect a reduction in these costs of administration and, for the first time, we are beginning to take hope that some success can be achieved. In 1965 costs declined slightly from the 1964 high of 26.6 per cent of assets realized to 25.7 per cent of assets realized.

For the past three years annual seminars have been conducted for referees and at each of these seminars a roundtable has been devoted to programs for reduction in costs of administration and related subjects of fees and allowances and conservation and liquidation of estates.

In addition, detailed studies of costs of administration have been prepared by the Administrative Office and mailed to all federal judges and referees. These studies, which bring into focus the particular items of costs of administration exceeding the national average, have been most helpful in presenting cost data to the courts. The presentation of these cost studies to the chief judges of the districts in which costs appear to be excessive has brought an encouraging response. Our courts and our referees must remain always alert to the need for economy in bankruptcy administration. It is to be hoped that the slight reduction achieved last year is the beginning of a trend.

Now we have a renewal of interest in improving the jury system. The trial jury is, of course, one of our oldest, most revered and most characteristic judicial institutions. For a long time most of us have been inclined to take the jury system for granted. But recently there has been a healthy renewal of interest in making the jury system fairer and more effective in its operation, and there is much need for this. Complacency about the federal jury system is unjustified.

This is a subject worthy of the attention of everyone. Since it is so basic to the administration of justice, it deserves the attention of all courts, state as well as federal. As far back as the early 1800's President Thomas Jefferson in his first inaugural address listed the principle of "trial by juries impartially selected" among those principles which "form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation."

As evidence of the general interest in this subject, there are no less than 31 bills now pending in the House of Representatives and 3 bills in the Senate affecting

jury selection. *Undoubtedly these proposals will be carefully scrutinized and studied by the committees of Congress and by the Judicial Conference of the United States and might well be the subject of a study also by the American Law Institute.*

Many of these suggestions made to the Congress at this particular time may be appropriate, but in just *surveying* them generally, it seems to me that some of them go a long ways and would very radically change the relationship between our Federal and State Governments, and for that reason alone should receive the most careful consideration, and unless the bench and the bar and our learned societies such as this become thoroughly interested in the matter and debate the changes that are suggested, I'm apprehensive that some legislation might not go through and at the same time be ill advised.

One matter above all others which we face as a profession which is of most concern to the American people today is the problem of crime. This concern is expressed in every walk of life and at every governmental level. So seriously does the President regard this problem that he has appointed a national commission to study it and he has appointed a separate commission to study the special problems of crime in the District of Columbia. In addition, he recently devoted an entire message to the Congress on this topic and proposed methods in which the nation can attempt to combat the high incidence of crime in our society. In his message to the Congress the President pointed up the unrelenting pace of crime and its cost to our people, not only in dollars but in death, injury, suffering and anguish.

The Congress has manifested its concern through numerous legislative proposals and through hearings which have already taken place or which are scheduled for the future.

Certainly, no single group in our population should be more concerned with studying the manifold aspects of this problem, its causes and the methods of meeting them than the bar of this country. Some critics who apparently do not share the opinion of most of us that we can successfully combat the criminal element and live within our constitutional guarantees take the easy approach of placing the blame for our high rate of crime on our courts and our system of law enforcement.

Now, you and I know, I believe, that as the President has recognized in his message to Congress, crime is a problem the root causes of which go deep into the whole fabric of our civilization and into our moral, social and economic systems.

The work which the Presidential commissions are now doing requires the full cooperation of our bench and bar; it suggests also the importance of the study of these problems, not only at the federal level but by our states and our municipalities. What is required today is intensive study and research into every facet of crime, of law enforcement and of the administration of justice. We of the bar face a tremendous challenge and we must respond to that challenge intelligently and wholeheartedly but without fear, rancor or emotion.

As a nation, we are dedicated to the rule of law. We take pride in our system. We have urged upon the other nations of the world the importance of the rule of law in solving the problems of mankind without resort to arms. We, therefore, have the duty and obligation to insure that the rule of law, as we know it, is administered fairly; that it represents the hopes and aspirations of our people and that it will fulfill the purpose of the founding fathers set forth in the Preamble of our Constitution.

The world has already crossed the threshold into the space age. We are in times of rapid change, when people are not willing to wait long periods for solutions to their problems. The problems we have been discussing this morning need the urgent attention of all of us. We live in a time when some of the world's oldest disciplines are reexamining their institutions and bringing their operations up to the demands and requirements of this age. The bench and the bar of this country have the responsibility, likewise, of insuring that our system and our institutions are responsive to the challenges and requirements of the age in which we live.

And, ladies and gentlemen, because I believe that the American Law Institute is interested in just such things and has dedicated itself to them, I am more than happy to be here this year and all the preceding yea[illegible] I have had the pleasure of joining with you. Mr. President, thank you.

[The meeting rose and applauded.]

President DARRELL. Thank you, Mr. Chief Justice, for bringing us up to date on the state of the courts and what's been going on. It was an excellent report, and we very much appreciate it.

I was very much interested in what you said about automatic data processing and information retrieval. We have through the Joint Committee put on several

programs for lawyers, quite elaborate, on that subject, and found in several places a great deal of interest, and I suppose it will come. We should study that further.

We will also note what you said about jury legislation, and we are very much concerned with this crime matter which you have expressed yourself on.

You are very welcome to remain with us as long as you wish. We have a motion pending before the floor relating to the police's right to stop and frisk, [laughter] and the next matter of business is to see what happens to that motion.

Chief Justice WARREN. If I may stay without being frisked, I'll stay. [Laughter and applause]

Senator ERVIN. One of the hazards of saying anything is that you will be misquoted and if you are not misquoted you are likely to be misconstrued. I think, Mr. Attorney General, some of the observations of the Chief Justice apply to title II. Now title II undertakes to tell the State whose names are to go in the jury boxes or the jury wheels, does it not?

Attorney General KATZENBACH. No, sir.

Senator ERVIN. Well, it undertakes to name the persons, not by name but by classes whose names are required to be placed by the State in the jury boxes or the jury wheels, or to have their civil and criminal prosecutions ended without trial, one or the other.

Attorney General KATZENBACH. I think, Mr. Chairman, that it is a fair statement of title II to say that section 201 constitutes a statement of prohibitions that the State cannot, in the selection of its jury, that is it cannot discriminate against certain people for certain reasons.

Most of these I would think were embodied in the Constitution itself, perhaps all of them. The only one that would cause any question I think about the Constitution itself would be economic status. I would think race, color, religion, sex, national origin would be discriminations that the State would not be able to make, in any event, should not make.

Beyond that—it includes economic status. I don't mean to avoid that. I think that is the only issue we really have there if we have one at all. Beyond that, what it does is prescribe a procedure which can be invoked for determining whether or not any of these discriminations have in fact existed.

It permits the State the widest kind of latitude within those limitations in how they want to select juries. Unlike title I, it doesn't tell them what lists they may use, how they may do this and so forth. It just says they can't discriminate on that basis, and it permits them a far greater latitude than is permitted in title I to the Federal——

Senator ERVIN. May I make a suggestion for constructive amendment to clarify matters before we go further in discussing the bill. I refer to page 17, lines 14 and 15:

In any proceeding instituted pursuant to section 202 of this bill or section 1983 of title 142 of the United States Code, or in any criminal proceeding in any State court prior to the introduction of any evidence.

I would suggest that that be amended to "prior to the selection and impaneling of the jury." The way it is now you impanel the jury, then you inquire whether the jury is fit to be impaneled.

Attorney General KATZENBACH. I think it is difficult until you know who the jurors are to determine whether or not there has been discrimination.

Senator ERVIN. As I construe this bill, all the jurors have to be drawn from the jury wheel or the jury box. In other words, this bill

abolishes the custom that prevails in my State where you can summon bystanders as jurors to serve.

Attorney General KATZENBACH. No, sir.

Senator ERVIN. I can't find a word in this that allows that to continue to exist.

Attorney General KATZENBACH. Can you point to the word "prohibited," sir?

Senator ERVIN. It says exactly how they are going to be drawn.

Attorney General KATZENBACH. Under title I, Senator, it does, and it does prohibit that with respect to Federal juries. Under title II it does not, and I think that kind of underlines the reason why, if that is your selection of a jury, you can't possibly know whether there has been discrimination or not until they have gone out on the street and hauled them in.

Senator ERVIN. This says exactly whose name goes in. Rather it specifies the classes of persons.

Attorney General KATZENBACH. Which section are you referring to, Senator?

Senator ERVIN. I am talking about title II. Most courts, all the courts that I know anything about, the State courts, have a list of jurors that are summoned. Their names are a matter of public record, and they are available to counsel. Therefore, it seems to me that this ought to be amended to say before the jury is impaneled. Now you don't impanel the jury until after they are selected, because under this, after you have impaneled the jury, then you can raise the question. In North Carolina practice, a challenge to the jury must be raised before you impanel the jury and start trying the case.

I would seriously suggest that you give consideration to striking out the words "prior to the introduction of any evidence" and to say "prior to the impaneling of the jury," to make it certain that you get to raise these questions.

Attorney General KATZENBACH. Senator, it is possible that that would be adequate in some jurisdictions, but you are dealing here with literally thousands of different ways of selecting jurors, and I think that under those circumstances it is safer to leave the language that we have here, which I believe under present law you can challenge a jury any time prior to the introduction of evidence.

Senator ERVIN. In most States you can only challenge a juror prior to the time the jury is impaneled. If you don't challenge him prior to that time, you waive the right to do it, under State practice, which I think is a very salutary practice.

Attorney General KATZENBACH. I don't see the difficulty, Senator, frankly, of the language that we have here. What is the difference whether the jury has been selected?

Senator ERVIN. The difference is this, Mr. Attorney General. Why waste the time of impaneling the jury and then after you have impaneled the jury pass on the question whether the jury ought to have been impaneled in the first place?

Attorney General KATZENBACH. At the chance that counsel is taking on that, Senator. I would think that would be a deterrent, unless he had a pretty good case.

Senator ERVIN. What chance does the attorney take?

Attorney General KATZENBACH. I think after that jury is impaneled, he is taking quite a chance, because if he finds no discrimi-

nation he proceeds to go ahead and try the case, and in fact that is the Hobson's choice that every defense counsel faces when he challenges a jury, and it is a tough one.

Senator ERVIN. I think orderly procedure would require that the challenge be made before the jury is impaneled, He knows not only whose names appear on the jury list, but he also knows any juror who is called in. They don't impanel him before he is called in.

Attorney General KATZENBACH. I don't think that I would have any strong objections to that, Senator, where it fitted the jury practice. You are talking about practice in North Carolina. I think practices go everywhere. As you mentioned a few minutes ago, that you sometimes ran out in the street to get jurors, if you ran out of names. In those situations a fellow runs out and picks 12 white people or 12 Negroes, and he comes in with them. In that situation discrimination would be taking place right at that moment. If he couldn't challenge it then, he would have waived his right with absolutely no knowledge as to what the basis of the selection is going to be.

Senator ERVIN. But no juror would be impaneled if discrimination was raised. He ought not to be allowed to accept the jurors, and then after he has accepted them, challenge them. In other words, he ought to raise that point before the jury is impaneled. I think that is a very serious question as a matter of orderly procedure, myself. Of course, it may be that my opinion is based on the practice I have always observed, which I think is a very sound and salutary practice. If a man is going to challenge a juror, he ought to do it before the jury is impaneled.

Attorney General KATZENBACH. I will be happy to give it further consideration, Senator.

Senator ERVIN. Now you make an observation that title II only affects the laws of four States, I believe. I don't know whether I misconstrued it. I don't want to misconstrue it or misquote you.

Attorney General KATZENBACH. I don't believe that——

Senator ERVIN. I believe you said six States as to women and two other States on some other ground.

Attorney General KATZENBACH. Under title II, two types of State laws regulating jury service by women would be nullified. Is that what you refer to?

Senator ERVIN. Yes.

Attorney General KATZENBACH. Page 6 of my statement.

Senator ERVIN. And I believe you said two others, on some other ground.

Attorney General KATZENBACH. Yes, sir, three other States with respect to women; Florida, Louisiana, and New Hampshire. They would be nullified. I was talking here about those State laws, and these are the only State laws that I am familiar with, after we have reviewed the 50 States, that deal with women.

Senator ERVIN. Yes.

Attorney General KATZENBACH. It would also affect a number of State laws, the economic status provision. It could affect a number of other State laws.

Senator ERVIN. I was going to suggest that.

Attorney General KATZENBACH. Yes; that is quite correct.

Senator ERVIN. There are many States, for example, New York State, as I understand it, requires jurors under certain circumstances to own as much as $250 worth of property.

Attorney General KATZENBACH. That is correct, and that law would be nullified by title II.

Senator ERVIN. We have a law in North Carolina, for example, that makes a distinction between a regular juror who does not have to be a freeholder and a tales juror who does have to be a freeholder. This law would certainly invalidate that.

Attorney General KATZENBACH. Yes; it would.

Senator ERVIN. Now, if I construe this title right, it is designed to give every person who has a civil action, or any person who is accused in a criminal case, the right to demand that the jury shall be a representative body, that is at least the sources from which the jury is selected shall be representative as far as race is concerned, as far as religion is concerned, as far as sex is concerned, as far as national origin is concerned, and as far as economic status is concerned; is that correct?

Attorney General KATZENBACH. If I understand your statement correctly, Senator, I would differ with it. I think that it doesn't require that with respect to a particular jury that it be representative in any respect at all, as long as those names are chosen by a random system. It does require in setting up a jury list that you not discriminate on any of these bases. So that I would—now your jury list could be representative or not very representative, by the system that was taken. But what it couldn't do, it couldn't have been set up in a way that was designed to discriminate on any of these grounds. You might end up with quite an unrepresentative jury list on this. It is possible that an unrepresentative jury list could have been chosen without any discrimination. In other words, it doesn't say if there is 10 percent Negroes in this county, that 10 percent of the list has to be Negroes. It doesn't say anything of that kind; nor, indeed, does even title I in that regard.

Senator ERVIN. Well, is this title proposed for the benefit of litigants or for the benefit of the citizens generally? In other words, is this just merely to enforce a person's right to serve on a jury?

Attorney General KATZENBACH. No, sir. I think it is both.

Senator ERVIN. And if this means what it says, for example, under the present decisions, a Negro has a right to raise the question whether members of his race have been systematically excluded from juries?

Attorney General KATZENBACH. That is right.

Senator ERVIN. Now the way this is phrased, can a Negro raise the issue if white men have been systematically excluded from juries?

Attorney General KATZENBACH. Yes, he could raise that.

Senator ERVIN. And a millionaire could raise the question whether paupers have been systematically excluded from the juries.

Attorney General KATZENBACH. Yes, sir. I don't think the status, sex, or color of the defendant has anything to do with the jury system in its selection.

Senator ERVIN. In other words, is this departing from the principle that the right to challenge a jury is based upon prejudice to the challenger?

Attorney General KATZENBACH. That the jury selection system of that particular county is in accord with the Constitution of the

United States and with this provision of law. Any defendant could raise it.

Senator ERVIN. This is certainly based upon the equal protection clause of the 14th amendment and nothing else, isn't it?

Attorney General KATZENBACH. Yes, sir.

Senator ERVIN. Now, normally a person is not entitled to raise any point in a case unless he has some grounds for raising it, and shows there is some reason to believe that such grounds exist; isn't that so?

Attorney General KATZENBACH. Yes. Normally, he can't raise it unless he can show some prejudice in his particular case, and we quite conscientiously thought that there were two difficulties with this, Mr. Chairman. One, what it means is that as long as a particular defendant gets a fair trial out of this, other defendants may not raise it. He may continue to have an unconstitutional system of selecting juries.

The second point for which we raise it, are merely related to the same thing, I think the problem is to try to have a jury selection system that operates in accord with the Constitution, and that ought to be the objective of legislation. I think as I said yesterday, to some extent the problem is illustrated by the fact that the supreme court in your State has had to deal, over quite a period of time, with one county where it keeps finding that that system is unconstitutional. Yet it seems to be unable to make that county revamp and reform its system to be in accord with the Constitution.

Senator ERVIN. Well, that is one county out of 100.

Attorney General KATZENBACH. I am sure you would agree with me if it is one county, it is one county too many.

Senator ERVIN. But Mr. Attorney General, the fact that North Carolina is enforcing the 14th amendment in this respect is pretty good reason for the Federal Government not to take control of the procedures in North Carolina, in my judgment.

Attorney General KATZENBACH. We are not attempting to really control the procedures in any very major way, and I didn't want to and wouldn't intend to single out North Carolina. I just thought you would be familiar with these cases. I would think the problems in North Carolina were considerably less than the problems in many other areas.

Senator ERVIN. Yes, I think they are, and that is one reason I think we had better leave these matters to the States, subject to the power of the court to set aside unlawful State action.

Under what power does the Federal Government have the right to prescribe rules of procedure for State courts?

Attorney General KATZENBACH. I would think as a part of effectuating the equal protection clause of the 14th amendment they could do this. After all, we have prescribed somewhat similar procedures.

Senator ERVIN. The difference as I see it is this: The equal protection clause gives Congress the right to prohibit the State from doing something, but it doesn't give Congress the right to require the State to do it in the way the Federal Government wishes. Title II, section 204, of this bill constitutes an attempt on the part of the Congress of the United States to prescribe rules of procedure for State courts. Isn't that true?

Attorney General KATZENBACH. Yes. It requires rules of procedure; yes sir.

Senator ERVIN. Mr. Attorney General, do you know of any Federal statute which has undertaken to prescribe rules of procedure for State courts?

Attorney General KATZENBACH. Well, the act of 1866.

Senator ERVIN. What does it say?

Attorney General KATZENBACH. In 42 U.S.C. 1982, I don't have the full text in front of me, but it requires State courts to recognize the rights of new freed men to sue, be parties, and give evidence.

Senator ERVIN. Yes.

Attorney General KATZENBACH. Those are rules of procedure.

Senator ERVIN. But they are to give evidence according to the rules of evidence established by the State courts, and they are to be parties according to the rules of procedure established by the State courts.

Attorney General KATZENBACH. That is correct, but as far as principle is concerned, they are certainly prescribing a rule of procedure when they say you must permit these people to give evidence.

Senator ERVIN. The difference is they were given the right to give evidence according to the laws of evidence established by the State courts, and to be parties according to the laws of the State. This goes beyond that.

Attorney General KATZENBACH. This goes further, yes.

Senator ERVIN. Now, of course, Congress can forbid the States from violating the Constitution, but it can't tell the States how they are going to function in their search for truth.

Attorney General KATZENBACH. Senator, certainly under the 14th amendment, as interpreted by judicial decisions, a number of rules of procedure are in effect required as the result of those decisions to be used in State court proceedings.

Senator ERVIN. Yes, but is it not true that all of those rules of procedure were established by the States?

Attorney General KATZENBACH. No, sir.

Senator ERVIN. And not by the Federal Government?

Attorney General KATZENBACH. Let's take something like comment on a defendant's failure to take the stand.

Senator ERVIN. The majority of the Supreme Court held in that case that a State law which permitted counsel for the prosecution to comment upon the failure of the defendant to take the stand was in violation of the due process clause of the 14th amendment, if I recall the case correctly.

Now that wasn't an effort to prescribe how the State would operate its courts and what procedure it would have. It merely invalidated a State law for violation of the 14th amendment, and left it to the State to adjust its law as it might see fit.

Attorney General KATZENBACH. Sir, it seems to me that the effect of that, whatever the rules of State procedure were, to say you can't have that procedure. You can't be permitted to comment on it. How about providing a free transcript?

Senator ERVIN. Providing what?

Attorney General KATZENBACH. Providing a free transcript to an indigent. How about providing counsel?

Senator ERVIN. I don't think that the Federal Government has any authority to pass a law requiring the State to provide a free transcript. The courts might hold that a failure of a State to do that constituted a violation of the 14th amendment, and any act of the State justifying such action was unconstitutional. But that is a far cry from the Federal Government passing a law telling the State what kind of comments a lawyer could make and what kind he could not make.

Attorney General KATZENBACH. Suppose we drafted this and said that the appropriate State or local official shall fail to furnish a written statement of jury selection information subscribed to under oath containing a detailed description of the following, then it will be in violation of the 14th amendment. That is just another way of saying it.

Senator ERVIN. That would be trying to beat the constitutional devil around the stump and I don't think you can do it.

Attorney General KATZENBACH. No, sir. I am just simply taking the approach that you took.

Senator ERVIN. No, I don't take that approach.

Attorney General KATZENBACH. You say these are prescribing procedures and that approach is no good.

Senator ERVIN. I don't take that approach. I take the approach that under the Constitution the Federal courts have the power to invalidate State procedures which contravene the 14th amendment. But I take the position that Congress has no power to go beyond that and adopt laws which establish affirmative State procedures which the State courts are required to follow.

Attorney General KATZENBACH. Sir, you say that is a way of getting around it. The enactment of the matter is, it seems to me, with respect to transripts, with respect to provision of counsel, with respect to commenting on the evidence, with respect to requiring a State court to go into the voluntariness of a confession, in all of these instances the court has said, "If you don't do these things, you are in violation of the 14th amendment."

Now it seems to me that when Congress enacts a statute under section 5, it can say in effect, "If you don't do these things, you are in violation of the 14th amendment. These are required practices and procedures for you to do."

If you feel better about this by saying "If you don't do this you can't proceed with the trial," it seems to me that is not really very different from stating the other. I would call to your attention a SC case, the decision of the Court. SC made a somewhat similar argument, and the Court said:

> We, therefore, reject SC's argument that Congress may appropriately do no more than to forbid violations of the 15th amendment in general terms, that the task of fashioning specific remedies or reapplying to the particular localities must necessarily be left entirely to the Courts.

That was under section 2 of the 15th amendment, but it is precisely what we are attempting to do here under the 14th amendment.

Senator ERVIN. Mr. Attorney General, I respectfully submit that the distinction between that case and the point we are discussing is about as wide as the gulf which yawns between Lazarus in Abraham's bosom and Dives in Hell.

In that case Congress was acting under a grant of power to enforce the right of citizens of the United States to vote. In this case, Congress has no affirmative legislative power to prescribe rules of procedure for State courts. Of course, Federal courts have a right to compel obedience to the Constitution and they have a right to invalidate State procedures which do not comply with the constitutional standard, but I deny that Congress has any power to adopt an affirmative rule of procedure for State courts to follow.

Attorney General KATZENBACH. Senator, let's take one of the decisions of the Supreme Court, any one decided under the 14th amendment. Suppose that Congress decided either before or after that, that it wished to, in implementation of this, use its legislative power to prescribe it. Suppose Congress said any of the things I have just mentioned. In every State court proceeding there must be an assignment of counsel. In every State court proceeding the judge must inquire into the voluntariness of the confession. In every State court proceeding the prosecutor may not comment on the evidence. And they just simply put that as requirements in implementation of the 14th amendment.

I would suppose they had the legislative power to do it. And I don't really perceive how you can have the power to do that under the 14th amendment by judicial decision but that somehow or other Congress is denied from stating it in an affirmative way under section 5 in implementation of its provisions.

Senator ERVIN. That is entirely as you put it. The distinction is that the 14th amendment is a prohibition. It is not an affirmative grant of power to legislate procedure for the States. On the other hand the Federal courts undoubtedly have the power to invalidate any State procedure which violates the Constitution.

Attorney General KATZENBACH. This is precisely the point of the SC case which I cited. The quotation there follows, the discussion of the 14th amendment, 18th amendment, 15th amendment, and they simply reject the argument that you are making. I don't know what the gap was. I can't repeat the gap. I don't think it exists.

Senator ERVIN. Mr. Attorney General, that is a voting rights case.

Attorney General KATZENBACH. Yes, sir.

Senator ERVIN. And it had to do with affirmative legislation of Congress relating to Federal matters, and this is affirmative legislation regulating State matters because the question of procedure in a State court is a State matter and not a Federal-State matter.

Attorney General KATZENBACH. It is a Federal matter to the extent that we have the 14th amendment involved, and I must say I simply don't perceive the distinction. The argument SC made in that case was you don't have any power under the 14th amendment to do anything but prohibit the States from doing something, and the Supreme Court of the United States said, just as you have said, Congress was exercising its affirmative powers under the 15th amendment, and here I am suggesting that Congress can exercise its affirmative powers under the 14th amendment and I see nothing sacrosanct in State court procedures. If they, under this, as I would hope you would agree, if they can state certain rules for police officials under this matter we talked about yesterday, why can't they state certain rules for courts, if these are designed to implement the guarantees

of the 14th amendment. I don't perceive why judicial procedure in a State court should be somehow or other scratched out as an implied exception to the power of Congress under section 5 of the 14th amendment.

Senator ERVIN. Mr. Attorney General, you take the position, if I construe your language right, that Congress would have the power under the equal protection clause of the 14th amendment to adopt an entire code of civil procedure which States would have to follow.

Attorney General KATZENBACH. That was considered appropriate legislation by Congress with respect to the implementation of equal protection of the laws, then I would suppose they had that power to do it. But I again would raise the same issue that I raised yesterday as to whether in that broadly defined area such legislation could really be regarded as appropriate without indication of a problem.

Here there have been repeated cases of discrimination with respect to State court juries, and the effort here is to straighten out these procedures, and to allow you to raise it in a State court.

It would be possible I suppose to say any time this is raised you have an absolute right of transfer to the Federal court, and then prescribe these exact rules as far as the Federal court is concerned and enjoin going any further on it. I don't see a constitutional difference in approaching it one way rather than the other.

Senator ERVIN. You see no limitation whatever on the powers of Congress under the 14th amendment. Is that you position?

Attorney General KATZENBACH. No, sir. It may be your interpretation of what I said, but not what I meant to say.

Senator ERVIN. I don't want to misinterpret or misconstrue you, but I thought you said "if Congress thought it was appropriate to pass it,"

Attorney General KATZENBACH. If it was appropriate.

Senator ERVIN. I thought you said if Congress deemed it appropriate, Congress would be the judge of its own powers and they would be unlimited in nature.

Attorney General KATZENBACH. No, if I said that I didn't mean to say it. If Congress deemed it appropriate and the Supreme Court found it appropriate.

Senator ERVIN. Mr. Attorney General, do you mean to tell me that you think Congress has the power to pass a law which would determine how long a lawyer would have to argue a case before a State jury?

Attorney General KATZENBACH. How long he would have to argue a case?

Senator ERVIN. Yes; how long he would be permitted to argue a case before a State jury?

Attorney General KATZENBACH. It is a little difficult for me to see the relation of that to equal protection of the law.

Senator ERVIN. That is a question of procedure. That is a question of how State courts proceed in their efforts to try cases and adjudicate controversies.

Attorney General KATZENBACH. I would say matters of procedure can affect equal protection of the laws. Where it is necessary to prescribe a particular procedure in order to effectuate the guarantees of the 14th amendment, I believe that Congress has the power to do so.

In the example that you give, I have great difficulty seeing how that particular matter of procedure would affect equal protection of the laws. But I can envision that if they said, "If you are defending a Negro client you can argue for 30 minutes, and if you are defending a white client you can argue for an hour and a half." and I think that the Court would have the power to throw that law out, and I think Congress would have the power to say, "You must permit the same length of time in argument in a case before your court, irrespective of the race, color, sex, or religion or national origin of the defendant or the plaintiff," and that they could prescribe that by statute and it would be perfectly appropriate for them to, although I think quite unnecessary.

Senator ERVIN. I would agree with you on the proposition that if a State had a law which said that counsel representing a Negro could argue only 15 minutes, whereas, counsel representing a white party had unlimited time, that the Federal courts could and would adjudge that as being invalid as denying equal protection of the law. But it does not follow that Congress has the power to tell a State Court how long counsel may argue a case.

Attorney General KATZENBACH. No; I agree with you. I said I thought it would be very difficult to relate the length of argument to equal protection of the laws if everybody was treated in the same way, but I take it you would agree with me that Congress as well as the Court could say in a statute, "In all State judicial proceedings counsel must be given the same rights irrespective of the race, color, national origin, religion, sex."

Senator ERVIN. I have no quarrel with the fact that Congress can enforce the prohibition, but I do quarrel with the proposition that Congress can pass a law establishing affirmative rules of procedure for State courts. States would have no reason to exist if that were so; they would have no powers.

Attorney General KATZENBACH. I believe that if it is reasonably necessary to effectuate the guarantees of the 14th amendment, the Congress has the power to prescribe such procedure. It is my firm conviction, and I think the idea that all you can do under the 14th amendment is prohibit something is an idea that the Supreme Court has unanimously rejected.

Senator ERVIN. Mr. Attorney General, the Federal Government can't prescribe the action to be taken.

Attorney General KATZENBACH. Where it is necessary to effectuate?

Senator ERVIN. I think that the Federal courts could set aside a conviction or trial if the State did not establish a procedure that would afford a litigant a reasonable opportunity to present his claim.

But I disagree with you most affirmatively on the point whether Congress can go beyond that and establish State procedure.

It can certainly invalidate the State's action if its procedure does not afford litigants their constitutional rights. But Congress cannot exercise the power of the State legislature by prescribing the procedure for the State courts.

I think perhaps you and I have reached an impasse, and your eloquence is not going to persuade me that Congress can enforce a prohibition by adopting an affirmative course of action, and I do not think that my feeble efforts are going to convince you of the rectitude of my

thoughts on this subject, so I am willing to let that proposition rest there, except to say that——

Attorney General KATZENBACH. I do not give up hope, Mr. Chairman.

Senator ERVIN. I do not think there is anything in the Constitution that gives the Congress the power to prescribe rules of procedure to govern State courts.

Attorney General KATZENBACH. Do you put rules of procedure in some special category?

Senator ERVIN. No, I put them in no special category. The fact is that the 14th amendment prohibits certain State action, and it does not give Congress the power to supersede the legislative authority of the States in an affirmative manner.

Attorney General KATZENBACH. It really is the proposition that all that the Congress can do under section 5 is to negate various State procedures, and that it cannot prescribe the affirmative steps that a State must take in this regard?

Senator ERVIN. I would say that under the 14th amendment the Congress cannot usurp the power of the State to pass affirmative legislation. All the Congress can do is to establish prohibitions as the amendment does against State action. Otherwise, Mr. Attorney General, the Congress can entirely supersede the State legislative power.

Attorney General KATZENBACH. The reason why I wanted to clarify that point is because it is precisely the argument that you just made, that the Supreme Court unanimously rejected in the *South Carolina* case.

Senator ERVIN. Mr. Attorney General, in the *South Carolina* case the question of State court procedure was not involved at all. What was involved was enforcement of the provisions of the Constitution, which Congress has the power to enforce.

Now I do not agree that they should have been enforced, as you know, in the way that act says, but that question is not involved in the remotest here, because the only procedures that are set there concern Federal courts and not procedures in State courts.

Attorney General KATZENBACH. Whether you put procedures in a particular point. I thought we clarified the fact that you thought the power of Congress was limited in terms of negating various State laws and practices, and my point was that the Supreme Court quite explicitly said that it is not confined to negating that legislation, to take steps reasonably necessary to prescribe what has to be done in order to fulfill this.

Senator ERVIN. I take the position that Congress cannot, under the 14th amendment, step into the field of legislative power which belongs to the States, and exercise that legislative power of the State in any particular whatever.

Attorney General KATZENBACH. You draw a distinction between saying a State may not convict a person, may not constitutionally convict a person who is not represented by counsel, and the position that a State must provide counsel for defendants in criminal cases.

Senator ERVIN. Yes.

Attorney General KATZENBACH. You see those as two different things?

Senator ERVIN. Yes. One of them is the enforcement of prohibition and the other is the exercise of affirmative legislation. In other words, to clarify the thing and make it specific about rules of procedure, the Federal courts can invalidate State procedure which is not in harmony with the assertion of a constitutional right. But the Congress cannot prescribe the rule of procedure.

Now let's go a little further beyond that point.

Under section 204, a person can challenge the jury without having any basis whatever for so doing, can he not?

Attorney General KATZENBACH. He can challenge a jury, yes, and as part of his right in challenging that, he can find out how the jury was selected, the procedures whereby the jury was selected.

Senator ERVIN. He has an absolute legal right to challenge the jury, even though he has not the slightest basis for so doing.

Attorney General KATZENBACH. He has an absolute right to get a statement as to how the jury is selected, and if that is the purpose of the challenge, he has an absolute right to get that. It is at that point that you proceed further.

It is very hard, Mr. Chairman, if you cannot even know how a jury is selected, and if that information is kept away from you, it is rather difficult to challenge.

Senator ERVIN. Well, I think the information is normally available.

Attorney General KATZENBACH. Well, in that instance all we are doing here is saying that information has to be made available.

Senator ERVIN. Mr. Attorney General, as a practical matter, if this statute is enacted, and held valid, I can prevent practically any case ever coming to trial in a State court anywhere in the United States.

In most of the United States there are rural counties. There are courts of general jurisdiction like the superior court in North Carolina, which convene at stated periods for short periods of time to try cases. A lawyer, if he wants to take advantage of an absolute legal right conferred upon his client can challenge the jury in every case or in any case by merely asserting that any rights secured by section 201 of this title have been denied or abridged. He can do that without having any ground whatever for so doing, and without having any reason whatever to believe there is any merit in his assertion. Is that not true?

Attorney General KATZENBACH. It is true that he can do that in order to get this information with respect to juries. It is also true he can challenge jury selection today without having any basis. He can say "On information and belief, I think Negroes have been totally excluded from this jury."

You then have to have a hearing on this subject.

Senator ERVIN. Yes.

Attorney General KATZENBACH. Counsel who does this, and there the jury has been selected, and selected fairly, had better think a good deal about it. This is somewhat offensive to the jury in this situation, and often somewhat offensive to the court in this situation. And so I would doubt that he would do this any more than he would do it today. All he gets out of this is a statement as to how the jury is selected. I do not see why——

Senator ERVIN. Here is the difference, and it is a very broad difference, and from a practical standpoint it is a wholly irreconcilable difference.

Now, if counsel challenges a jury, the court says "All right, we will hear your testimony"—and if counsel says "I have no basis for my challenge that I am able to show to the court," the court will not entertain the challenge and will go ahead and try the case.

But under this procedure, counsel can make the assertion without having any reason to believe the assertion to be true, and require the State jury officials to furnish a written statement as to how they select people to serve upon the juries.

Senator JAVITS. Mr. Chairman, will the Chair yield for one instance?

Senator ERVIN. Yes.

Senator JAVITS. To give us an idea of time. I see it is 12:40. We are still on titles I and II. I have have some questions on titles I and II. So has Senator Kennedy. We have not yet reached the floor. Can we have some idea of the disposition of the Chair on this subject?

Senator ERVIN. If you gentlemen want to ask questions at any time I will yield to you for it, because I know that every Senator has a multitude of tasks to do, and I know that under the practice in the Senate, when a man happens to be chairman of a subcommittee, the primary obligation to preside and stay rests on him rather than on other Members. So I am perfectly willing to yield to either one of you.

Senator JAVITS. Mr. Chairman, I would suggest that Senator Kennedy proceed if he chooses to and I will follow with questions on titles I and II. Then if the Chair would let us know if the witness is expecting to finish this afternoon, which would mean completing title IV, I would be ready to ask my questions.

Senator ERVIN. I doubt very seriously that we can reach title IV today, because I have received communications from several Senators who are interested in title IV asking that we not reach questions on title IV today.

I am frank to state I have a good deal more on title II.

Attorney General KATZENBACH. Could I, in view of your description of that, Senator, I would like if I might, with your permission, to read a quotation from *State* v. *Wilson*, a 1964 decision of the supreme court of your State 262 North Carolina Reports 419.

At pages 423 to 424, it says:

> Reliance by the State upon the burden of proof rule and the consequent failure of the State to offer evidence usually results in denying the judge the benefit of the crucial facts and in arousing suspicion that there has been discrimination as alleged. In the instant case, for example, the evidence fails to show the number of white and Negro taxpayers, the number of white and Negro males subject to poll tax, the number of white and Negro women taxpayers, the number of white persons, male and female on the jury list, the number of Negroes male and female on the jury list, the matter of drawing jury panels for sessions of court, whether any names drawn from the box for jury service were discarded, laid aside or deliberately not summoned, the matter of selecting grand juries, the panels actually drawn over a reasonable period prior to the current court session with disclosure of their racial composition, and lists of grand juries previously in service with disclosure of their racial composition. If these and other pertinent definite facts were presented, trial judges could make clear findings of fact and more readily reach proper conclusions.

It was upon that basis and upon our feeling that you can, when the facts are totally within the control of the jury commission, it is extremely difficult for the defendant in a case. He says, "I think the selection matter has been discriminatory here."

He says, "There are 12 white jurors on here."

The court says, "That does not prove it is discriminatory."

He says, "I think it is, but I do not have any other evidence because I cannot get it from the jury commission. I do not know how they were selected."

The court says, "You have not proved your case," the North Carolina court would reverse it.

Senator ERVIN. You would put the litigant in the position of the defendant who did not have counsel. The court asked if he would like for the court to appoint a counsel and he said, "Yes, but I would a whole lot rather for the court to furnish me with some witnesses."

Attorney General KATZENBACH. Well, it was for these reasons in that very fine decision of the North Carolina Supreme Court that we felt we were entitled to some information here, that it was hard to have a fair procedure, Senator, that does not allow a person some opportunity to see whether or not the jury has been selected fairly.

Senator ERVIN. I appreciate you reading a North Carolina case. I think we have run things pretty well in North Carolina, and I do not think that we need to have the Federal Government doing the legislating as well as the adjudicating in this field.

Senator KENNEDY. Mr. Attorney General, I gather from the testimony which you have presented to this committee, and which you have substantiated here this morning, that you feel that there is in many areas in many States of the South a serious problem of discrimination against Negroes in serving on State juries as well as on Federal juries.

Attorney General KATZENBACH. I think there is a problem of discrimination in a number of counties at least with respect to State juries.

I think the Federal problem has been somewhat different, Senator. To the best of my knowledge there has been no discrimination in Federal juries of any intended or unconstitutional sort, but the jury panels have resulted because of the system of jury selection in quite disproportionate representation on the panels with respect to Negroes.

Senator KENNEDY. Now, the Southern Regional Council has provided some figures, and I would like to know whether they are substantially what you would agree with, that in Alabama 30 percent of the voting age population is Negro, yet it is estimated that only 5 or 6 Negroes are on a typical jury panel of 110.

In Arkansas, which has a population that is 20 percent Negro, it is estimated that 4 Negroes are on a double panel of 50, and in 11 States of the South, of the 28 court clerks and 129 jury commissioners attached to the Federal courts all are white and all are appointed by 65 white district judges.

The point that I am trying to suggest, and I think it is borne out well by your testimony, is that there is a critical need today for making provisos for this section 2.

Attorney General KATZENBACH. I certainly think there is, Senator, and there have been at least six decisions on jury discriminations since January of this year.

Senator KENNEDY. And you fundamentally believe that in order to provide justice that some kind of adjustment has to be made—I am just now directing my attention to title II on this—as far as State juries are concerned in order to provide equal justice under law in the South.

Attorney General KATZENBACH. Yes, I do, Senator.

Senator KENNEDY. Now the approach which is followed and suggested by title II, as I understand it, is modeled after the approach which was initially used and eventually adopted in the Congress and the Senate in the civil rights bill of 1957, as far as giving power to the Attorney General to participate in these suits.

Could you describe for the members of the committee what your reasoning was for utilizing that approach an approach many of us, in light of the recent history and experience, would question rather than a triggering device or a more dramatic effort which has substantially been supported in the more recent civil rights bills, and which I think provide a greater degree of effectiveness in meeting this problem?

Attorney General KATZENBACH. Well, there would be two reasons, Senator.

First, I think the effort by the Federal Government in 1957 and 1960 to see whether you could not get voluntary compliance with voting, given the facts at those times made sense, rather than taking the much stronger affirmative remedies that were taken with respect to the 1965 act.

Admittedly, the case-by-case approach of doing this did not work there primarily because of the fact that voting registrars simply did not comply with it.

It would be my hope at least that in the field of juries, where the responsible officials are judicial officers themselves, that the great bulk of them would review their jury selection system and bring it into compliance and would be assured that their jury commissioners were in compliance.

I would hope that that would be true. If that did not prove to be true, if you had to have repeated litigation, then I would think the Congress should act to do more. But it really is an effort—I do not know whether the chairman would agree with me or not—it is an effort to put as much State responsibility as I think can be put to secure as much voluntary compliance with the law to leave States as free as they can be left and still do justice in these cases.

I am frank to say it may not work, Senator, as we would hope that it would work. I would like to try it.

Senator ERVIN. I would say although I do not share your opinion about the desirability of this legislation, I do share your desire of leaving as much authority as possible in all circumstances to local people, because I happen to believe what a great Bostonian once said to be the truth: Justice Brandeis said that the States are the only breakwater against the ever pounding surf which threatens to submerge the individual and destroy the only society in which a personality can exist.

I think when we keep concentrating power in the Federal Government, especially if we go beyond what is absolutely necessary, that we are making an error for the future welfare of the country.

Senator KENNEDY. Do you think Mr. Attorney General, that in light of the recent experience it would be reasonable for us as members of the committee to conclude that the other means of a triggering device would be the most effective way as far as your role as the chief law enforcer? Do you see any real problems with regard to the constitutionality of a triggering device if the members of this com-

mittee feel that this would be the most effective way of combating the problem?

Attorney General KATZENBACH. I would think at least, Senator, you would have a problem on your triggering device as to the accuracy of statistics in this regard, which I think could cause a problem which we were able to avoid in the voting situation.

Senator JAVITS. Would the Senator yield?

Attorney General KATZENBACH. I think it could raise some problems there.

Senator JAVITS. I have offered a triggering device amendment, and I hope the Attorney General will give us his views on that at his earliest convenience and have it printed in the record.

Attorney General KATZENBACH. I would be happy to, Senator. I would not want my remarks to be thought to believe that title 2 here is going to be ineffective. I think it can be effective.

The triggering device, I do not know what the problems may be in particular. I can suggest there might be a lot of litigation with respect to the selection process. I am not sure that over the long haul on this you do not get more voluntary cooperation out of this kind of thing than you do out of a triggering device, which is almost sure to get at least initial resistance to it.

I believe that with the increased registration of voters and the increased political participation generally by Negroes of the South, that while we have a long way to go, there has been a considerable change in attitudes, considerable compliance with other statutes, and I would hope that the tremendous resistance that we got on voting which required the 1965 act would not also be true in the case of the selection of jurors.

Senator KENNEDY. Could I ask you this: In light of the *Swain* case and the opinions of Goldberg, the Chief Justice and others, what is your feeling on shifting the burden of proof to the States in situations such as this?

Attorney General KATZENBACH. We have come, it seems to me very close to doing that really here, by requiring that all the defendant here, or the person complaining, has to do to benefit under this system has to have some evidence. And if he produced some evidence then the State must produce its records and, if the records do not permit a determination to be definitely made, then the burden shifts to the appropriate State officials to produce additional evidence that shows that the denial or abridgement did not occur. It is shifted at least to that extent.

I think that that is a pretty satisfactory—if after you have gotten a complete description of how the jury system works, if at that point you have not been able to produce any evidence of discrimination, I would think that at that point you could drop it. But if there is any evidence of discrimination, then you move ahead.

"Some evidence" is a term of art, and it is a good deal less than a prima facie case that you have to make. I think you ought to have to show some evidence if you have this much information given you. So we really do shift the burden after the initial stage.

Senator KENNEDY. If we were to spell that out in clearer language, do you have any reservations?

Attorney General KATZENBACH. No.

It may well be that it can be spelled out more clearly.

Senator KENNEDY. I want to ask what your opinion would be with regard to requiring the States to record on the basis of race their jury records. What would be your opinion about that?

Attorney General KATZENBACH. To keep them that way?

Senator KENNEDY. Yes.

Attorney General KATZENBACH. Oh, I think that is a reasonable requirement. I think it is almost essential if you are going to be able to prove it and make a case. That kind of recordkeeping, there is nothing unconstitutional in that kind of recordkeeping. It has been recognized by the Supreme Court with respect to decrees and so forth, that it may be necessary to keep that kind of record.

Senator KENNEDY. You would find no problem if there was an amendment to include that kind of provision in the bill?

Attorney General KATZENBACH. No. It is a little awkward in a way, Senator, because we have not prescribed here any records that a State has to keep, other than the records that it keeps itself. We then said if, however, there is some evidence that if they do not have any records they are going to have a hard time carrying the burden, where there is a finding of discrimination, then you can require all kinds of records be kept.

We have not prescribed what records they would keep or be required to keep.

Senator Kennedy. One of the things that might be done is to require States to keep whatever they report with respect to jury service.

Attorney General KATZENBACH. Yes; that approach could be taken, Senator.

I think they are going to be hard put if they do not have records, to prove that this system has not resulted in discrimination. So I think this is sort of an incentive really to keep records in the manner suggested by the extract I read from the decision of the North Carolina Supreme Court.

Senator KENNEDY. You mean if a question is raised by a defendant as to the system by which the jurors are selected?

Attorney General KATZENBACH. Yes.

Senator KENNEDY. Then you think it would be almost essential for the State to carry the burden of demonstrating from records that they keep on the prospective jurors and the jurors' race that there has been no discrimination.

Attorney General KATZENBACH. I would think so.

Senator KENNEDY. Thank you very much.

Senator ERVIN. In fact, you would have to have a quota system, would you not?

Attorney General KATZENBACH. Quota system?

Senator ERVIN. Yes.

Attorney General KATZENBACH. No. I think there has to be some relationship. I think there are the laws of chance and if you have got 30 percent Negroes the laws of chance would be against your getting 1 percent on the jury. I do not think they would be against you getting 15 percent or 18 percent.

Senator ERVIN. The only safe thing for the State would be to establish a quota system, would it not?

Attorney General KATZENBACH. I think that a system of selection with a quota system would be quite clearly in violation of this.

Senator ERVIN. That is what I thought, but I thought that would be about the only way the State could have the proper percentages.

Attorney General KATZENBACH. Would they not have to say they had a quota system when you asked how they were selected?

Senator ERVIN. Yes.

Attorney General KATZENBACH. You would not expect them to perjure themselves.

Senator ERVIN. No; you would set it aside on that ground. I was just pointing out that if the State wanted to have evidence of no discrimination they ought to have a quota system, even though that would be unlawful.

Senator JAVITS. Mr. Chairman, I will keep the witness not over 10 minutes. Will that be satisfactory?

It is 3 minutes to 1. It would be a great accommodation to me, knowing that it is lunch time.

Attorney General KATZENBACH. You can keep me all day, Senator. I am at your service.

Senator JAVITS. Mr. Attorney General, one of the amendments which I have put in would give the prosecutor under title I the power to challenge the composition of the jury himself. That is not now contained in the law, and I gather you have said that the right exists under existing law. Has that right ever been used in modern experience?

Attorney General KATZENBACH. I cannot recall a case where we have challenged a Federal jury. I can recall cases where we have suggested in our prosecution, one recent one, that the jury was not selected as it should have been selected, and the case should be retried. And I can recall other instances where we have found that the jury system was not in accord with what we thought was right, where we have suggested that changes be made in the jury system.

I do not recall any challenges, at least in terms of a trial.

Senator JAVITS. May I say that the reason this has troubled me is because I do think, and I am speaking carefully as a lawyer, that there has been very grave concern in legal circles that in many of these cases which have resulted in acquittal, the acquittals might not have been granted if another jury were sitting on the case. This is because of local climate in which such decisions have been made, and the composition of these juries.

Now again, as I said, and I speak carefully as a lawyer because this is a very dangerous idea, you cannot rely upon juries in certain States. Hence the reason for endeavoring, insofar as we can, to enact titles I and II, which I consider constitutional, as you have them, and extremely important to the total scheme of this legislation.

That is why I was so deeply concered with the question of giving the prosecutor the same right, because you cover everything which might prejudice a defendant, but you do not cover what might prejudice the United States specifically, and therefore I wondered whether you felt you were on strong enough ground, without anything in title I, to give yourself that right as a prosecutor.

Attorney General KATZENBACH. I simply have confidence that as far as the Federal system is concerned, that the Congress prescribes this, that the judges would carry it out in the fashion here prescribed.

Senator JAVITS. And you see no need for giving the authority to the prosecutors specifically?

Attorney General KATZENBACH. I do not think it is really necessary. I am not trying to say that as opposition. I think I am reluctant because of my own views as you are and as you have indicated, Senator, to give too much power to the prosecution.

Senator JAVITS. But you do give the power to the defendant?

Attorney General KATZENBACH. The defendant does have the power.

Senator JAVITS. If you feel the courts would carry it out anyway, there must be some reason for giving it to the defendant. Is not that reason broad enough to give it to the prosecutor as well?

Attorney General KATZENBACH. Well, it is a right that the defendant has a good deal of stake in. We could not take the right to challenge a jury, I do not think, away from him.

Senator JAVITS. He can raise an appeal today under existing law and it does cover him there.

Attorney General KATZENBACH. He can raise it habeas corpus.

Senator JAVITS. That is right.

Then he goes through jeopardy, however. This is the thing that troubles me, however. I offered the prosecutor's amendment because of the acquittals in cases which have made such a very bad impression.

Now, again I repeat as a lawyer, I cannot challenge them. They were acquitted. But I do think we can take precautions to see that at least we put our best foot forward in that regard.

Attorney General KATZENBACH. I would be happy to consider your amendment.

Senator JAVITS. Thank you.

Now what will happen if a prospective juror refuses to disclose his race or religion as required by 1865(a)? Will he then be disqualified from service?

Attorney General KATZENBACH. No; I state that for the reason that it is not a qualification for being a juror.

Senator JAVITS. So that he could refuse to answer?

Attorney General KATZENBACH. Perhaps I ought to make it clear.

He does not have to disclose on that form anything that does not go to his qualifications for being a juror. The reason for the disclosure is simply to have records to tell you something about how your system is working, and if he objects to disclosing any of those things that have no relationship to——

Senator JAVITS. Intimidation, for example, could be effective to cause that to happen.

Do you fear any holes in what you are trying to legislate as attributable to that fact? I really do not think you can do much about it.

Attorney General KATZENBACH. I do not think so. I do not quite frankly think, while religion is in here, I do not quite frankly think it makes very much difference, because I am not familiar that there are really problems of religion in any of the Federal systems. I do not really have strong feelings about disclosing that.

With respect to the disclosure of race, it would seem to me under this procedure that if a person did not want to disclose the race, that it would be relatively simple for the jury commissioner to simply note it.

Senator JAVITS. Now one last technical question on title I.

We note that subsection (c) of section 1867 speaks of the procedures in this title as the exclusive means by which a person may

challenge any jury in a case. I hope that it will be made clear, and I would like the Attorney General to do that, that this is not taking away any existing right to challenge an appeal, but rather conferring a new and additional right.

Attorney General KATZENBACH. That is correct.

Senator JAVITS. That is correct.

Now, moving to Title II, under the title as you have drafted it, can suits be brought by the Attorney General on a statewide basis or must they proceed on a county-by-county or district-by-district basis?

What is the Attorney General's understanding of that?

Attorney General KATZENBACH. They can be brought against a State or a political subdivision, but I suppose whether you can bring it against a State depends whether this is a statewide practice.

Senator JAVITS. Yes.

Attorney General KATZENBACH. Or a practice peculiar to this particular political subdivision?

Senator JAVITS. The authority is broad enough to give the Attorney General the discretion?

Attorney General KATZENBACH. Yes, if the State is an appropriate——

Senator JAVITS. I understand.

The reason is that many of these States have enormous numbers of counties. Georgia, for example, has over 230 counties.

Attorney General KATZENBACH. Yes, I am very familiar with that.

Senator JAVITS. So that I just wanted the record to be clear that the Attorney General felt he had that authority.

Attorney General KATZENBACH. Yes.

Senator JAVITS. I assume you consider that you have great flexibility in joining groups of counties, sections, districts, or the State?

Attorney General KATZENBACH. Yes, you could join them, I think where there was a like problem, you could join them.

Senator JAVITS. Now section 204 we note gives the parties the right to obtain records. Can we assume that if discrimination is demonstrated, proceedings will be enjoined and a new jury selected?

As we read the statute, it does not follow through. It may be less obvious, but I do think it should be made clear as to exactly what does occur.

Attorney General KATZENBACH. It is not stated, and perhaps it should be, but I think it is clear that if you do not follow the procedures set down in here, you cannot have a constitutional conviction if you and I are right about the Constitution.

Senator ERVIN. Pardon me. Under this if a State is found to be in violation of the bill's provisions it could not operate its courts unless it reconstituted its jury source, as I construe it.

Attorney General KATZENBACH. The State could not operate its courts unless what?

Senator ERVIN. The State could not try the case because there is compulsion here inferentially to reconstitute the jury.

Attorney General KATZENBACH. That is correct.

Senator JAVITS. Our point is that the procedures are spelled out when the Attorney General brings a suit. What I am trying to do is to get the analogy for when the parties act alone. Will the same thing happen?

In other words, does the statute as the Attorney General has drafted it contemplate that the same thing will happen? Must a

jury be reconstituted and a new jury selected? Must those proceedings be enjoined?

You see, we find in reading it—perhaps the Attorney General and his staff would like to go over it again——

Attorney General KATZENBACH. It is not spelled out. Perhaps it should be spelled out.

I think the sanction we depended on here is if you proceed with a jury that is not in accordance with the procedures here, you have got an unlawful conviction and it has to be set aside.

Senator JAVITS. On appeal?

Attorney General KATZENBACH. Yes.

Senator JAVITS. On appeal?

Attorney General KATZENBACH. If they proceeded, it would have to be set aside.

Senator JAVITS. Will the Attorney General re-read that to see whether it would be desirable to spell out the procedure which would ensue on suit by the parties is the same as that for a suit himself.

I come lastly to this triggering device. Now the thing that motivates me there, and I would like the Attorney General's comment on that, is that the 1957 law to which analogy is made here was ineffective. We had to pass a 1965 law. The 1965 law was based on a triggering device, and the courts have sustained it.

Now the question. Why should we not therefore profit from experience and include the triggering device here, since we have been over this course before, and found that the other is too slow, too ineffective, too limited in its case-by-case application to effect the measure of remedy which the situation in the 1957 Act on Voting required. If there is an analogy then, why do we not profit by experience?

Attorney General KATZENBACH. I would I think just repeat what I said to Senator Kennedy, that I would hope that we have made more progress than that. We are dealing with a different group of officials.

I believe I am correct in saying that even under your triggering device somebody would have to go to court to go through this, would they not?

It has that difference from the voting, where that was not required.

Senator JAVITS. That is true.

Attorney General KATZENBACH. You would still have to go through the litigation process, and it really goes more to the judgment of the evidence in it than it does to, it seems to me, speeding up the process, and I am not saying that in saying that that is not a proposal that ought to be considered. We considered it, something like that, and thought that this might be as effective and might not have the difficulties of having to proceed by judicial proceeding.

Senator JAVITS. I think this is true, but of course you do settle the question of proof very firmly and make it very much simpler to prove the case, and——

Attorney General KATZENBACH. Except for the statistical problem.

Senator JAVITS. Yes.

Attorney General KATZENBACH. That we may have.

Senator JAVITS. That is true. It will require recordkeeping, but of course we have that in the voting records and the census figures of the number of Negroes and the number of whites who are in a particular community. To that extent you already have that kind of record vailable which could also be applicable to these jury cases.

Personally, I believe that we should have a triggering device, that this is a really serious injustice, for which there has been much suffering over a very long period of time, that we should profit from our experience in the fact that it is slow and cumbersome and difficult to prevail in a case-by-case method with a largely open-end method of suit.

But I do agree that this will still require suit. I do think that we are entitled to give the suing party the benefit of every ingenuity which we have which will stand up under the Constitution to correct what is admittedly a situation of gross injustice—discriminating in who shall serve upon a jury to judge a man in respect of his liberty and perhaps his life.

Attorney General KATZENBACH. Could I make just two minor observations on that.

I have been encouraged by the extent to which the States' supreme courts, two decisions, for example, by the Supreme Court of Mississippi have found the jury selection recently to be unconstitutional, and it indicates some willingness, interest, integrity on their own part to try to do something about this.

Again in line with my earlier statement, we are dealing with judges here. We may have more at this time, in effect, with these people voluntary compliance than one might expect with respect to voting in 1957.

The second comment I would make is that I would think if the statistics under the triggering device, your automatic rule were available and able to be used and so forth, that probably those same statistics, the same procedure would serve to show the discrimination under our rule. I am not sure that there is a very major difference between them.

Senator JAVITS. Mr. Attorney General, there is a question of very important purpose in what you say, and I would like to reply to that.

It implies, and I doubt that you mean it, but it does imply that to induce appellate courts in areas of the country where there has been a gross evil to do what is right you have to give them a statute which is less than the maximum we can devise in order to bring about justice.

I would challenge that concept. I think if these courts have the desire to do what is right, they are going to do it anyhow, and they ought to do it anyhow, and that we should not do less than what is required of us in order to bring justice to a highly unjust situation, because we wish to make the courts feel well, we are not going too hard on the subject now, and therefore they will be more likely to do what they ought to do.

I think that I detect that in the approach, and I think it is wrong. I do not say that in any sense of opposition. I think we are both very much on the same side in trying to do everything that needs to be done. But sometimes it is good to have these things laid on the table for one's own consideration as I lay it on the table for your consideration.

I do not think we are going to change one decision in any Southern court by doing all we can to correct this situation, and I am for doing all we can, rather than, as we did in 1957, go part of the way and then in 1965 find that it does not work adequately. We have to go the rest of the way, which we could have gone in 1957 especially because we are dealing with judges, and you do not have the impact of the civilian who, you could perhaps mollify somewhat by not being too strong.

Senator ERVIN. We have pretty good judges down there.

Senator JAVITS. I am not quarreling with that, Senator. You yourself were one of the best. It would be invidious to quarrel with that. But this is the framework and mores of centuries. We understand that only too well, and we are hoping and praying that it may have an influence upon thinking in these areas, as I think it already has.

I do not think that we ought to stay our hands. If ingenuity and wisdom can devise the best means, we ought to legislate the best means.

Thank you, Mr. Chairman.

Senator ERVIN. I just make the observation I am always intrigued by triggering devices because you can hit something without aiming. It happens in many cases that it is not the appropriate target as has been proved in North Carolina by the triggering device in the voting Rights Act of 1965.

We will take a recess now until 2:45, if that is satisfactory to you.

Attorney General KATZENBACH. Yes.

Senator ERVIN. Thank you.

(Whereupon, at 1:15 p.m., the committee recessed, to reconvene at 2:45 p.m., the same day.)

AFTERNOON SESSION

Senator ERVIN. The subcommittee will come to order.

I think we have agreed on the proposition that under title II, counsel for any litigant has an absolute right, regardless of whether he is able to show any basis for so doing, to assert that the rights secured by section 201 have been denied, and automatically, the appropriate jury officials must furnish a written statement concerning the method of jury selection.

STATEMENT OF HON. NICHOLAS deB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, ACCOMPANIED BY DAVID SLAWSON, ATTORNEY ADVISER, OFFICE OF LEGAL COUNSEL, AND ALAN MARER, ATTORNEY, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE—Resumed

Attorney General KATZENBACH. Yes, I think that is essentially right, Senator.

Senator ERVIN. Now this written statement requires a detailed description of the following:

First, the nature and location of the sources from which names were obtained for inclusion in the wheel, box, or similar device.

Second, the methods used and the procedures followed in selecting names from the sources referred to previously for inclusion in the wheel, box, or similar device.

Third, the methods used for selecting names of prospective jurors from the wheel, box, or similar device for testing, or otherwise demonstrating their qualifications for jury service.

Fourth. The qualifications, tests, standards, criteria, and procedures used in determining whether prospective jurors are qualified to serve as jurors.

Fifth. The methods used for summoning or otherwise calling persons for jury service and assigning such persons to grand and petit jury panels.

How long do you think it would take, after the assertion was made, for local jury officials to get up a statement in that detail?

Attorney General KATZENBACH. I do not know, Senator. I suppose that it could be done in a few hours, and I would suppose once done, if it were true, it would be done for that district for all cases. In fact, they might even do it in advance just so they could have that statement to file.

Senator ERVIN. That would be the wise thing to do because conceivably it might take several days for them to be able to furnish this written statement.

In my State the jury list is compiled by the Board of County Commissioners, most of whom are laymen, and it would be quite a tedious task for them to compile a written statement of this magnitude and detail. I can conceive of it taking 3 or 4 days to do that, unless they follow the example of the man who had a copy of a prayer perched on the head of his bed and pointed each night to it and said, "Lord, them is my sentiments."

Now of course they could set up a form, but that form would hardly apply to methods used for summoning the jurors except in times past, would it?

Attorney General KATZENBACH. It just does not impress me, Senator, as a very formidable task. I would assume that the people selecting the jury would have some knowledge, I would hope some fairly detailed knowledge, of what it was they were doing. That is all that is asked here. It says "Sit down and describe what you are doing."

Senator ERVIN. I think they would be aware of what they are doing, but they are not only required to state what they have done, but they have to state what the law of the State is.

Attorney General KATZENBACH. Well, that is something that can be found.

Senator ERVIN. Yes.

Attorney General KATZENBACH. And it is something that they have to not only—Gosh, Senator, if they do not know what the law of the State is, they are not familiar with it, they are not very good jury commissioners.

Senator ERVIN. I would think the lawyer in the case ought to be a little bit better posted in the law than some layman.

Attorney General KATZENBACH. Yes.

Senator ERVIN. And also, the statutes of my State concerning jury selection cover several pages. It would take quite a long document just to set out the standards and the qualifications that the law requires.

I would say at a minimum that the furnishing of this kind of a statement would delay a trial anywhere from 3 or 4 hours to possibly 3 or 4 days, all of which is done without any evidence whatever that there has been any improper action in connection with the preparation of the jury lists.

Now I will call your attention to the provisions of section 204, subsection (b) as they appear on the top of page 19, starting with the word "provided" in the first line.

Attorney General KATZENBACH. Yes.

Senator ERVIN. I will ask, after the jury officials have furnished this detailed statement, the party who has not elicited a single syllable of evidence to indicate any discrimination in preparation of the jury lists, can subject the jury officials to cross-examination as a matter of right?

Attorney General KATZENBACH. Yes.

Senator ERVIN. He can ask them questions about anything that is relevant to the manner in which the jury selections were made?

Attorney General KATZENBACH. Yes.

Senator ERVIN. I live in an average county. We probably have 25,000 people who are old enough under our laws to serve on the jury, and as I construe this bill, the attorney who has made the objection, which may be totally without basis, can then proceed to ask each one of these jury commissioners every relevant question about not only the people whose names were placed in the jury box, but he can also ask every question that has any relevancy about each of the people of the age of 21 years and up whose names were not placed in the jury box or the jury wheel, can he not?

(At this point Senator Kennedy entered the hearing room.)

Attorney General KATZENBACH. I would suppose that it would be very difficult to establish the relevancy of that. But if you assume, which I would not, that that is relevant, then I suppose he can ask any relevant question. I am sure he can ask any relevant question on cross-examination.

Senator ERVIN. The title requires that there be no discrimination on account of race or religion or sex or national origin or economic status, and it is plainly apparent to me that the attorney can ask each one of the jury officials any questions which are necessary to reveal the race or the religion or the sex or the national origin or the economic status of every person whose name is included in the jury box or the jury wheel. Is that not so?

Attorney General KATZENBACH. I would not think so, Senator. I honestly would not.

I would think the questions here are to the method of selection of how those things are accomplished, and I think you can satisfy people that this is done by a random arbitrary basis, then I would not think it was relevant to say what do you know about each individual in this county, that if that is not perfectly clear from this, as I believe it to be, then certainly we ought to say that he cannot ask about every person in the county. It does not seem to me that that would be done.

Senator ERVIN. I would have to hold, if I were the presiding judge, that an attorney had a right to ask all those questions, not only about everybody whose name appeared in the jury box or jury wheel, but everybody of age to serve as jurors who were resident in the county.

Attorney General KATZENBACH. Do you take the view, Senator, to help me a little bit on this, that that can presently be done?

Senator ERVIN. No, because presently an attorney must show that there is some basis in fact for his assertion.

Attorney General KATZENBACH. You think if he made whatever he would regard as sufficient showing to be done, he would then be entitled to ask about all these people from what did you say, 2,500 people?

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Senator ERVIN. 25,000 I said in my county.

Attorney General KATZENBACH. 25,000?

Senator ERVIN. Yes, sir.

Attorney General KATZENBACH. Do you think when the Supreme Court in North Carolina in *State* against *Covington* at 258 North Carolina 495 at page 500 said this, they meant that? They said there:

> When the trial court denied defendant's motion to require process for issue of certain named officials in Union County to appear and give evidence relative to the preparation of the jury list and the drawing of jury panel and grand jury for the February term 1962, and denied his motion for reasonable time to inquire into alleged facts in respect to the intention of exclusion of Negroes born of their race from the grand jury which returned the indictments, it would seem that defendant was denied a reasonable opportunity to produce evidence, if any such evidence exists as he contends.

Senator ERVIN. No, not under North Carolina practice but under this bill he would, and in that case a preliminary showing was made indicating that there was some discrimination.

Attorney General KATZENBACH. Suppose that he did. I thought your proposition was if you permit cross-examination, all of this is relevant.

Now, if that is your proposition, and certainly some of these things you will agree with me are embodied in the Constitution itself, that he can go and inquire as to all those 25,000 names under existing practice; if not, then the law of North Carolina must be that he cannot cross-examine these witnesses or examine these witnesses on relevant questions.

I do not think they are relevant, that is all.

Senator ERVIN. The difference is in that case, as in all North Carolina cases, the North Carolina court did not make an inquiry into this matter unless the accused or the litigant first makes some showing indicating that there is some basis to believe that the jury has not been properly constituted. But under this bill, no showing is required in the first place, and even though the jury commissioner makes a statement under oath which indicates that there has been no discrimination, nevertheless under this bill, the attorney for the litigant has an absolute right to cross-examine as adverse witnesses these jury commissioners, and anybody else having knowledge of relevant facts.

Now, the relevant fact is, have people been denied the right to serve on grand or petit juries on account of race?

How are they going to determine that question without determining both the race of the people whose names are in the jury box or the jury wheel and the race of the parties who are excluded from the jury box or the jury wheel?

Attorney General KATZENBACH. No, sir.

I think what is relevant here is the methods used, the procedures followed in selecting and the qualifications, tests, standards, criteria, procedure used, and the other matters.

The purpose of this provision is to say that after the jury commissioners have stated the procedures which they follow, counsel may cross-examine them—let me start again—counsel may cross-examine them in order to determine whether they have in fact followed the procedures that they say they have followed, and he may in addition to that, if they for example use the keyman system, he may inquire

of the keyman if the procedures that they say they are following were in fact followed by those keymen.

Now this is precisely the problem that came up in these North Carolina cases. What the court said in those cases, in all of them, was this information is peculiarly in the hands of the commissioner, and you can discriminate from here to eternity, if somehow or other he cannot get this information. You do not see anything——

Senator ERVIN. But Mr. Attorney General, how are you going to determine whether the procedures used by the jury officials deny people the right to serve on juries because of race, without making an inquiry as to the racial character of the people in the jury box and the racial character of the people whose names are excluded from the jury box?

That is the purpose of the inquiry. So those things are relevant. You cannot show, for example, that virtually all the people in the jury box are members of the white race without going into an inquiry as to the race of the people whose names are in the jury box. And you cannot show that people have been excluded on the basis of race from the jury box unless you go into the racial character of the people who have been excluded, and that means that you could go into the character of all the people in the county, racially speaking.

Attorney General KATZENBACH. Senator, I dislike differing with you, but I think you can.

For example, if a commissioner says, "I have not the faintest idea of the race, religion or anything else of these people," that would be relevant evidence to me that he was not discriminating. You ask the commissioners what instructions they have given about race. If he says, "Well, we instructed them not to recommend any Negroes," that would be pretty good evidence that they were discriminating.

If the instructions to a key man in a key man system was that "We would like recommendations from a fair cross section irrespective of this, that, or the other thing," I think that would be evidence of no discrimination.

I do not think you have to go into, in fact it would not do you much good to do it.

Senator ERVIN. Under that interpretation all the jury commissions would have to show is that they are totally ignorant about the people whose names they put in the jury box, and therefore, they could not possibly be quilty of discrimination?

Attorney General KATZENBACH. That is correct, plus all the instructions that they had given to the key men as to how they were to select people, and so forth.

I think that is all that is necessary. Then you would have to ask the key men whether they were guilty of discrimination. They were told not to discriminate and if they recommended nobody but white people, and this was true of all of them, I would find the system was probably discriminatory.

Senator ERVIN. I do not believe it is going to be quite that easy on the jury commission.

I do not think that a man can discharge his duty as a jury commissioner without knowing something about the people whose names are placed in the jury box under his direction.

For example, in North Carolina there is a requirement that jurors shall be men with sufficient intelligence and character.

Attorney General KATZENBACH. That is right.

Senator ERVIN. I do not see how a jury commissioner can perform his duty, if he does not pay any attention to whether he is putting into the jury box the names of people who are brilliant or the names of men who are idiots. I think he has to know something about them.

Attorney General KATZENBACH. If he knows something about them, he can be asked whether or not any of these people, whether or not he has excluded people, Negroes, whether he has given instructions that these same standards should be applied in that way. He can be asked questions about how he applies those standards, what his criteria are.

I would think, Senator—suppose in North Carolina today counsel makes affidavit on information and belief that Negroes have been excluded from this jury. Would he then be entitled to examine the jury?

Senator ERVIN. In my judgment, no.

Attorney General KATZENBACH. This is exactly what happened in the *Covington* case and the Supreme Court said that he was.

Senator ERVIN. He would have to make a showing, either by the absence of men of a particular race from the jury panel or in some other way indicate, that there is some basis for making that contention.

Attorney General KATZENBACH. The *Covington* case on that affidavit, the Supreme Court held that he was entitled—the Supreme Court of North Carolina held—that he was entitled to subpena the commissioners and examine them.

Senator ERVIN. Oh, yes. He is entitled to subpena witnesses without an affidavit.

Attorney General KATZENBACH. All we are saying here is that he should be entitled—is your objection to the word "cross-examine"?

If you want to change that to "examine the commissioners", I would have no objection.

Senator ERVIN. That is a different point. In the *Covington* case, counsel wanted a subpena to issue for witnesses.

Attorney General KATZENBACH. Yes, sir; without showing anything.

Senator ERVIN. Yes, but he alleged in his affidavit that the witnesses would furnish evidence, and the trial court absolutely refused to allow him to summon the witnesses. That is clear violation——

Attorney General KATZENBACH. I do not think that he made an affidavit that they would so testify in anyway at all. I think he just said on information and belief he thought Negroes had been excluded, and on that basis alone the court said that he was entitled to examine the commissioners without showing anything more.

Senator ERVIN. Mr. Attorney General, anyone is entitled, under North Carolina law, to subpena a witness as a matter of absolute right, and of course the trial court erred in not allowing him to subpena witnesses.

Attorney General KATZENBACH. Senator, perhaps we are in agreement. That is all we are saying here is that he is entitled at this point to subpena and examine these people. That is all we are saying.

Senator ERVIN. The bill provides an absolute right to make this examination without requiring any showing whatever indicating any improper discrimination.

Attorney General KATZENBACH. Yes, sir, that is exactly what I understand North Carolina law to be.

Senator ERVIN. I have not read that case in a good while, but I think it was not just based on an affidavit. Counsel has a right to

subpena witnesses to show that the Constitution has not been complied with, but the trial court denied him even that right.

Senator KENNEDY. Mr. Chairman.

Attorney General KATZENBACH. The witnesses that he wanted were the jury commissioners.

Senator ERVIN. Yes. You can subpena anybody as a witness. It is a matter of right, without the court's consent.

Attorney General KATZENBACH. Then I do not think we are in disagreement, because all this statute says is that he is entitled to subpena these witnesses. That is really all it says.

Senator ERVIN. It goes further than that.

Attorney General KATZENBACH. Does it?

Senator ERVIN. It says that he has the right not only to subpena them but he has the right to cross-examine them.

Attorney General KATZENBACH. I said I would change "cross-examine" to "examine." A subpena without a right to examine is not worth much.

He wants to ask some questions when he subpenas them. That is the purpose of subpenaing.

Senator ERVIN. Counsel is entitled to bring his witnesses in, and to present his witnesses, but unless it appears that they have some knowledge that is relevant, the court is not going to let them testify.

Attorney General KATZENBACH. I would suppose the commissioners would have some knowledge that was relevant. I cannot imagine that they would not.

Senator ERVIN. Not only that, he can inquire of every man in the county concerning his religion, though I think that is sort of tilling on soil which the Federal Government has no business plowing.

Attorney General KATZENBACH. Where would you conceive——

Senator ERVIN. Or his sex, or his national origin, or economic status. I do not see how you ever would get to trial.

Attorney General KATZENBACH. I am afraid with the exception of the economic status, which I grant is not a factor under the North Carolina law, I would suppose that North Carolina would be hard put to it, having said you have a right to subpena and examine the witnesses on relevant questions, they would be hard put to it to say but you cannot examine this category of witnesses who have relevant information. Where do they draw the line? Cannot you examine anybody with relevant information on that information?

Senator ERVIN. Absolutely.

Attorney General KATZENBACH. Then what is the difference?

Senator ERVIN. The difference is in North Carolina you can only examine them if you have made some kind of a showing. You cannot stay there forever. The bill gives the absolute right to cross-examine the jury officials, and to offer as witnesses any other person having any relevant knowledge.

And what is relevant knowledge? It is whether people have been excluded from a jury box by reason of race, or by reason of sex, or by reason of religion, or by reason of national origin, or by reason of economic status.

Attorney General KATZENBACH. Which one of those rights would you not have under North Carolina law? Could you examine a witness who had relevant knowledge as to discrimination on account of race? Could you do that?

Senator ERVIN. You could not examine them on any of those subjects under North Carolina law as I understand it, and as I have applied it and as I have seen it applied, unless you first make a showing that there is some reason for the assertion that there has been an improper discrimination in the preparation of the jury list. That is the only way.

Attorney General KATZENBACH. Senator, could you help me out on how this man establishes what you say he has to establish, if he cannot subpena anyone?

Senator ERVIN. Oh yes. He can show, for example, all of the members of the jury are white men.

Attorney General KATZENBACH. Is that enough?

Senator ERVIN. Well, they are sitting there in a jury room.

Attorney General KATZENBACH. And that is enough?

Senator ERVIN. No, that is not enough. That is one way though he can show there is some basis.

Attorney General KATZENBACH. That is enough to get witnesses?

Senator ERVIN. No, that is enough to let the court make an inquiry. Or he can show by witnesses that there has been virtually nobody summoned to serve on juries or who have served on juries except white men. Under North Carolina law, as I have always seen it applied, he has to do something along that line before he can cross-examine everybody in the county.

Attorney General KATZENBACH. We do not agree that he can cross-examine everybody in the county, because I think it highly unlikely that everybody in the county would have relevant knowledge as to how this jury was selected, if that is what you are asking about.

Senator ERVIN. Everybody but the counsel for the defense, who does not have any knowledge at all.

Attorney General KATZENBACH. Well, if he does not have any knowledge as to how it is done, it is because the jury commissioners were unwilling to give him any idea as to how this jury was selected. They are unwilling to say the nature and the location of the sources, the methods they used, or anything else.

They say, "You go ahead and prove we discriminated, but the one bit of evidence you cannot have and which we forbid you from having is how we did it."

It justs seems to me that puts him in an awfully difficult position. "We will not tell you whether we complied with the law or not. We will not tell you how we went about it. We will not tell you what instructions we gave. We are not going to tell you anything about how this jury was selected, and you are not entitled to know anything about how this jury was selected, unless you can show we discriminate. You cannot even ask us."

Senator ERVIN. Well, certainly when the question raised by the assertion is whether people have been excluded from the jury box on account of race, or excluded from the jury box on account of religion, or excluded from the jury box on account of sex, or excluded from the jury box on account of national origin, or excluded from the jury box on account of economic status, any evidence relevant to disclose those characteristics concerning any person of the age eligible for jury service in the area covered by the jurisidiction is quite relevant.

Under this bill, in my honest judgment, a man has an absolute right to cross-examine witnesses about those matters, even though he

never obtains the slightest evidence of any discrimination on any of those grounds.

Now in many States women serve on juries only if they are willing to, and it seems to me that question should be determined on the local level and not on the Federal level.

Attorney General KATZENBACH. I agree with you about this, Senator. For that reason, we allow the State to exempt women, if they wish to exempt women, if they want to be exempted.

Senator ERVIN. I believe you have some questions.

Senator KENNEDY. I have just one question that I did not have a chance to ask this morning. I would appreciate it if I could ask the Attorney General if this is in regards to title 1 on Federal juries.

Now, as I understand it, under the present system, there are three different ways of selecting the jurors. You have the keyman role. There are various public lists. Then you have court clerks and jury commissioners, the recommendations of their friends and acquaintances.

As I understand it, this is generally the way in these three broad criteria that jurors are selected under the Federal system throughout the country, and selected in the southern part of our country, and that you have reached, from your own study, the conclusion that this means of selecting the jurors does not provide and has not provided in the past equal representation by the Negroes in certain parts of our country.

I think that this evidence is substantiated by the Southern Regional Council in a study which is entitled "Racial Discrimination in Southern Federal Courts."

I am wondering if it is correct that the Justice Department surveyed districts in Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas with regard to the percent of Negroes who are on Federal jury panels versus the percent of the Negro population. The Justice Department——

Attorney General KATZENBACH. Yes, we did. We have got our U.S. attorneys in that area to do a survey of it, and we have some figures on it. I do not know that they have all the accuracy of a Census Bureau official, but they are the best figures that we were able to come up with, and if you wish, I could submit this for the record, Senator.

It shows quite a disproportion between the panels and the population, which varied from one place to another. In some cases there is absolute accuracy, because we have been able to get hold of the records to do it. In other cases it is not.

In some cases I would say it was not so disproportionate as to be of serious concern. In others, I would say it was quite disproportionate. I think to find a percent on the panels—well, I will just read the Alabama figures to give an example.

In the northern district, and these are estimates by U.S. attorney, about 5 to 10 percent are Negroes and the percentage of population is about 21 percent. In the middle district, 5 to 15 percent of the population, percent of the population is about 32 percent.

Senator KENNEDY. That does not actually reflect the number of Negroes who actually serve on juries though.

Attorney General KATZENBACH. They are on the panels.

Senator KENNEDY. On the panels?

Attorney General KATZENBACH. Yes.

Senator KENNEDY. From which the jurors are selected?

Attorney General KATZENBACH. From which the jurors are selected.

Senator KENNEDY. It is your experience that the numbers that actually serve on the juries are less than the numbers that would be reflected on the panel lists? Do you have any way of indicating this?

Attorney General KATZENBACH. I cannot really state that to be true. It is hard to know what the operation of a challenge system would be, were the challenge for cause or not, but I can perhaps offer this for the record.

Senator KENNEDY. If we could have that for the record, Mr. Chairman.

(The document referred to follows:)

TABLE SHOWING NEGRO REPRESENTATION ON JURIES IN SOUTHERN FEDERAL COURTS

Number of Negroes appearing on Federal jury panels, as compared with number of Negroes of jury service age, in the districts within the 5th circuit

District	Division	Percent on panels	Percent of population
Alabama	N.	[1] 5–10	[4] 21
	M.	[1] 5–15	[4] 32
	S.:		
	Mobile	[1] 8–10	[1] 35
	Selma	[1] 5	[1] 50
Florida	N.:		
	Pensacola	[2] 4–11	[4] 14
	Mariana	[2] 13	[4] 17
	Tallahasee	[2] 4–16	[4] 37
	Gainesville	[2] 7	[4] 23
	M.	[1] 4–5	[1] 13
	S.		
Georgia	N.:		
	Atlanta	[1] 17–23	[1] 35–40
	Rome	[1] 17–23	[1] 25
	Gainesville	[1] 8–9	[1] 15
	Newman	[1] 17–23	[1] 34–40
	M. (Macon division only, involved in *Jackson* and *Rabinowitz* cases).	5.9	35
	S.:		
	Augusta	[1] 20	[1] 50
	Brunswick	[1] 20	[1] 40
	Dublin	[1] 20	[1] 40
	Savannah	[1] 20	[1] 40
	Swainsboro	[1] 20	[1] 40
	Waycross	[1] 20	[1] 40
Louisiana	E.	[1] 5–10	[4] 36
	W.:		
	Alexandria	[3] 13	[4] 26
	Lake Charles	[3] 11	[4] 19
	Monroe	[3] 16	[4] 36
	Opelousas	[3] 10	[4] 32
	Shreveport	[3] 15	[4] 33
	Lafayette	[3] 9	[4] 22
Mississippi	N.		
	S.:		
	Meridian	[3] 8	[4] 44
	Hattiesburg	[3] 12	
	Jackson	[1] 12	
	Biloxi	[2] 12–27	
Texas	N.	[1] 3–5	[1] 5–30
	S.	[1] 5–10	[1] 25
	E.	[1] 5–10	[1] 25
	W.:		
	San Antonio	[1] 3–5	[5] 7
	Austin	[1] 3–4	[1] 7–10

[1] Estimate by U.S. attorney or assistant U.S. attorney.
[2] Percent appearing on recent panels.
[3] Percent appearing on jury list.
[4] 1960 census figures for "age 21 and over" category.
[5] Recent survey of general population.

Senator KENNEDY. I understand that the suggested recommendation of the administration approach is first of all to consider or adjust these lists, considering the voter registration in a given area or, secondly, to supplement these lists as well by recommendations of lists made by the judicial council of that particular district.

Now I think that we are aware of the rather significant achievement in recent months of increasing the percentage of Negroes who have been registered to vote. I think there are probably a number of different States in which that percentage still is not as high as perhaps it should be, for a variety of reasons.

Are you satisfied that even by utilizing the register of voters perhaps in Alabama or in a number of Southern States, you are going to alleviate what I would certainly consider to be a rather critical and crucial problem as far as providing Negroes on these southern juries?

Attorney General KATZENBACH. Yes I am, Senator. As you point out, that can be supplemented wherever the judicial council does not feel that that adequately reflects the population in any district. I would think that in the very near future, your registration figures with the Voting Rights Act would be a fair method of going about it.

It is just a very difficult proposition frankly to find lists that do not have built-in biases of one kind or another in them, and the voting list is the best we can come out with in terms of a listing device.

We corresponded for quite a while with the Census Bureau on this as to the validity of other lists in this regard, and they do not. We have had some amusing experiences in terms of lists.

One district which I will not name found that the jury commissioner had been using the PTA list as a list of jury officials, which seemed to exclude an awful lot of people who did not have children in school. And the telephone directory, city directories, all of these have a much bigger bias built into them and the voting lists, and that was the only uniform list that we could find that seemed to be free of any of the biases discussed here.

Senator KENNEDY. Are you satisfied that by supplementing the voting list where the Chief Justice feels it is necessary to do so, are you satisfied that the judicial council is equipped to make these lists available? Are you satisfied that they have both the manpower and machinery as well as the wherewithal?

Attorney General KATZENBACH. Yes, I think they could supplement the list. I would frankly hope it would not really ever be necessary. I think the way we are going under the registration, it would be unlikely to have to use that privilege.

Senator KENNEDY. In view of the voting registrar's list approach and the judicial council's recommendation, I would be interested in your response to an area sampling approach in order to make any necessary adjustment.

In the conversations that we have had with the Census Bureau, they feel that this can be done, and that it can be done economically. It seems that the area sampling approach would be of particular value in areas where registration today is not at the level we would like it to be. This kind of an approach, in a selected way, would make a good deal of sense.

Attorney General KATZENBACH. I would not have any objection to that, Senator, and perhaps it would be a useful way of going about it.

I think it is important to remember that, at least in my judgment, the objective is not to create on any particular jury or even on any particular jury panel a mathematically exact sampling of the population that you have. It would not bother me if there were 30 percent Negroes in the area, it would not bother me if you had 20 percent on one panel and 40 percent on another panel, or even if you just got within that range. I do not think—we are not trying to create a cross section here.

Senator KENNEDY. That is right.

Attorney General KATZENBACH. And if you allow a little bit of elbow room and latitude on this, then I think your voting list—your voting registration list would tend to be adequate. There may be some underrepresentation of Negroes on it, which would come about for a little while, but I would suspect that by the time this is law, which I would hope would be in the very near future, that you are going to have 50 percent of your Negroes registered in most places in the most difficult areas, as against maybe 75 percent of the whites. So there will not be a big built-in disproportion even there.

Senator KENNEDY. But if this committee were to believe that any area sampling approach would be appropriate, particularly, if it appears that the voting rights lists do not reflect a cross section of a community, you would not have any reservation yourself about this kind of an approach.

Attorney General KATZENBACH. No, if I understand correctly just in that area what sampling means, how you can pose a list from there, in effect it could be insulated the way jury lists should be, I would have no objection.

Senator KENNEDY. And you are satisfied that as far as the economics of both systems, that under the Judical Council's recommendation, they have both the manpower and the technique, and that it would not be an undue——

Attorney General KATZENBACH. Yes, I am satisfied that they could do that. I think you will tend, in the rural South, to have some under proportion, under representation of Negroes even under this bill, because you are going to have a higher percentage of illiterates among the Negroes than you are among the whites, and we have to preserve at least a minimal literacy requirement here, so I would expect to see some disproportion continue for that reason. But I would expect the figures that I submitted to change considerably, if the voting lists were used as the basis.

Senator KENNEDY. Thank you, Mr. Chairman.

Senator ERVIN. I think that counsel has one or two questions about technical aspects of titles 1 and 2.

Attorney General KATZENBACH. All right.

Mr. AUTRY. Mr. Attorney General, I believe the chairman and Senator Javits both today alluded to the requirement of religion, which appears on page 6, title 1, on the form for prospective jurors. It was their understanding that it was not necessary for them to fill out the blank as to religion.

Attorney General KATZENBACH. Yes, I think the only things they are required to say anything about are those things that go to their qualifications as jurors.

Mr. AUTRY. I suppose you know the Anti-Defamation League and the American Civil Liberties Union and others object to this use.

Attorney General KATZENBACH. Yes.

Mr. AUTRY. Do you have any objection to the subcommittee striking that?

Attorney General KATZENBACH. I do not think religion has been a problem, and for that reason I have no particular objection to doing it. I would like it to be clear that that is my reason.

Mr. AUTRY. Right. I believe that was also their position, that they had no evidence of any discrimination.

Attorney General KATZENBACH. If there had been discrimination, then at least in my judgment it would be important to try to determine that.

Mr AUTRY. And of course that is why you require race. Now I think perhaps this morning you said you did not require a prospective juror to fill out what his race might be.

Attorney General KATZENBACH. No. If he objects to filling it out in the form, he does not have to fill it out.

Mr. AUTRY. The language of section 1865, the new section 1865, is "shall appear before the clerk and fill out a juror qualification form to be prescribed by the Administrative Office of the U.S. Courts in consultation with the Attorney General. The form shall elicit his name"—and so on—"including race."

Does the card not give the impression that they are required to fill in what their race might be?

Attorney General KATZENBACH. Well, we have not got a card yet. But insofar as—I think your point is perfectly valid.

I think what I am saying here, when I do not see they should be required to fill that out if they object, it is not made clear in this statute and perhaps it ought to be made clear either there or in the report, that if any person objects to filling out those things specified here that do not go to his qualifications for jury service, he does not have to fill them out. It could be clarified, I agree.

Mr. AUTRY. Excuse me. The chairman has spoken of the right of privacy. I think that you might agree that another reason for not requiring race would be the difficulty sometimes of determining it.

I notice the Columbia Encyclopedia defines "race" as "an obsolete division of humanity based on hair color, color, skin color, and other conspicuous features."

Attorney General KATZENBACH. If we could enact that into law, it would be a great thing.

Mr. AUTRY. I agree. This provision would apply to Hawaii where you have a variety of races just as it would apply to Florida and Louisiana and other States?

Attorney General KATZENBACH. Yes.

Mr. AUTRY. Then we have a mixture of, I suppose, what is called Polynesian and oriental and the Caucasian races, and it might be very difficult, do you not agree, unless it is made clear, for them to fill in this blank?

Attorney General KATZENBACH. Yes.

Mr. AUTRY. One more question in that connection, Mr. Attorney General. There is a case, *Gideon* versus *United States*, and this is not the famous Gideon case; it is an 8th circuit case that came out of Missouri in 1931. The court held that it was reversible error to permit the court to send a summons to petit jurors with questionnaires respecting religion, occupation, age, family, and previous service as a juror.

This was a circuit case, not a Supreme Court case. I have a copy of that here—do you see any conflict with that holding, or do you disagree with that holding?

Attorney General KATZENBACH. I am frankly not familiar enough with the case to say.

Mr. AUTRY. I understand that.

Attorney General KATZENBACH. I would say this. The Supreme Court has made it clear, at least as far as the decrees are concerned, that records of race may be kept in various instances. As I just look at the case as you have handed it to me, it seems to me at least some of the questions that they ask on this are: married or single, how many children, boys and girls, and are you in favor of prohibition, I think that would go along with your court on that. I think that is the wrong thing to ask somebody.

Mr. AUTRY. The thrust of the opinion I think is on page 429, and I think I have the same copy you do, the right-hand column, in which the Court states:

> The question of the questionnaire upon jurors must have been painful. They must have been led to believe that the Government had some purpose in asking questions about their beliefs and was keeping a record of their answers for future use. They doubtless were led to believe also that in the minds of Government officials at least their usefulness as jurors was in some way affected by their beliefs about which inquiry was made. It is not impossible that they were led to think that the Government intended to influence them in their beliefs.

It goes on to say:

> Had such a questionnaire been sent out by attorneys for some of the defendants awaiting trial, we cannot doubt that the proceeding would have been open to severe criticism.

You do not believe that in the context title I, the Court's criticism of that questionnaire is a serious problem.

Attorney General KATZENBACH. No; I would think—I would not think so.

Mr. AUTRY. Another question. I know you have noticed in recent weeks——

Attorney General KATZENBACH. With the exception of religion. This does not go to any beliefs, opinions, anything of that kind.

Mr. AUTRY. And you did state that you would have no objection to striking religion.

Attorney General KATZENBACH. That is right.

Mr. AUTRY. Right. I have absolutely no knowledge as to the existance of discrimination against Mexican-Americans in some parts of our country but in recent weeks there have been increasing allegations of such discrimination. There is nothing in the questionnaire which would elicit information as to whether these people might be of that, I do not know what you would call it, national origin, ancestry, race.

Attorney General KATZENBACH. I suppose that would be national origin.

Mr. AUTRY. But national origin is not included in title I.

Attorney General KATZENBACH. No; it is not an item of information that would be elicited on the form.

Mr. AUTRY. And you do not see any necessity for including it?

Attorney General KATZENBACH. No. I do not believe so. I do not have any objection to national origin, to the extent that that is felt to be relevant. If there has been discrimination in that regard, then I do not have any objection to it.

Senator ERVIN. I have always wondered what national origin is.

Mr. AUTRY. Just as race and sometimes religion are sometimes undeterminable. I am not sure everyone knows exactly what their national origin is and there might be arguments in the same family as to what that would be.

Attorney General KATZENBACH. That is true. It proves too much in a way.

Mr. AUTRY. Exactly.

Attorney General KATZENBACH. When you say race, it can be difficult to determine. The fact of the matter is that race is usually determined or determinable at least in the ways that affect bias, and I think you say national origin it is difficult to determine. That may be true, but I think it has been true in the past in parts of this country and perhaps in the present, but Mexican-Americans have apparently been identifiable enough to be discriminated against.

Mr. AUTRY. The point I am coming to, Mr. Attorney General, is that if you do not think on this same basis that we could also eliminate race from the form. It would seem that the procedures that you have built into title I do not allow any room for discrimination. I think that you have gone to great lengths to insure that, and I just wonder if there is any need for asking race on a questionnaire.

Attorney General KATZENBACH. I think we have gone to lengths to avoid this. The reason for this being in was really just as a cross-check for the provisions which allow you to supplement the list from voter registration lists.

That is if you find that out of this you are not getting very much of a proportion, then perhaps it could be done in that way. That is the purpose of it, and I would think that without the extent that that purpose is not necessary, that sufficient information can be gotten from voter registration lists alone, these things on the form could be eliminated. But since many voter lists do not reflect race, we need to elicit that on our form.

The difficulty of eliminating race is you never know what you have done afterward, and there may be some satisfaction at least for a period of time in knowing what kind of a cross section you are getting.

Mr. AUTRY. But it would be impossible to compile meaningful statistics, if people are not required to fill in race as you have said they should not be.

Attorney General KATZENBACH. I thought the race problem was relatively simple. At the time I was thinking of it, I must confess I was not thinking of Hawaii but perhaps there could be some difficulties on this.

But my response this morning was I think that if they do not want to fill in their race, if they do it in the presence of the jury commissioners, the chances are it is not going to make many mistakes on this in the jury situation. It may make a few.

Mr. AUTRY. In a reply to the chairman a few minutes ago, you made it clear, and in your statement I think also, that title II would not nullify laws which exempt women from service or offer other exemptions from service on juries.

Attorney General KATZENBACH. The type that prevent women from serving, it would nullify those.

Mr. AUTRY. Right, but an exemption.

Attorney General KATZENBACH. There is the type that say women are exempted unless they volunteer, I believe it would eliminate those. Beyond that, if they want to exempt women on their request, it would not effect that.

Mr. AUTRY. The only reason I mention that is that Judge Vanderbilt—I am sorry I do not have any later statistics, but I could not find any—said that 26 States automatically excluded those classes of persons who had exemptions, such as women, doctors, lawyers, public servants, because there was no sense in having them come down to the courthouse, if they had an exemption.

They presumed that persons in the exempted classes would probably go ahead and use their exemption. I just wonder if this remains true, if it would not frustrate the policy of titles I and II, and whether you have any information on that.

Attorney General KATZENBACH. I do not really have any information on that. I would think that that would come pretty close to violating section 201. If you say since women are permitted the privilege of being exempted, we are never going to let a women be on a jury panel, I would think that was probably denying them the right to serve.

Mr. AUTRY. In practice it would be denying the right to serve.

Attorney General KATZENBACH. And I would think that that practice would be outlawed here. I mean after all, let me put it in another context and say suppose they said "We are going to exempt Negroes from service. Therefore we will not ask any Negroes." It might make a clearer case.

Mr. AUTRY. As the chairman said this morning, Mr. Attorney General, the subcommittee contacted the Judicial Conference and the American Law Institute and the American Bar Association, and the American Trial Lawyers Association, and requested all of them to give us any opinions they had, any criticisms they had of title I and II.

Each of the organizations, with the exception of the American Trial Lawyers Association, which is going to testify in favor of title I, said that it would take at least a year, more probably, for them to go through the normal processes to come up with an official opinion.

Several lawyers at the same time were very concerned that we did not have these, expert opinions, although as you pointed out this morning we are not required to receive expert testimony.

Congress passes legislation without it. But as you also know, it is the normal practice of the Subcommittee on Improvements in Judicial Machinery to request the concurrence of at least the Judicial Conference in its legislation.

The same lawyers suggested that if you waited this long—and on such proposal was made in the 1964 act or the 1965 act—that you could wait another year, until these organizations did have a chance to go over this legislation in fine detail.

It is alleged, that there is less jury discrimination now than at any previous time in the South.

I note that in the Washington Post on March 9, 1966, the headline: "White Jury Convicts Four Others in Beating." This was a Ku Klux Klan case, and you are probably aware of it.

Or course in the *Liuzzo* case there was a conviction from a jury which was composed of 11 whites and 1 Negro.

I have a letter from the publisher or the managing editor of the Anniston, Ala., Star who states that the Library of Congress is mistaken:

> Hubert Damon Strange was convicted in November 1965 for the night riding slaying of Willie Brewster, a Negro foundry worker. The incident occurred on the night of July 15, 1965 following the second of a series of so-called white man's rallies at the county court house.
>
> The state had no physical evidence or no eye witnesses to present at the trial, which jurors explained was the reason they voted to convict Strange of a reduced charge of second degree murder. He was sentenced to ten years in the state penitentiary.

I also note in the Washington Star another case where an all white Mississippi jury convicted a white man for raping a Negro girl.

In view of that, and in view of what you said this morning concerning the Mississippi Supreme Court is there an improved climate in the last year?

Attorney General KATZENBACH. Yes, I think there is an improved climate. I think we have a long way to go to get where I would like to see us be.

Mr. AUTRY. Is there any reason the administration did not propose laws such as this last year or the year before?

Attorney General KATZENBACH. Yes, there were reasons for it. One major reason for it is that we had great difficulties devising title I and devising that kind of a system with respect to Federal courts until the Voting Rights Act of 1965 was passed, because we had no list that we had great confidence that we could go to. We did propose legislation which would have taken us a little of the way, not very far.

Mr. AUTRY. Are you speaking of H.R. 5640?

Attorney General KATZENBACH. Yes. There were those reasons. Furthermore it seems to me that both the Civil Rights Act of 1964 and the Civil Rights Act of 1965, neither was presented by the administration on the theory that this was all of the civil rights legislation that was necessary and important to be enacted. I understand, the thrust of your question, it is why did we not propose these bills in 1963.

Mr. AUTRY. If the problem was worse last year than it is this year, why was legislation not proposed last year, and why can we not wait one more year so that we can get the opinion of the Judicial Conference.

Attorney General KATZENBACH. Well, I think that it is important to deal with this at this time. If you want the opinions of those groups, they want to have the opportunity to see how this is in operation, if they want to make amendments they could make those amendments. But I would be very strongly opposed to waiting for what I think is important and necessary legislation, and I hope, I believe that it can and should be enacted this year.

Mr. AUTRY. Since you mentioned the bill which you did propose last year and which has passed the House and was reported out of the Judicial Improvements Subcommittee, I'll ask you if, by supporting this measure, you withdraw your support of H.R. 5640 which to

some extent at least would conflict with the bill that is before us today?

Attorney General KATZENBACH. This is the bill that we want. This bill would supersede anything that is necessary in that bill. It incorporates the parts of that bill that we thought were important.

That bill was introduced in 1961 actually, if I recollect correctly, and in that instance the Congress waited some time to enact it. It was introduced because a number of judges felt that they had no control over what the jury commissioner was doing, even if a jury commissioner was doing something that they disapproved of.

I disagreed then and I disagree now with the view that the district court judge cannot tell his jury commissioner how to select a jury and the process to put in, and if he does not like that, cannot get rid of the jury commissioner and get another one.

About half of the judges or somewhat more of the judges think they have that power. Some think they do not. But really the major purpose of that bill was simply to tell the judges they had a power that I quite frankly thought they already had, and it was not aimed at any really of the problems which this bill is aimed at.

It was just aimed at such things as PTA lists, where we were in great fear that any prosecution we succeeded on could be undone because the way the commissioner was selecting the jury list, even in instances where the chief judge agreed with us, that this was terrible.

Mr. AUTRY. Mr. Friesen testified just last year on this bill, and one of the reasons for proposing it was the flexibility that it would permit in jury selection to account for the needs of particular districts. Of course S. 3296 would invoke a standardized procedure, would it not?

Attorney General KATZENBACH. Yes, and I think the two statements are totally consistent. I think without the Voting Rights Act of 1965, without being able to use the voter list there, in order to accomplish the same objectives, it was essential that there be flexible approaches if any steps were to be made in this direction.

I think with that kind of a list available, that the need for flexibility and the arguments for flexibility fall by the wayside.

Mr. AUTRY. Mr. Attorney General, the remaining questions I am asking at the request of either the American Trial Lawyers Association or the attorney general of Wyoming, both of whom have written to us. If you would please, sir, comment on this program from the attorney general's statement:

> We have been proud in this State of blue ribbon juries used in U.S. District Court for the District of Wyoming. There has been no discrimination on account of race, color, religion, or sex, national origin, or economic status. The currently existing system has been above and beyond criticism.
>
> I therefore oppose all provisions of S. 3296 having to do with change in the present system of selection of U.S. district court juries. I am entirely satisfied that it would significantly lower the quality of juries which we have enjoyed in this great State on Federal matters.

Any comment on that? Of course, you disagree. I think you have made that clear.

Attorney General KATZENBACH. I would like to ask how on earth you have a blue ribbon jury that never discriminates in the way in which he says it never discriminates. I just do not think it is possible.

Mr. AUTRY. I think perhaps he is referring to blue ribbon juries that may be chosen for complex antitrust matters and tax cases.

Attorney General KATZENBACH. He is saying that if you have a blue ribbon jury there, it makes no discrimination on, among other things, economic status?

Mr. AUTRY. Yes. But on the matter of intelligence, I believe that is in the sense in which he was referring to blue ribbon juries. Blue ribbon juries nevertheless would be abolished by it.

Attorney General KATZENBACH. He may have a different meaning of blue ribbon juries than I have customarily thought of them being. But I thought that blue-ribbon juries in general had been taken from the upper strata of your society.

Mr. AUTRY. His objection to title II, Mr. Attorney General, is based on Wyoming statutes which require among other things that a person to be a juror be assessed on the last assessment role of the county. He claims this would be stricken by title II. Do you have any opinion on that?

Attorney General KATZENBACH. Let me look at the Wyoming law.

Mr. AUTRY. I suppose this would be something like the chairman mentioned in North Carolina.

Senator ERVIN. Mr. Attorney General——

Attorney General KATZENBACH. I think it probably will be. I think the answer is that that probably would be void under the economic status.

Senator ERVIN. Mr. Attorney General, I am confronted with the problem of a roll call vote at the present moment, and I am going to leave. Mr. Autry has some other questions, which he may ask after I leave.

Because some of the Senators are not yet prepared to ask you questions about title IV, we cannot possibly finish today.

We wish to have you back at as early a date as possible, particularly with reference to title IV, and at that same time I can ask a few questions I have about title III.

I want to take this occasion to express my appreciation personally, and as chairman of the subcommittee, my appreciation for the very fine way in which you have cooperated with the subcommittee in giving us the benefit of your views of the constitutionality and the desirability of the bill. I appreciate those efforts on your part, notwithstanding the fact that I do not fully concur in what you have to say.

Attorney General KATZENBACH. Thank you, Mr. Chairman. I appreciate your courtesy.

Senator ERVIN. We shall try to arrange a convenient date for you to appear again as soon as reasonably possible.

Mr. AUTRY. Mr. Attorney General, I do apologize for holding you, but in order that the hearings would not be delayed, we did not offer an opportunity to all lawyers who wished to testify on his own individual behalf and who had an interest in titles I and II but we did offer them a chance to send in statements and questions which they thought should be put to you.

Attorney General KATZENBACH. Sure.

Mr. AUTRY. I will try to be very brief. Several have suggested that an age limit be placed on Federal jurors of 70. Do you have any comment on that?

Attorney General KATZENBACH. An upper age limit?

Mr. AUTRY. An upper age limit.

Attorney General KATZENBACH. I do not have any strong feelings about it. My own experience has been that people in upper ages vary considerably in their abilities, and I would have thought that it would be sufficient to provide, as we do in here that a person is not incapable by reason of mental or physical infirmity. I think you can get a lot of jurors of a fairly advanced age that are perfectly and physically and mentally capable of serving, and I do not really think they should be denied the opportunity to do so.

Mr. AUTRY. It was suggested that for the convenience of the prospective jurors, that the form be sent out by certified mail and returned by mail rather than requiring prospective jurors to come into the clerk's office to fill out the forms. I surmise that the reason that you did not authorize this is that the literacy requirement is fulfilled by the filling out of the form in the clerk's presence; is that correct?

Attorney General KATZENBACH. That is correct. I can see the burden of a two-trip system. We do use it in many places even today. I think it would be possible to devise at least in areas where the distances were long or there was expense involved in this, I think there would be ways in which that objection could be met.

I do not think the certified mail would do it for the reason you suggest. I think perhaps filling it out and having it notarized, if you filled it out in front of a notary public and sent it in might be one possible suggestion. It is worth trying to think of ways not to make a burden of this and still meet the standards of the statute.

Mr. AUTRY. Under title II, again for the record, is it permissible for States to authorize a blue ribbon jury, either grand or petit, for any kind of special purpose?

Attorney General KATZENBACH. No, sir.

Mr. AUTRY. Or special trial?

Attorney General KATZENBACH. No, sir.

Mr. AUTRY. And I take it from your answer that you do not think that policy is ever served by requiring or authorizing a blue ribbon jury, even in a State case?

Attorney General KATZENBACH. Speaking as a prosecutor I can see a lot of advantages to a blue-ribbon jury. Speaking as a citizen, trying to be a little more objective about it as a prosecutor might, I do not see much excuse for blue-ribbon juries.

Mr. AUTRY. The requirement that prospective jurors fill out forms indicating race, to get back to that just a minute, is in conflict with New York State law. Do you happen to know whether that is true or not? I was informed that it was true.

Attorney General KATZENBACH. Filling out a form for Federal jury service?

Mr. AUTRY. No. Under certain circumstances would jurors not be required to state their race, in the discovery procedures under title II?

Attorney General KATZENBACH. Only if they kept those records.

Mr. AUTRY. Only if they kept them.

Attorney General KATZENBACH. If they did not keep those records, they would not. If they were found to be discriminating, the court could, by issuance of a decree, require them to keep those records, and it would be I think just a simple supremacy proposition in that instance.

Mr. AUTRY. Mr. Attorney General, this is a quote from the office of the American Trial Lawyers Association:

The real source of discrimination in jury service—

And I think he is speaking of economic discrimination especially—

stems from the severe economic burden which falls on the working man and family man who puts his employment and income in jeopardy by the requirement that he serve for 30 days.

Even the $20 per diem is not enough in certain cases to alleviate this hardship. The suggestion is that we reduce service to 1 week or the completion of one case. Do you have any comment on that?

Attorney General KATZENBACH. One week minimum or the completion of one case?

Mr. AUTRY. The point is that the juror——

Attorney General KATZENBACH. I see the point of it, but what I cannot honestly answer is what that would do in certain districts, whether this would involve such a rapid turnover of jurors in some of the major districts that I do not know what the effect of that would be. We thought 30 days was a pretty reasonable minimum figure. I think my inclination would be that 1 week was too little. I think there could be compromises in between those two.

I might just make a comment on the blue-ribbon point. You could have, by educational requirements, some blue-ribbon effect that could be left to the State. You could require certain educational requirements, as long as they did not bite too deeply into economic status and raise the suggestion that you were discriminating on that score. So in that sense we eliminate it from the Federal system, I do not make too flat an answer in terms of elimination in the State system because objectively applied, educational criteria could be used.

Mr. AUTRY. A college education, for instance.

Attorney General KATZENBACH. Could be used in the selection of a jury, as long as in that respect it was not a device used to exclude people because of economic status or race, or something of that kind.

Mr. AUTRY. A college education, for instance, would be an objective device for a State.

Attorney General KATZENBACH. I would think that would be going too far.

Mr. AUTRY. Too far.

Attorney General KATZENBACH. It would be eliminating a tremendous amount of your population when you do that.

Mr. AUTRY. The official who intends to testify for the American Trial Lawyers Association in favor of title I, and I think title II also, informs us that he may testify to the effect that he is a member of the bar of both Connecticut and Florida, and that although there is no purposeful discrimination on the basis of race in either State, that there is effective discrimination on the basis of race, but that is probably worse in Connecticut than it is in Florida.

You do not have any surveys or information on the States other than those which you have already provided the subcommittee, do you?

Attorney General KATZENBACH. No. I think Florida was one of the States in there.

Mr. AUTRY. Florida was; yes.

Attorney General KATZENBACH. The Negro population in Connecticut is quite small.

Mr. AUTRY. In the cities?

Attorney General KATZENBACH. Yes; it really is quite small, the percentage is really quite small, smaller than I had thought it was when I looked at the actual figures.

Mr. AUTRY. Mr. Attorney General, I think that concludes it, and I am awfully sorry I had to detain you, and I do appreciate your staying and being so courteous.

Attorney General KATZENBACH. Thank you.

(Whereupon, at 4:10 p.m., the subcommittee recessed to reconvene at 2 p.m., Thursday, June 9, 1966.)

CIVIL RIGHTS

THURSDAY, JUNE 9, 1966

UNITED STATES SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 2 p.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin, Jr., presiding.

Present: Senators Ervin, Smathers, and Javits.

Also present: George Autry, chief counsel; H. Houston Groome, Lawrence M. Baskir, and Lewis W. Evans, counsel; and John Baker, minority counsel.

Senator ERVIN. The subcommittee will come to order.

I believe counsel has a statement to make with reference to the inability of Senator Hart, who was scheduled to be the first witness, to appear at this time. I will ask counsel to make that statement, and then we will hear from Senator Douglas.

Mr. AUTRY. Yes, Mr. Chairman.

The first witness originally scheduled for today was Senator Hart, who is the principal sponsor of the administration bill. However, because of his duties today on the floor as manager of another important bill, he has been rescheduled as the first witness for tomorrow morning. Therefore the first witness today will be the Honorable Paul Douglas, Senator from the State of Illinois.

Senator ERVIN. Senator, we will hear your statement at this time. I express the hope on the part of both of us that we won't have any more voting interruptions until you have an opportunity to finish your statement, because I understand you have to go to Illinois as soon as you reasonably can.

Senator DOUGLAS. I will try to give adequate time to the grueling cross-examination which I know I will experience.

Senator ERVIN. Well, sir, I will promise you here and now that I will refrain from cross-examination.

STATEMENT OF HON. PAUL H. DOUGLAS, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DOUGLAS. Thank you very much.

Mr. Chairman, I am here today to testify on behalf of S. 2923 which I and 20 of our colleagues introduced as early as February 10.

In the areas where S. 2923 overlaps in subject matter with the administration bill (S. 3296), of which I am also a co-sponsor, I believe on the whole that the provisions of S. 2923 are superior. There are some provisions in our bill which are not in the administration bill and our group urgently believes that these should be included in a

meaningful civil rights bill this year. It is possible that the administration bill has copied some of the features of our earlier bill; if so, we are pleased.

In addition, in the administration bill, one provision—title IV; namely, that on housing—is not a part of our bill, and I am also here to testify on behalf of that provision of the administration bill. What I am saying, Mr. Chairman, is that we hope we can essentially pass the main provisions of S. 2923, plus the main features of the housing provisions of the administration bill.

The major provisions of our bill include (1) first of all, (title I sec. 101) the improvement of jury selection in Federal courts so as to avoid discrimination on grounds of race, color, sex, religious or political affiliation, or economic or social status—in other words, so that juries may represent a true cross section of the population.

Secondly, (title I, secs. 105, 106, 107 and 108) where people have been systematically excluded from grand or petit juries on grounds of race or color in a State or local court and where a showing and proof of such systematic exclusion can be made, then the provisions of the Federal jury selection can apply to the State and local courts, by action of the Federal district courts.

Third, the bill provides (title II, secs. 201 and 206) for the Federal courts to have jurisdiction over certain crimes and trials arising out of civil rights cases where this is necessary to make certain that the Constitution of the United States is carried out. I do not find any equivalent protection in the administration bill and I regard this as vital, although title V of the administration bill, which was added at a later moment than the advance release, does attempt to deal with this matter. We also, under our bill, amend the United States Code to broaden Federal offenses in the area of civil rights (sec. 207).

The bill also provides for civil preventive relief, in the form of injunction, to those who exercise their rights under the 14th amendment (title III, secs. 301–303). The purpose of this provision is to provide for protection in advance of police or private violations against those who are attempting to assert their lawful and constitutional rights. In other words, we would not wait until the crime is committed, but would try to prevent the crime in advance by obtaining a restraining order before a Federal court.

In addition, the bill provides for the removal of defendants from State to Federal courts where it can be shown that there is a segregated and discriminatory system of justice. Later, Mr. Chairman, I will speak about the objective criteria which we attempt to lay down to determine whether or not there is a segregated and discriminatory system of justice.

Our bill also provides for civil indemnification awards where those who are exercising their lawful and constitutional rights can be compensated for injury to them or their property.

Finally, our bill extends the FEPC provisions of the 1964 Civil Rights Act to State and local government units and, especially, to those State and local government units administering justice. These are just a bare summary of the major provisions of our bill.

Now, let me return to the need for and a more detailed description of our bill.

I believe that all of us had hoped, when the Civil Rights Act of 1964 and the Voting Rights Act of 1965 were passed, that those

acts would be the last for a rather long period of time and that it would not be necessary for Congress to pass any more legislation in the field of civil rights in the immediate future.

But what has unfortunately happened is that, despite the judicial findings of the Federal courts, and despite the affirmations by Congress in the form of legislation, it has become extremely difficult for individuals to advocate their constitutional rights in certain sections of the South. In fact, over a large portion of the country, men and women do not feel free in asserting their legal and constitutional rights.

It is not my purpose today to call the roll of the brutalities and murders which have been committed, nor cite the instances in which juries have refused to convict when the evidence would seem to the outsider to be clear, nor to go into too much detail and discussion of the composition of those juries and of the influences which were being brought to bear upon them.

I have assembled a large number of such cases and, if challenged, they can be submitted. But in the over 17 years in which I have debated this issue in the Senate, ever since I joined our body in 1949, and in the years that I have discussed this issue in virtually every section of the country, I have been careful not to use any language which might inflame the passions or set one race against another or one section of the country against another.

I know that this is a real world, and that passions exist and that injustices occur, and, as a human being, I, like the vast majority of my fellow Americans, feel keenly about these issues. However, I believe we have been successful in conducting the discussion in the Senate on the basis of logic, with a minimum appeal to the emotion-arousing instances which could be enumerated at great length.

Nevertheless, we as Senators cannot pretend to be ignorant of what as men we know is real. We read the newspapers. We have friends over the country. We talk to aggrieved parties. We have friends in the South. And so we know what has been going on. What has been happening is that there is a matter of great risk, in certain sections of the South—I do not say in all—for people to assert their constitutional rights, and it is excessively difficult, even when the case is overwhelming, to get action in State courts, and sometimes in Federal courts.

Those are the clear facts of the situation. They can be documented in great detail. I am not indicting any section of the country. The great crime of slavery—and for that crime we have been paying for a century after the abolition of slavery—has poisoned the relationships of people, not merely in the South, but over wide areas of the rest of the country as well. I have often said that in the North and West as well as in the South that if the situations were reversed the people in the North would not behave any better than the people in the South and would, in all probability, have acted in a similar way.

The bill, which 21 of us introduced, is a relatively simple bill. It is designed to assure due process of law and the equal protection of the laws where crimes of intimidation, violence, and murder against Negroes and civil rights workers lawfully seeking to enforce the Constitution now go unpunished. I emphasize the words "lawfully seeking to enforce the Constitution."

The bill would carry out many of the proposals of the Civil Rights Commission.

In going over the report of the Commission on Civil Rights, I would say that virtually every enforcement provision of the present bill merely carries out a recommendation previously made by the U.S. Commission on Civil Rights.

In the first place, the bill is designed to improve the selection of juries in both State and Federal courts. Jury lists are sometimes manipulated in a strange and wonderful way to obtain virtually all white juries or such overwhelmingly white juries as to make any other representation merely token and of no account. Our bill provides for a representative cross section of the population on jury lists, and to avoid discrimination on grounds of race or color in the selection of juries.

We, in effect, provide for a broad list, and then selection within this list by lot, with the proviso that the representation of any race should not be less than two-thirds the proportion which that racial group has in the population.

In other words, if 20 percent of the population of the State is Negro, that on the list not less than 13 percent should be from the Negro race. Very frankly, Mr. Chairman, I think this should also include the Latin Americans of the Southwest, who in many respects are treated as badly as Negroes. We are interested in the protection of all minority groups, and in a jury system which will not be weighted against them or weighted against any group.

That is buttressed by provisions which would set up jury commissions in each Federal district court, which would put into effect a sampling plan subject to the approval of the Director of the Administrative Office of U.S. Courts which would furnish a representative cross section of the population of the Federal district without exclusion on the basis of race, color, sex, religious or political affiliation, or economic or social status.

In addition, literacy tests are banned for Federal juries, but the judge may exclude illiterate jurors from particular cases where reading is a significant factor, except that no person shall be excluded on this ground who has completed the sixth grade in an English language school.

With regard to the State courts, when a Federal district court finds that there has been discrimination on the ground of race, or color, the Director of the Administrative Office of the U.S. Courts would take over and would administer the selection of juries under the Federal system created by this act, and he might use the Federal jury list if that were practical. In other words, discrimination on grounds of race or color is the trigger for Federal action, but where this discrimination is found, the jury rules for fair juries apply.

These can be ordered into effect only by a Federal judge and upon appeal of the Attorney General. Of course, the assistance of the Bureau of Census can be called upon in the preparation of representative cross sections of the population.

The second feature is an extremely important one because it makes it possible for the Federal courts to have jurisdiction of certain crimes when Federal prosecution is necessary to assure equal protection of the laws. That may seem to some to be a very radical proposal, but I would like to read from the report of the Civil Rights Commis-

sion for 1963, page 125, recommendation No. 4. The Commission recommended:

> That Congress amend Section 1443 of Title 28 of the United States Code to permit removal by the defendant of a state civil action or criminal prosecution to a district court of the United States in cases where the defendant cannot, in the state court, secure his civil rights because of the written or decisional laws of the state or because of the acts of individuals administering or affecting its judicial process.

So, we are merely carrying into effect the very important recommendation on this point by the Civil Rights Commission. That was a unanimous recommendation.

If we may put this in simple terms, perhaps I should list the objective criteria for determining whether or not there is discrimination in State courts. Such discrimination would be judged to exist:

Where members of the racial or color group are:

1. Systematically excluded from jury service.
2. Systematically denied the franchise in elections for judges, prosecuting officials, states attorneys.
3. Systematically segregated or discriminated against in jails, police stations, courts or other public buildings relating to the administration of justice.
4. Systematically subjected to harsher punishments upon conviction.
5. Systematically subjected to more onerous terms or conditions of bail or conditional release.

We have tried to spell out five objective criteria which the several district courts may follow in determining whether or not a civil rights case should be transferred within a given jurisdiction from a State to a Federal court.

There must be proof of such a segregated system of justice, and in the second place, a certificate by the Attorney General of the United States for prosecution in the Federal court would fulfill the responsibility of the U.S. Government to assure equal protection of the laws.

Under similar circumstances, the Attorney General may remove to Federal court a case which has already been commenced in a State court. Under our bill these provisions last for only 10 years and expire on the first of January 1975, or perhaps more technically speaking, 10 years after the date of enactment of this measure.

We hope that this will stimulate the States to purify their own jury systems and to improve their own systems of justice so that the transfer of jurisdiction need not occur in many cases, but will be held in reserve and be employed only if the States and the civil subdivisions thereof continue to be derelict.

(At this point of the proceedings, Senator Smathers entered the committee room.)

This title would also amend section 241 of the United States Code to broaden Federal offenses in the area of civil rights. It is believed that this broadening of Federal offenses may be the least important part of the title. But we submit, Mr. Chairman, the killer of a civil rights worker ought to be tried for the crime of murder in a Federal court rather than for depriving someone of his constitutional rights, which is the main avenue of approach now. Basically, that is what this title does.

In addition, we have part III which really restores the original title III of the 1957 civil rights bill. This provides preventive relief in the form of injunctions to those who exercise rights under the 14th amendment to the Constitution. As I have said, this is in a sense

the old title III or part III of the 1957 bill, which was debated before the Senate for many weeks, and upon which there was a rather close vote. It permits an individual or the Attorney General to obtain injunctions against violations of constitutional rights. This is now true in many circumstances, such as segregation in the schools, segregation in public facilities, the denial of voting rights, and the rest; but the proposed authority would also provide protection against police violence and private violence, and do it in advance, rather than to have, as so often occurs at present, futile subsequent trials almost universally resulting in acquittal.

The fourth title provides for the removal of defendants in certain cases from State to Federal district courts. What I discussed before was where a person guilty of attacks, offenses, could have their cases transferred and the other is where defendants can have their cases transferred. This is where a county or other political subdivision provides a segregated and discriminatory system of justice, and the criteria are the same as those which I have already mentioned.

Where a county or other political subdivision provides a segregated and discriminatory system of justice, those who attack Negroes and civil rights workers have almost universally done so with impunity, while Negroes and civil rights workers who themselves are charged with crimes have not received fair trials.

Just as title II of this bill provides for the prosecution in the Federal courts of those who attack Negroes and civil rights workers in areas of segregated justice, to title IV permits the removal to Federal courts of Negroes and civil rights workers who are subjected to prosecution in such areas.

A somewhat novel feature is introduced by title V, which I think is crucial. It provides for civil indemnification awards by a Federal board in certain cases where a person is injured in his person or property or is deprived of his life while he is lawfully exercising rights protected by the Constitution. This would be done by creating an indemnification board within the Civil Rights Commission to indemnify persons killed or injured or who have lost their property because of lawful civil rights activities. I emphasize lawful civil rights activities. Just as the Federal Government assists those who have served their country, and just as States provide compensation for injured workmen, so those hurt in the struggle for civil rights should also be compensated.

Under this title, the Federal Government would make payments to the injured person and would then have the right to collect such payments from the person or persons who caused the injury and from the State or political subdivision where the injury was caused by a person acting under color of law.

The idea that persons injured by unlawful acts should be allowed to bear the full burden of their losses, physical and financial, is being gradually replaced by the idea that the community owes some responsibility to those people. This proposal is an attempt to apply that principle to the field of civil rights.

Title VI provides that the FEPC provisions of the 1964 Civil Rights Act shall now be made applicable to State and local governmental units. It is only by integrating State and local personnel engaged in the administration of justice that equal protection of the laws can be a reality.

As I have stated, the Civil Rights Commission supports most of these provisions.

A recent study by the Southern Regional Council cites 93 deaths, arising out of civil rights activities, between 1955 and 1965.

The American Friends Service Committee, the National Council of Churches, and the Southern Regional Council have documented more than 500 cases of violence in civil rights matters from January 1961 to May 1965.

The Civil Rights Commission reports 150 serious racial incidents in Mississippi.

The NAACP has forwarded hundreds of complaints to the Department of Justice.

I do not call the roll of these complaints, though I have some of the most prominent cases here, for the reasons I have mentioned; but the solid evidence indicates that there is a need for action. It may be that not every feature of the bill is perfect, but I hope that it will be seriously considered, not only by the committee, but also by the general public, and that we shall recognize the deep practical problem which underlies this whole matter.

We sometimes say that justice delayed is justice denied; but justice which operates under the threat of fear, intimidation, physical violence, and other improper pressures is a justice which largely tends to be inoperative, justice which sometimes proceeds on the assumption that not the murderer but the murdered is guilty. We can enact all the laws we want; the courts can hand down all the decisions they wish; but if there is no will to obey these decisions and if those who resort to the crudest of methods and then deny them and are often almost certain to be freed in any court before which they may be brought, we have an inoperative system.

I do not believe anyone is more desirous of preserving the functions of localities than I am. I started my political life in a humble way as an alderman of a city. I have always felt the importance of local self-government.

It is my sincere hope that this threat of the removal of cases to the Federal court may serve as such a stimulus to State action that it will be seldom invoked.

I live in the hope that a new spirit is rising in the country underneath the ashes, and that more and more the American people in their hearts want to make these principles of equal rights a reality and are not condemning people because of their race or color.

This requires to a certain degree a good deal of change in our thoughts.

My mind goes back to 1956 when we were able to get only six votes in the Senate for a civil rights measure. However, something was started with that discussion which helped to bear some fruit in 1957, 1960, 1963, 1964, and 1965. I hope that the measure we have introduced may have a somewhat similar effect.

And now may I take up title IV of the administration's bill which deals with housing? Many southern advocates of segregated schools have reproached us northerners who have supported the Supreme Court decisions on desegregation, and who have tried to give them practical vitality, with being insincere and, in fact, hypocrites. They told us and they still tell us, "You are opposed to legal segregation of the schools in the South but you defend de facto segregation in the

North." First, let me say that de facto segregation is not as bad as legal segregation since in school districts, in mixed neighborhoods, the schools are desegregated while in legally segregated school districts a change in neighborhood conditions cannot produce an increase in desegregation, without taking legal action.

Nevertheless, de facto segregation is not desirable and we should proceed in the North to practical desegregation. Our support of title IV, of the administration's bill, should be proof that we are not hyprocrites and that we are willing to apply to ourselves what we prescribe for the South.

For the large degree of de facto segregation in the big cities of the North is due to the practice of tightly compacted Negro and Latin American neighborhoods. Elementary schools must, in the main, follow neighborhood patterns because of the necessity that a child should not have to walk too far to his school. On the whole, a 15-minute walk is about as far as a child should be asked to travel on his way from home to school. Perhaps 10 minutes would be a more convenient radius. The distance for high school students can be greater, but even here there are limits. If virtually all the homes in the neighborhood are lived in by people of one race, then in practice the schools will be attended by the children of that race. That is why all Negro neighborhoods give rise to all Negro schools and all Latin American neighborhoods create all Latin American schools. That is the fundamental reason behind de facto segregation in the big cities in the North.

Now, to a certain degree, many, though not all of the people of the same race like to live together since they share a large number of common interests and possess much the same background. What Franklin H. Giddings of Columbia used to call "The consciousness of kind" acts as a cohesive force to hold such communities together and to produce as a voluntary derivative a large degree of racial similarity in the people who live in the same neighborhood and whose children attend the same schools. No law should interfere with this voluntary type of residence provided it is truly voluntary and not forced or compulsory.

But there will be some who, for one reason or another, will want to live in a neighborhood lived in largely by those of another race or other races. If landlords, however, will not rent or sell houses to them solely because of their color, the minority groups will be held against their will in segregated neighborhoods and they will be forced together by iron bands. And their children will be forced to attend schools which—naturally enough—will also be largely segregated. If the minority groups are also economically poor, as they so often are, the children will suffer from the disadvantages of poverty and it will be hard for the schools to compensate for this lack.

As long as potential buyers and tenants of homes are not considered on their merits in the sale and renting of homes but are discriminated against solely or primarily because of their race, then we will have de facto segregation in the schools and we will justifiably lay ourselves open to the charge of implicit hypocrisy.

But let it be understood that the adoption of fair renting or home selling practices does not mean that tenants or purchasers must be accepted merely because they are members of a minority race. If they are of a bad moral character, their applications for renting or

purchasing a house or apartment may be rejected just as firms may refuse to hire incompetent or immoral workmen. Or, if people are known to take poor care of their homes or apartments, properties need not be sold or rented to them. All that is required is that they should not be discriminated against because of their race. And that if other grounds are alleged, these must be real and justifiable grounds and not mere verbal devices to cover up basic racial prejudices.

By adopting this title in a proper form, Congress can do a great deal to promote desegregation in northern schools as we have been attempting to do in southern schools. Speaking for myself, I can say that those of us who feel as I do and who live in the North are willing to take the same medicine we prescribe for others. I hope that this will silence the cries of "hypocrisy" which have been raised against us for so many years.

It so happens that I live in the Hyde Park-Kenwood neighborhood in Chicago and have for nearly a half century. This was once an upper middle class completely white community. It is now probably the most racially integrated neighborhood in Illinois and possibly in the Nation. Our experience has, on the whole, been good. We have had our troubles, of course, but mostly caused by people from outside the neighborhood. But the community is composed in the main of men and women who have wanted to make desegregation work, and who have tried to work out living together peacefully and cooperatively. We have largely succeeded although, of course, we have not established a Utopia. I am proud to have played some part in this desegration, because I felt one should practice in one's own life what one tries to prescribe by legislation. There are, however, unfortunately, residential communities in Illinois and, indeed, in the Chicago area which are to all intents and purposes segregated and where the schools are, in consequence, also segregated. I do not think that many people in these communities will welcome my testimony. I ask these good people to study the experience of Hyde Park-Kenwood which should eliminate many of their fears. We in Hyde Park-Kenwood would not like to go back to the old order.

I think you will find that ultimately the fears now expressed about title IV of the administration's bill will prove to be as unsubstantial as those which were once expressed about the future of Hyde Park-Kenwood.

Thank you.

Senator ERVIN. Senator, does Illinois have any so-called open occupancy laws?

Senator DOUGLAS. No, it does not. The Democratic House of the Illinois Legislature passed such a law, but the Republican Senate refused to approve it. We do have in Chicago an open-occupancy ordinance directed primarily at real estate agents.

Senator ERVIN. Now in addition to that, as far as Chicago is concerned, President Kennedy's Executive order on housing went into effect in 1962, which was 4 years ago. Has there been any marked increase in integration of housing in Chicago since either the adoption of the ordinance or since the promulgation of President Kennedy's open occupancy?

Senator DOUGLAS. There has been some increase in the so-called Pilsen area, but not a marked increase.

I think this is due either to sabotage within the Federal Housing Administration, or to the fact that the Federal Housing Administra-

tion will only guarantee or insure loans in neighborhoods which they believe have an economic future, and when you have a large admixture of Negroes into a neighborhood, then FHA will tend to say, well, the community doesn't have an economic future, it will be dangerous to insure the loans, so that the loans will not be insured.

In practice, therefore, the act I will not say is being evaded. I will say it is being avoided.

Senator ERVIN. Isn't it true that neither the Executive order of President Kennedy nor the ordinance of the city of Chicago have produced any marked increase in——

Senator DOUGLAS. They have produced some improvement.

Senator ERVIN. Very slight, though; isn't it?

Senator DOUGLAS. I would not say that it was marked. It has produced some improvement.

Senator ERVIN. Senator, on page 11 of your statement you come pretty close to expressing some convictions which I hold. I have observed in the North, the South, East, and West, throughout the United States that where people are left at liberty to select their own associates and associates for their immature children, they almost invariably select people of their own race. Is that not true?

Senator DOUGLAS. Yes, I think that is true, and we don't propose to change that. We do want to say that it should be a voluntary choice on their part, and not a forced choice, that if people want to move elsewhere and are of good character, then they should not be prohibited by real estate owners or landlords from doing so.

Senator ERVIN. Well, is it not true that in Illinois as elsewhere in the United States, that the great majority of people prefer to live in residential neighborhoods inhabited by people of their race, rather than people of other races?

SENATOR DOUGLAS. Well, I would say this is in large part true. If you take a population which descends from foreign stock, this is markedly true in the first and second generations. By the time of the third generation, there is a tendency to move away, and by the fourth generation they are largely homogenized into the general population.

But the Negro, because of the fact of color, cannot move into these other classes of population in the same way that an Italian or a Greek or a German or an Englishman or a Scotsman can do.

Senator ERVIN. Is there any inherent evil in members of the Caucasian race, for example, preferring to live in a community inhabited by other people of the Caucasian race?

Senator DOUGLAS. There is nothing to interfere with their own choices. I would say, however, that if a Caucasian wanted to live in a Negro section of the town, that he should not be prohibited by Negro landlords from so doing, and conversely I would say that if a Negro, who wants to keep his property in good shape, wishes to move into a white section, that a landlord should not refuse to sell or rent to him either solely or primarily because of color.

Senator ERVIN. Senator, you are not moved, however, to support the housing provisions of the administration bill by the fact that there is any great demand of members of the Caucasian race to be allowed to live in areas inhabited by nonwhites; are you?

Senator DOUGLAS. Well, I have known that to occur. I don't think they should be discriminated against by the Negro race, if they wish to move in

Senator ERVIN. Yes, but there is no necessity of which you are aware for the Federal Government to take away from nonwhites the right to sell or rent property they own, in order that the Caucasians might buy or occupy that property.

Senator DOUGLAS. I do not favor black nationalism. I am opposed to black nationalism, to Muhammed X, and to some of the recent statements by some leaders of branches of the so-called civil rights movement. I think we should be treated as individuals and as citizens with equal rights; that Negroes should not discriminate against whites, and whites should not discriminate against Negroes.

Senator EVIN. But you don't believe in allowing the individual to make that choice. You would prefer for the Federal Government to force that choice on him.

Senator DOUGLAS. In social matters, there is no obligation to invite people into your home. There is no obligation to admit people to your club. But where the schools depend upon the racial admixture of the neighborhood, what I am saying is that where you have segregated schools in the North, they come not from laws but from segregated neighborhoods, and I have heard you, my dear friend, criticize the North for having the de facto segregation, and I must say I have writhed——

Senator ERVIN. No, sir, I have not criticized——

Senator DOUGLAS (continuing). Under the verbal lashings which you have administered. You stirred the consciences of all of us, and this is an attempt on our part to redeem ourselves in your sight, and I hope you will not deny us the opportunity to improve and to reform.

Senator ERVIN. Senator, everything I have said on this subject is recorded in the Congressional Record, and I have never criticized the North for having de facto segregation.

Senator DOUGLAS. Well, some of your esteemed colleagues have.

Senator ERVIN. Yes, sir. But, not me. I think de facto segregation is the product of a law of nature, and that law of nature is like seeks like.

Senator DOUGLAS. But suppose you want to escape from having too much like? Suppose you want a little variety in your life or you want better schools for your children.

Senator ERVIN. Senator, I would say to the people in those communities, if they want to alter their communities, they should have the privilege of doing so. But I do say that it is not the function of the Federal Government to deny people basic rights of property, and to force a choice on them which they are not willing to make themselves.

In other words, the trouble with this proposal is that it robs members of the Caucasian race of the right to select associates for themselves and their children for the alleged benefit of a minority.

Senator DOUGLAS. You know, Mr. Chairman, people who deny these rights are very frequently not people who live in a community at all. They are property owners who live outside the community, and they are making decisions for others, both those who live in a community and those who would like to come into the community.

I would like to see an admission on the basis of quality. Are you of good moral character? Do you keep your house clean? Do you keep the sidewalk clean? Do you plant a few flowers now and then?

Let those be the tests. Do you behave yourselves? That should be the test, not what is the pigmentation of your skin.

You know if you start that, what happens to people from the Eastern Mediterranean stock? We have got a section in here in Washington which I think as I remember it prohibits sale to Iranians. I think the Iranians are good people.

Senator ERVIN. Senator, I think you must fundamentally agree that the reason you have de facto segregation in the North is that people live in communities composed of members of their race or their ethnic origin because they prefer to do so.

Senator DOUGLAS. Mr. Chairman, we have gone over this many times. Let me say that to the degree that this is a voluntary choice on the part of people, of course we should not object to that. But where a person wants to live in some other area, either for advantages to himself or so that his children may go to better schools, and we know there are differences in the quality of schools, then he should not be forbidden because his color is black or brown or yellow.

Senator ERVIN. The practical effect of this whole title is that if a man of the Caucasian race in a Caucasian residential section had a piece of property to sell, and he thought that it would be more appropriate to sell it to a member of the Caucasian race he could not do so.

The result would be that you would have to sell to people of the minority race. It is discrimination against the majority in favor of the minority. I don't believe in discriminating even against the majority myself.

Senator DOUGLAS. Well, I don't believe in discrimination against anyone, and a great Justice of the Supreme Court once said the Constitution is colorblind. It was John Marshall Harlan, the grandfather of the present Justice.

Senator ERVIN. That is the trouble with this proposed legislation. It is not colorblind. It picks out people on account of their color and gives them special privileges and special legal rights by the denial to other people of their privileges and their rights. This bill fragmentizes the American people by race, by religion, by economic status, and it does it for the benefit of just one group of them.

Senator DOUGLAS. Mr. Chairman, I don't believe it discriminates in favor of the minority. It merely provides that they are not to be discriminated against because of their race or color.

Senator ERVIN. Senator, do you believe the Attorney General of the United States, in the political climate which now prevails in the United States, is going to bring any suit to compel people to sell property to whites under this bill, if it is enacted?

Senator DOUGLAS. Well, I would say that is legally possible.

Senator ERVIN. But practically and politically impossible; isn't it?

Senator DOUGLAS. I don't know that it is politically impossible, but if the black nationalist movement gathers headway, that might arise.

Senator ERVIN. If the Attorney General acts, he is going to act for the nonwhite, and it means that this is a bill to give special privileges to the nonwhites in buying and renting property at the expense of a majority of the American people's basic rights of freedom and property.

Senator DOUGLAS. It is not, unfortunately, the people down at the bottom of the heap who customarily discriminate against those at the top of the heap. I introduce that as sort of a humorous effort to show

the quality of the bill. It is generally the top dogs who discriminate against the underdogs. May I quote one of my favorite authors?

Senator ERVIN. Yes.

Senator DOUGLAS. Anatole France wrote a novel called the Red Lilly. He spoke of the majestic quality of the laws, which forbids the rich as well as the poor from sleeping under bridges and begging in the streets for bread. And that is true. If a rich man were to sleep under the bridges of Paris he would be arrested as a vagrant. If he took his hat in his hand and stood outside the Opera in Paris and begged he would be arrested as a beggar. But because of his money he does not have to do that, and therefore it falls upon the poor and unfortunate. Similarly in these discriminations it is the people without resources and property and social standing and ownership of homes, and so forth, that get it in the neck. When I introduced this reference I know that you would not, shall I say, take it as immediately applicable to indicate that we also believe in the majestic quality of the laws and that the poor should not discriminate against the rich. The Negroes should not discriminate against the whites, but I agree that at the moment this no not what happens.

Senator ERVIN. Well, as a matter of fact, this law as a practical matter has no equality about it. It says to the caucasians "You cannot live in residential areas inhabited by your people because if a nonwhite wants to buy there, the Federal Government is going to compel you to sell to him."

In other words, you are going to deny them their rights for the benefit of the minority and there is no equality in that.

Senator DOUGLAS. You know if they stayed and did not take flight, they would find conditions were not so bad. In the first place, this would apply only primarily to those who can meet the economic test, those who would have money enough to pay a relatively high rental or pay a relatively high price, so that this would apply in the main to the fringes of the Negro population.

Senator ERVIN. Yes, sir.

Senator DOUGLAS. We have never claimed anything more than that, Mr. Chairman. But that is a very considerable factor.

Senator ERVIN. And that is one of the things that shows this law is not concerned with those who sleep under bridges or beg for their bread, but it is to give special privileges to those who are wealthy to intrude themselves into neighborhoods where the majority of the people would prefer for them not to come. That is not equality either. You are still leaving the others to sleep under the bridge.

Senator DOUGLAS. You are not going to cure all the economic inequalities of life very speedily, Mr. Chairman. I used to think that we could, but after some years of experience I have decided it is going to take some years.

Senator ERVIN. I am about to violate my assurance to you to let you finish, but I am intrigued by your statement on page 9 of your statement. You say:

> The American Friends Service Committee, the National Council of Churches and the Southern Regional Council have documented more than 500 cases of violence from January 1961 to May 1965.

Senator DOUGLAS. Referring to civil rights matters, sir, yes.

Senator ERVIN. Do you know how many murders have taken place in Chicago during that 4-year period of time?

Senator DOUGLAS. We have had quite a number. I am not defending that primarily.

Senator ERVIN. I just want to say, Senator, in these 4 years there have been probably 6,000 crimes of violence in Chicago.

Senator DOUGLAS. Oh, no. There is an article——

Senator ERVIN. You think the estimate is too high?

Senator DOUGLAS. There is an article in the Wall Street Journal which is a very conservative paper which I just put into the record a few minutes ago indicating the tremendous improvement which has occurred in Chicago under Mayor Daley and under the superintendent of police. Now, it is perfectly true that we have had and still have more crime than we would like. Part of it comes out of the very slum conditions which we are trying to remedy, because the program of reducing crime is not merely one of repression or of sentencing. It is also trying to eliminate the moral and economic cesspools from which criminals are made. I will say this, Mr. Chairman. If you will submit a list of murders in Chicago, I will submit a list of crimes, civil right crimes in the South. I have refrained from doing that. But if we get into a challenge of comparative instances, I will match it.

Senator ERVIN. Senator, I am not trying to cast any aspersions on Chicago.

Senator DOUGLAS. Well, I thought that to be the import of what you said.

Senator ERVIN. I will frankly concede that in that Garden of Eden known as North Carolina that there were far more than 500 cases of crimes of violence between January 8, 1961, and May 1965. Now there is a provision in this bill that would apply the Federal FEPC to State officials, particularly those concerned with the administration of justice. How would you go about telling the people of the State whom they had to have for public officials, especially those charged with the administration of justice?

Senator DOUGLAS. Not every official is elected. They have bailiffs, judges have bailiffs, clerks of courts.

Senator ERVIN. Yes, sir; but all the bailiff does is to cry and pray for the court, and all the clerks do is record his records.

Senator DOUGLAS. They can do a great deal in setting the——

Senator ERVIN. The people who administer justice are the judges.

Senator DOUGLAS. I notice very gentlemanly young men arranged behind you and I am sure they add greatly to the dignity and genteel bearing of this committee room. The same is true with the bailiffs and clerks.

Senator ERVIN. Well, these young men who sit behind me are more handsome than most bailiffs and clerks that I have seen, but the administration of justice is fundamentally——

Senator DOUGLAS. And what about police officers?

Senator ERVIN (continuing). Through the judges.

Senator DOUGLAS. What about police officers? They are appointed, not elected. Very frequently they are biased.

Senator ERVIN. Police officers do not administer justice. They try to enforce and keep peace and arrest people for violating the law. I would just like to know as a practical matter how you can make it work.

Senator DOUGLAS. They are informal agents of justice. I want to come back, however, to a point you made. I think you have given

very eloquent testimony really in favor of my measure. You spoke of murders in Chicago. We have laws against murders in Chicago. They don't work perfectly but they work much better than if we did not have laws. You have racial violence in the South but you don't have effective laws against this, so if we have laws against murders we should also have laws against violence in civil rights matters. I want to thank you for the very eloquent argument you have made in defense of my measure.

Senator ERVIN. We have laws against racial violence already so far as that is concerned but I would say there are no laws in any area of the country which operate perfectly. There are many crimes that go unpunished, many of them in all areas. But I am intrigued by this suggestion about a Federal FEPC to control the officials who administer justice in the States. How can that be done without destroying the States as effective entities of government, if the Federal Government is going to tell them who their officials are going to be.

Senator DOUGLAS. What we are trying to do is to prevent the nonelected officials from being too heavily weighted against civil rights workers and participants. If you have satisfactory language to clear up any of the structural defects, I would welcome it. I don't pretend that I am a perfect draftsman.

Senator ERVIN. I believe, as Chief Justice Chase said in *Texas* v. *White*, that the Constitution in all its provisions looks toward an indestructible union composed of indestructible States and when the Federal Government sets up an FEPC commission to tell the States who their officials who administer justice are to be, you are destroying the States, and I am not willing to draft language that would accomplish that.

Senator DOUGLAS. I was primarily speaking of police officials, Bull Connor, Jim Clark.

Senator ERVIN. I believe Bull Connor was voted out by the people of Birmingham.

Senator DOUGLAS. Yes, that was fine, that is fine, but there are others who are not. Yes, I welcome the defeat of Bull Connor. Also, I hope for the defeat of Jim Clark. I am afraid what I say will support both of them politically.

Senator ERVIN. I notice that S. 2923 proposes to establish civil indemnification awards?

Senator DOUGLAS. Yes. This is a pioneer proposal.

Senator ERVIN. But the bill does not propose to allow those rewards to be made in courts of justice, but it proposes to set up some kind of a board comparable to the Commission on Civil Rights.

Senator DOUGLAS. If you would accept this provision I would accept an amendment to provide that the amount should be determined in the courts. May we get your acceptance of that proposal?

Senator ERVIN. No, sir; I do not accept that because I don't believe in inflicting the sins of the guilty upon the innocent, and that is exactly what this civil indemnification would do. I believe in punishing the guilty and not the innocent.

Senator DOUGLAS. Oh, well, this would not punish the innocent.

Senator ERVIN. Oh, yes.

Senator DOUGLAS. This would help to indemnify——

Senator ERVIN. The innocent taxpayers would pay the damage.

Senator DOUGLAS. Oh, I see.

Senator ERVIN. They could all be at home praying on their knees that there never be another act of violence done in the history of the world, and some twisted brain could commit a crime, and then they would have to pay for the crime.

Senator DOUGLAS. Well, you know, Mr. Chairman——

Senator ERVIN. Even if they are doing as they did down in Mississippi where they had deputy sheriffs around trying to protect a man.

Senator DOUGLAS. Particularly after the atrocities committed by Hitler, who burned to death, or gassed to death 6 or 7 million people, predominantly Jews, but also slaves. I have talked to a great many Germans on my trips to Germany, and they all denied knowing anything about it, but I think they are guilty of the crime of indifference, and I have come to believe that indifference and not being concerned about the evils that go on about them is a crime and that we do bear some responsibility, even if we are not active participants in injustice, the fact that we allow injustice to continue without protesting against it makes us liable in a sense.

And I think it is this feeling which accounts for a great many people who have not themselves been offended by anti-Negro, anti-racial acts, feeling that they owed it to society to protest. Now a great many people say they are just troublemakers, but I think in the majority of instances, they have stirring in them the feeling that they cannot be indifferent to what is going on, that we are our brother's keeper, as Jesus said, and I think we bear some responsibility for what happens to innocent people, an innocent advocate of civil rights who is beaten up or killed and leaving his family destitute. I do not think that even enough justice is done by punishing his murderer, although even that is very difficult now.

But this underlies all problems, Mr. Chairman. It is not peculiar to civil rights. This is a pioneer proposal. If it is too far in advance of the times, it can be stricken. But it is something I think that society must face.

Senator ERVIN. Well, it certainly visits the sins of the guilty upon the innocent. There is no way to erase that proposition.

Now in those cases tried in Federal courts under the provisions of S. 2923, who do you contemplate is going to prosecute?

Senator DOUGLAS. In the Federal court I would think the U.S. attorney.

Senator ERVIN. The U.S. attorney?

Senator DOUGLAS. I would think so.

Oh, wait a minute, you might prosecute against the person who committed the attack upon a civil rights worker. You mean where the civil rights worker himself was being accused. I think in those cases, though I am not an expert in legal procedure, that probably the local State's attorney or county attorney should have the right to prosecute.

Senator ERVIN. It seems to me sometimes that the cure is worse than the disease. You can cure a man's headache by shooting him through the head with a high-powered revolver. That will cure the headache, but destroy the man.

How can a State exist if it is deprived of the capacity to prosecute its own citizens for crimes against it in its own courts?

Senator DOUGLAS. It should not be if those courts are fair. I have tried to avoid inflammatory language, Mr. Chairman

Let me say that I have friends who have examined cases very thoroughly involving capital offenses. I think this is true, that I have never found a case where a white man has been executed for murdering a Negro in the South. Where a Negro murders a white man, the judgment is almost invariably guilt. When a Negro murders a Negro, this is generally regarded as something outside the law which the legal authorities can more or less disregard. But if you can produce any case where a white man murdering a Negro has been condemned and executed, I will be very grateful. I have not found any.

Senator ERVIN. Senator, I would have have to take issue on one part of your statement as far as North Carolina is concerned. I have spent about 30-odd years in the administration of justice in North Carolina as a practicing lawyer or as a judge, and I would say very few Negroes are sentenced to death or die for killing white men.

Senator DOUGLAS. Have you ever known a white man convicted or executed for killing a Negro?

Senator ERVIN. As a matter of fact——

Senator SMATHERS. I have known several in our State.

Senator DOUGLAS. I said convicted and executed.

Senator SMATHERS. But who have been sentenced to life imprisonment and have served life imprisonment.

Senator DOUGLAS. Nearly always the sentences imposed upon whites for offenses against Negroes are much less severe than the sentences imposed upon Negroes for offenses committed against whites. We know that. We can support that.

Senator SMATHERS. I do not believe that is supportable by the facts in the last 10 years. That was the case 25 years ago.

Senator DOUGLAS. Let me say this: Due to the agitation of those of us in Congress and elsewhere who favor civil rights, there has been a big improvement in the South in the last 10 years, and in the North too.

Let me also say to my good friend from North Carolina that we have always regarded North Carolina as the best State in the South.

Senator ERVIN. Well, thank you.

Senator DOUGLAS. We regard North Carolina as the Wisconsin or Illinois of the South. We commend you. May you improve this virtue.

Senator SMATHERS. I am not going to object to that because I come from North Carolina originally.

Senator ERVIN. I thank you for paying that tribute to North Carolina, but I am not going to concede that you and others who advocate civil rights are responsible for all the improvements going on in North Carolina.

Senator DOUGLAS. No, not for all. You know the proddings of the North have helped the conscience of the South.

Senator ERVIN. Well, is it not like looking after another man's conscience?

Senator DOUGLAS. Oh, yes, that is true. It is much easier to take care of others. This is really an attempt, you know, on our part to reform our practices, and I really thought you would join in this. This is much more applicable to the North than to the South.

I have been accused of serving political ends in advocating civil rights in the South. Believe me, this is not a political advantage to me in the North, Mr. Chairman, in the slightest bit. But we would like to reform too. Do not deny us the beneficent things which we have done for the South.

Senator ERVIN. Well, Senator, I sort of envy people who worry about the South from a long distance, because I wish I worried about the sins of Chicago rather than those around me.

Senator DOUGLAS. That is exactly what I thought you were doing, worrying more about Chicago than the South. I am worrying about them both.

Senator ERVIN. Now I noticed in the State of Mississippi a short time ago an all-white jury convicted a white Mississippian for the rape of a 15-year-old Negro girl and sentenced him to the penitentiary for life.

Senator DOUGLAS. What if a Negro had done that to a white girl? What would have happened? Would he have been sentenced to life or would he have been executed?

Senator ERVIN. I would have to wait and see.

Senator DOUGLAS. What would have happened, there would have been a sentence of death.

Senator SMATHERS. I am beginning to worry about what happens under that kind of a situation in the District of Columbia, when a colored boy rapes a white girl. It seems to me that we do not see the equal application in vigor in bringing about justice in such a situation. It has gotten to the point that if you happen to be a minority group that perpetrates this kind of an act in certain areas of the country, you do not have the same vigor of prosecution as though you were a white Protestant or something like that.

Senator DOUGLAS. May I say I happen to be a white Protestant myself. Let me say that I am not asking that special privileges be given to the Negro race or to the Latin Americans in our country, but that equal justice be granted to them. That is all.

If a Negro commits an offense, he should be punished, although we should realize the circumstances behind it. Very frequently people you know go in the wrong direction because of lack of advantages and because of circumstances under which they were brought up. It is not wholly their fault. I think all this means that we should introduce a certain amount of compassion in our judgments.

Senator ERVIN. The Chair is glad to have Senator Smathers with us today. This is the first day he has sat as a member of this subcommittee since he was assigned to membership on it.

Do you have any questions of the Senator at this time?

Senator SMATHERS. Thank you, Mr. Chairman.

I merely want to ask one question.

On page 12, Senator Douglas, you state:

Let it be understood the adoption of fair renting or home selling does not mean the tenants or purchasers must be accepted merely because they are members of the minority race.

Senator DOUGLAS. That is correct.

Senator SMATHERS (continuing):

If they are of bad moral character their applications for renting or purchasing a house or apartment may be rejected, just as firms may refuse to hire incompetent

or immoral workmen, or if people are known to take poor care of their homes or apartments, properties need not be sold to them.

Now, if I understand that statement correctly, and I do not know that I do, does that mean that you are saying that the seller will have the right—and not be prosecuted—if he determines in his own mind that the person who has sought to buy his property is a person who probably would not keep that home as well as would another person. Would you say that is a basis upon which he cannot sell it to one and sell it to another?

Senator DOUGLAS. Well, I would say that such reasons as I say in the subsequent sentence, should be real and justifiable, and not mere verbal devices to cover up basic racial prejudices.

Senator SMATHERS. What I am driving at is how do we really determine and who is it that determines whether or not a person has a basic racial prejudice, or whether in point of fact that person believes that the person who has sought to buy his house is not a particularly good owner?

Senator DOUGLAS. The procedure would be for the aggrieved person to bring a case, and then for judgment to be made before the proper tribunal. But he would have to prove that it was discrimination, not justifiable rejection for immorality, bad behavior, or poor home maintenance.

Senator SMATHERS. In other words, you are saying that the person who claimed discrimination, they would file the suit, and then the burden of proof is on that person?

Senator DOUGLAS. That is correct.

Senator SMATHERS. To establish before the court?

Senator DOUGLAS. That is correct, much the same thing follows in the FEPC provisions.

Senator SMATHERS. Right.

Now in the bill as I understand it, there is provision that the attorney's fees would be taken care of if it is determined that there was discrimination. As a matter of fact, it is a subsidized proceeding, I believe.

Does this not put a homeowner in the position that if he had his house up for sale and if two people, each of them made an offer of $25,000 apiece, would not the homeowner be just generally well advised to always sell that particular piece of property to the member of the minority group, so that he could guarantee himself that he would not be subjected to some sort of a lawsuit?

Senator DOUGLAS. Well, I may say that the costs are limited, the actual costs, up to $500 of punitive costs, so that the sky would not be the limit.

Senator ERVIN. If you will pardon me, Senator, I think you are wrong on that. He could recover actual damages for humiliation, and mental anguish, which could go to the skies, and he can also recover punitive damages, punitive damages are limited to not exceed $500. He is allowed to recover actual damages for humiliation and anguish and there is no limit whatever on those.

(At this point, Senator Javits entered the hearing room.)

Senator DOUGLAS. Mr. Chairman, if you are not satisfied with the language on costs, I will be very glad to accept amendments which will bring this in line.

Senator ERVIN. And on another point relative to what Senator Smathers is asking about, if the person desires to purchase or lease, he can get a court-appointed attorney. If he wins the case, he can get the attorney's fees allowed. If the owner of the property wins the case, he gets nothing except the bare court costs. He cannot get back attorney fees.

That shows how unequal and prejudiced the bill is. That is not your bill but that is the administration bill.

Senator DOUGLAS. If the plaintiff loses the case, he has to bear the entire cost himself, and this is a deterrent against capricious suit.

Senator ERVIN. No, he gets a court-appointed attorney. He does not have to pay him.

Senator DOUGLAS. He pays his own costs. That is a deterrent.

Senator ERVIN. If he is a pauper he does not have to pay that. He does not even have to secure the payment of costs because he can bring suits without securing the costs, which shows how the law is one-sided instead of being equal.

Thank you, Senator.

Senator DOUGLAS. A pauper could not afford to go to law.

Senator SMATHERS. Let me just ask this question.

The Senator is of course familiar with the provision of the Constitution which says that one shall not be deprived of——

Senator DOUGLAS. Life, liberty, and property without due process of law, yes.

I am also familiar with the same clause in the 14th amendment. No State shall deny to any person the equal protection of the laws.

Senator SMATHERS. We are all familiar with that.

Senator DOUGLAS. Not so familiar.

Senator SMATHERS. But what I am trying to get at is in point of fact not the way the language of this bill is drafted such that it would deprive in fact a person of his right of property, in that it does not let him make a disposition of that property in a manner which he might choose to do.

Senator DOUGLAS. I need not remind you, Senator, of the way in which this issue has been fought over for 60 years, for 80 years. Originally the courts gave a very strict interpretation. No, I would say a very forced interpretation of due process.

They threw out the minimum wage laws for women, maximum hours laws for women knowing this interfered with the right of a woman to work for less than the minimum wage if she wanted to or to work excessive hours if she wanted to. Gradually that point of view has been superseded, and it has not stretched as far as it used to be.

We have also seen expansion of the commerce clause. The commerce clause has been extended to agriculture. Even if a person produces agricultural products for his own use, this has been——

Senator SMATHERS. The point I am trying to make, Senator, is this, and I do not want to argue with you. I just want to get your comment about it.

You said in your answer to Senator Ervin that what you were really seeking to do is that people would have the voluntary right to associate with each other, and that ought to be protected certainly, as you say. I do not think anybody could oppose that.

Should not a person also have the voluntary right to dispose of that which they have worked and acquired over the course of years in a manner which they wanted to?

Is that not an equal right?

Senator DOUGLAS. I do not think you should have the right to discriminate. I do not think they have a right to discriminate on such extrinsic grounds as race or color or religion. I really do not think so. People should be considered as individuals on their merits.

Senator SMATHERS. Well, if what we said, if what you said were carried to its logical conclusion, there would really be no reason then for us to have different churches or different neighborhoods or different anything.

Senator DOUGLAS. No.

Senator SMATHERS. Because everybody would be of the same means, the same norm.

Senator DOUGLAS. We could have variety based on voluntary choice, but not forced association or forced disassociation.

Senator SMATHERS. I do not believe that if a person in Chevy Chase wanted to sell their property to somebody who they thought would give them a good price first, and I think that is going to be the governing thing in the disposition of property every time, who pays the most, and usually when a person is getting ready to move they do not much care who gets it as long as they pay the price, but it seems to me to tell them that they cannot make a disposition of it without first exonerating themselves of any sort of discrimination, real or imagined, I think puts the homeowner and the property owner in a disadvantageous position, and I do not know whether the Senator really wants to do that or not. I do not think he does. That was the reason that I raised the question.

Senator ERVIN. Senator Javits, do you have any questions?

Senator JAVITS. Yes. I was going to first of course compliment my old colleague in arms for his personal and durable struggle for civil rights. He has always faced the problem directly.

Senator DOUGLAS. May I say I am greatly pleased that you should be on this bill, 2923.

Senator JAVITS. I am very honored to be. To have had two such stalwarts as yourself and Senator Case join in this legislation is a matter of great satisfaction to me. This kind of coalition is what you and I have spent most of our lives here trying to bring about.

Senator DOUGLAS. That is correct.

Senator JAVITS. I am very gratified. The bipartisan tradition of civil rights has been preserved.

I would like to ask, if I may, Senator Douglas, about a number of unique features of this bill. There are not too many, but they seem to me to stand out.

The first is the fact that you do have a title in the bill for the removal of cases from State to Federal courts.

Senator DOUGLAS. Yes.

Senator JAVITS. Now I might say that I favor that very strongly, and the Association of the Bar of the City of New York has articulated a bill on that subject which is very well researched and very substantially backed. I have introduced that measure as drafted by the Bar Association of the City of New York, which is composed of lawyers of all ideological complex, conservative as well as liberal, as an amendment to the pending bill, and I gather that you, Senator Douglas, place considerable store in this provision; do you not?

Senator DOUGLAS. Very much.

The Association of the Bar of the City of New York is a very distinguished body. I think perhaps it is the most socially conscious element in the bar in the country. I will say that I think we beat them to the punch, Senator, because on February 10 we introduced our bill, and in that we laid down five criteria. I do not know how they compare with the bar.

This is in transferring cases, civil rights crimes, to Federal courts they must involve a victim who is a member of a racial or color group subject to discrimination or a person advocating or supporting equal protection for such racial or color group.

Discrimination exists where members of the racial or color group are first systematically excluded from jury service. We have already had the testimony on that.

Second, systematically denied the franchise in elections involving judges or prosecuting officials.

Third, systematically segregated or discriminated against in jails, police stations, courts, or other public buildings related to the administration of justice.

Fourth, systematically subjected to harsher punishments upon conviction.

Fifth, systematically subjected to more onerous terms and conditions of bail or conditional release.

In other words, this is not something to be picked out of the air. Take these five elements and then see whether or not they apply.

Senator JAVITS. In any case it is very good to have this eminent bar association's proposals on removal, and I just wanted to emphasize the importance that the Senator attaches to it.

I notice also that in your reference to an extension of what we call part 3 of the 1957 bill, you speak of the fact that "injunctions may now be obtained in many circumstances such as segregation in schools."

It is a fact, is it not, that the administration bill seeks to strengthen the power of the Attorney General in that area?

Senator DOUGLAS. Yes; that is true.

Senator JAVITS. And that therefore it is——

Senator DOUGLAS. I think that also may have been taken from our bill.

Senator JAVITS. There is some echo in any case in this bill, in the administration's bill.

Now, the other idea that I would like to call to your attention is to me the most unique idea in this legislation, and that is the indemnification section.

Senator DOUGLAS. I have just undergone very severe cross-examination from our very able chairman on that point. If you continue the argument with him, you may do much better than I.

Senator JAVITS. I do not wish to have an argument. I was just going to mention that philosophically I think it does establish a Federal responsibility and obligation. We have provided for indemnification because we have been at fault for not bringing about compliance with the Constitution and the laws for so many decades, that we impose. To me it is analogous with the fact that you can sue the city if it fails to fix the sidewalk because that is its job. You can be shown to be negligent but, you may sue and recover, so I think that is right.

In addition, when the Federal Government is called on to send marshals or somebody else into a particular area in order to see that civil rights are given and enjoyed, I think that it would give a greater sense of responsibility to know that the alternative to such action is that someone could be liable for damages, and that the States would have to pay.

In the amendment which I have put in, Senator Douglas, to carry out that concept in the current bill, I included a trust fund of $10 million, so that you would not have to depend upon a day-to-day appropriation.

Do you have any feeling about that?

Senator DOUGLAS. I think that is a very valuable suggestion. It is awfully hard to get a special bill through the Congress, particularly of this nature.

Senator JAVITS. To pay a judgment against the United States. And finally, Senator, and please feel free not to answer this next point because I do not want in any way to embarrass or press you. As I say, you are a Senator of the Democratic Party and in the majority, but if you do have a comment I would appreciate it out of my love and respect for you.

I have made the point that since the door has been opened by President Kennedy toward dealing with housing discrimination by Executive order, it is not tactically very wise now to submit this whole issue to the Congress where it turns out to be the stormy petrel of the whole civil rights bill, where from all indications you are not going to do as well as you could do by another Executive order. We are convinced from our study that an Executive order building upon the Kennedy Executive order could deal with 80 percent of discrimination in housing.

Senator DOUGLAS. Wait a minute, that would only cover public housing and FHA housing; would it not?

Senator JAVITS. Well, it could also cover under the same theory housing under guaranteed mortgages and housing loans made by federally insured banks and savings and loan associations.

If the Senator has any comment on that as to the validity of——

Senator DOUGLAS. I have great respect for you, Senator, but it seems to me that the President is honoring the prerogatives of the Congress, and is trying not to invade the legislative powers of Congress by Executive order.

I have heard so many members of your party—not you—so many members of your party inveigh against the invasions by the executive or the legislative branch that I think perhaps they may have made the President sensitive on this score, and if you can persuade your fellow Republicans to lay off on criticisms of Executive action, I will try to persuade the President to apply and operate in this field by Executive order, and when you succeed, I will try to succeed. But I do not believe in unilateral action.

Senator JAVITS. Senator, I do not want to fence with you about this matter. I am deeply convinced that since President Kennedy has acted, and this action stood up, that an extension of that action is very much wiser and more prudent in the interests of the civil rights cause than to throw it in the maelstrom of——

Senator DOUGLAS. You have always been fine on this, but if you will get your colleagues to favor a strong Executive when the Democrats are in power, I will advocate the exercise of that authority.

Senator JAVITS. President Kennedy did act and I think President Johnson could and should act.

Senator DOUGLAS. I can imagine what would have happened from other members of your party had he done so.

Senator JAVITS. I would say with all respect, Senator Douglas that I can imagine what would happen to other members of your party had he done so.

Senator DOUGLAS. I would say that is tit for tat.

Senator ERVIN. If I may interject myself, I am glad that my friend from New York has brought the Senator from Illinois and the Senator from North Carolina and the Senator from Florida to agreement on the proposition that laws ought to be made by the Congress rather than by the President.

Senator DOUGLAS. That is what we are trying to do, embarrassing though it may be.

Senator JAVITS. Senator, just to conclude, obviously the President could not issue an order which enlisted the legislative powers. I believe he has the Executive power.

President Kennedy asserted it, and I believe President Johnson could assert it.

Senator DOUGLAS. The Executive order of President Kennedy still continues, but I think that applied only to public housing and FHA.

Senator JAVITS. It did.

Senator DOUGLAS. Guaranteed housing.

Senator JAVITS. It did. It was limited to that.

Senator DOUGLAS. This is only a minority of public housing. There are about 700,000 public housing units in the country. Only about 2.5 percent of the housing units. FHA insurance is still a minority. The vast majority of housing is privately owned and privately financed.

Let it be said in the books that here you are a very eminent Republican asking the President to use more authority.

Senator JAVITS. That is correct, I am, where he has already used it, and where his authority to expand the existing protection from 23 percent of housing to 80 percent——

Senator DOUGLAS. Senator Javits, you and I agree on so many subjects, let's not fall out.

Senator JAVITS. No. I thank you, Senator Douglas, for your testimony, and I pay tribute again to your tremendous leadership in this field.

I thank the Chair.

Senator DOUGLAS. It has been very minor really.

Senator ERVIN. I want to thank you for appearing before the committee and presenting your views in respect to the proposed legislation in such a genial and such an eloquent fashion. At the same time, let me express my regret that you do not entertain the same sound views on this legislation that I do.

Senator DOUGLAS. Thank you very much, Mr. Chairman.

I always feel a privilege in appearing before you. You have had so much experience as a lawyer and a judge, and I hope you will forgive any inadequacies which I displayed.

Senator ERVIN. Well, you have not displayed anything that requires forgiveness.

Senator DOUGLAS. Thank you very much.

Senator ERVIN. And I hope you have a very nice trip out to your State.

Thank you very much.

Senator DOUGLAS. I hope to mend some fences. Finally, Mr. Chairman, I would like to include in the record as part of my testimony a fine analysis of the provisions of our bill, principal bills introduced in the House, and the bill prepared by the Administration. While I believe the analysis to be most accurate I should point out that it was drawn up on the basis of reports of the content of the administration's bill rather than on the final wording of the text of that bill. But again I say that the analysis is an especially useful one for comparing my bill with that of the administration.

(The matter referred to is as follows:)

Analysis of civil rights protection legislation pending in Congress

This analysis was made before the introduction of the administration's bill. It is based on advance reports of the bill's contents. Revision and expansion of the sections relating to the administration's program may be necessary when it is introduced.

[Whenever the term "race or color" is used in S. 2923 and H.R. 12807 it includes civil rights workers who are promoting racial equality]

	S. 2923, Douglas, Case, and other bypartisan Senators; H.R. 12807, Diggs and other Congressmen	H.R. 13323, Mathias (Maryland) and other Republican House Members	Administration program
JURY TRIALS			
1. FEDERAL JURIES			
Discrimination prohibited	Discrimination on basis of race, color, sex, political or religious affiliation, economic or social status prohibited.	Same as S. 2923	Discrimination on basis of race, color, religion, sex, national origin, or economic status prohibited.
How juries are selected	Names obtained from cross section of population under sampling plan prepared in consultation with Director of Administrative Office of U.S. Courts, with advice from Director of Census Bureau. Juries selected from names so obtained by random selection.	Names obtained from voting lists. Random selection made from those lists under plan directed by chief judge of district court with assistance and approval of Administrative Office of U.S. Courts and advice of Director of Census Bureau. Names shall not be used again until voting lists are exhausted.	Names obtained from voting registration lists; but if judicial council of circuit determines use of voting lists would not be nondiscriminatory, it could prescribe other sources of names. Random selection from voting or other lists.
Literacy provisions	Requirement of ability to read and write English language repealed. Judge may exclude in cases requiring this ability, except no person with a 6th-grade education can be excluded from service.	Existing requirement of ability to read and write English retained unless person has completed 6th grade.	Existing requirement of ability to read and write English retained.
Enforcement	Attorney General, any citizen of judicial district or litigant may apply to court of appeals if selection procedures are not followed or if records are not kept. Court of appeals may appoint jury commissioners responsible to it.	Jury selection review annually by judicial conferences. Chief judge of circuit shall take charge of supervision if provisions are not enforced.	Procedure provided for challenging jury selection in criminal and civil cases.
Recordkeeping	Questionnaires used in jury selection, names on jury lists and in jury wheel, names and race of those serving, date of service, etc., must be kept 4 years. Criminal penalties prescribed for failure to keep records or for destroying or dsmaging them.	Similar to S. 2923	
Other provisions		Repeals existing provisions authorizing court to select jury from bystanders when jury list is exhausted and to call special juries.	

II. STATE JURIES			
Discrimination prohibited	Discrimination on basis of race or color prohibited. But where this is shown, or recordkeeping provisions of bill are not followed, prohibitions applicable to Federal juries go into effect.	Discrimination on basis of race, color, or sex prohibited.	Discrimination on basis of race, color, national origin prohibited.
How enforced	1. Suit in district court brought by Attorney General, citizen of district, or litigant. Upon showing of discrimination or failure to keep records, court can direct Director of Administrative Office of U.S. Courts to administer jury system and apply Federal standards. 2. Initiation of cases in or transfer to Federal courts (see below).	1. Transfer by defendant to Federal court. Also applicable if records are not kept (see below). 2. Injunctive action by Attorney General.	1. Injunctive action by Attorney General. If discrimination is found, corrective action can be taken by court, including appointment of master to perform duties of State jury officials. 2. Disclosure procedure in cases brought by Attorney General or private litigant residing in district, or defendant in criminal case or convicted person attacking conviction.
Methods of demonstrating discrimination	1. Any final judgment of Federal or State court within 5 years determining that there has been systematic race or color exclusion from jury unless local officials prove exclusion no longer exists. 2. Showing that over a period of 2 years ratio of colored within area to total population exceeds by ⅓ or more ratio of colored serving on juries to total number of persons serving on juries (except where colored are less than 10 percent of population).	In cases involving transfer, a showing that State courts do not follow procedures for selecting Federal juries, unless it is established that procedures followed do prevent discrimination on grounds of race, color, or sex.	If court under challenge procedure determines that there exists probable cause that the jury was not selected according to procedures described by State officials, burden of proof of nondiscrimination is shifted to State.
Recordkeeping	Similar to that for Federal juries with same criminal penalties.	Similar to S. 2923	In suit brought by Attorney General, court may require recordkeeping as part of relief granted.
Changes in laws relating to juries	Attorney General may file suit to enjoin any change in law affecting juries after Jan. 1, 1966 if change is for purpose of circumventing provisions of this bill.		

Analysis of civil rights protection legislation pending in Congress—Continued

This analysis was made before the introduction of the administration's bill. It is based on advance reports of the bill's contents. Revision and expansion of the sections relating to the administration's program may be necessary when it is introduced.

[Whenever the term "race or color" is used in S. 2923 and H.R. 12807 it includes civil rights workers who are promoting racial equality]

	S. 2923, Douglas, Case, and other bipartisan Senators; H.R. 12807, Diggs and other Congressmen	H.R. 13323, Mathias (Maryland) and other Republican House Members	Administration program
TRIAL OF STATE CRIMES IN FEDERAL COURTS:			
(In S. 2923 and H.R. 12807 only. No similar provisions in H.R. 13323 or administration program)			
Type of case	Any case triable under State or local criminal law.		
Basis of Federal jurisdiction	Whenever trial in Federal court is necessary to assure equal protection of the laws to victim or group to which he belongs.		
Requirements for trial in Federal court	(1) Determination by Federal district court, if jurisdiction is challenged, that trial is necessary to assure equal protection of the laws. (2) Certification (nonreviewable) by Attorney General, at or prior to final arraignment, that prosecution in Federal court would fulfill responsibility of United States to assure equal protection of the laws.		
Criteria for determining equal-protection issues	Case must involve a victim who is a member of a racial or color group subject to discrimination or a person advocating or supporting equal protection for such racial or color groups. Discrimination exists where members of the racial or color group are (1) systematically excluded from jury service; (2) systematically denied the franchise in elections involving judges or prosecuting officials; (3) systematically segregated or discriminated against in jails, police stations, courts, or other public buildings related to the administration of justice; (4) systematically subjected to harsher punishments upon conviction; (5) systematically subjected to more onerous terms or conditions of bail or conditional release. A final judgment of a court within 5 years that there has been jury exclusion or voting discrimination, unless it is shown that such exclusion or discrimination has ceased, shall be conclusive on these issues. Jury and voting discrimination may be proved by a showing that the ratio of the population of the group in the area to the total population exceeds by ⅓ or more the ratio of the number of persons of the group serving on juries bears to the total number of persons serving on juries (over a 2-year period) or the ratio of the number of persons of the group registered to vote bears to the total number of persons registered to vote.		
Applicable law	In any trial under these laws, the substantive State law relative to the crime shall apply, including that of penalties. Federal rules of procedure shall govern the trial. Postconviction matters such as custody, parole, probation, etc., shall be under Federal law.		
Investigation and prevention of crime	In all cases subject to the jurisdiction of these proceedings, FBI, U.S. marshals and other U.S. officials may act to prevent or investigate crimes even though the Attorney General has not as yet filed his certificate.		
Removal of cases from State courts	In any instance in which the Attorney General could initiate a suit under these provisions, he may remove a prosecution commenced in State court to Federal court by filing a certificate, provided that jeopardy has not attached.		
INVESTIGATION OF JURY EXCLUSION			
(In S. 2923 and H.R. 12807 only. No similar provisions in H.R. 13323 or administration program)			
Responsible agency	U.S. Commission on Civil Rights authorized to conduct investigations of jury discrimination.		
Procedures	After investigation, Commission shall submit its findings to responsible State or local authorities. If controverted Commission shall consider responses and may revise findings. If still controverted it shall conduct a public hearing, then publish findings.		
Effect of findings	Commission's findings shall constitute evidence in any action brought under this bill, except to extent that person controverting them satisfies the court that they are not correct.		

CRIMINAL LAW			
Coverage	1. Existing criminal statutes on civil rights are amended so that all Federal rights are protected from interference by all persons whether acting under color of law or not. Rights now protected only against conspiracy would be protected against individual action. 2. New provisions cover assaults on persons for exercising or advocating rights protected against discrimination. 3. New provisions cover personal assaults that interfere with exercise of equal rights or opportunities when use of interstate commerce or anything that has moved in commerce is involved in assault.	Amends existing law to protect all Federal rights from interference, whether under color of law or not, but limits protection to cases involving race or advocacy of equal rights.	New provisions protecting persons using public facilities or public schools on equal basis from obstruction, interference, or punishment. Civil rights workers and school boards or others with duties to perform in affording equal rights also protected. (Note: It is expected that the administration may suggest revision of existing criminal civil rights laws after analyzing the Supreme Court opinions in the *Penn* and *Schwerner-Chaney-Goodman* cases (Mar. 28, 1966). It is not expected that the administration will suggest trial of State crimes in Federal courts as this issue was not before the Supreme Court.)
Penalties	Penalties are increased and made flexible. Range from 1 to 20 years' imprisonment, depending on gravity of offense.	Penalties are increased and made more flexible. Range from 1 to 30 years' imprisonment, depending on gravity of offense. Mandatory sentence of not less than ½ of maximum penalty for 2d offense.	From 1 year to life imprisonment, depending on gravity of offense.
PREVENTIVE RELIEF			
Protection afforded	1. All Federal rights protected from interference by anyone because of race or color. 2. Right of free speech or other expression used to advocate equality of persons or opportunity also protected in areas where discrimination is shown.	Similar to S. 2923	No new protections. Would authorize Attorney General to bring suit to desegregate public schools or public facilities without present requirement of written complaint.
Person entitled to sue	Attorney General or person whose rights are threatened.	Same as S. 2923	Attorney General.
REMOVAL OF CASES FROM STATE TO FEDERAL COURTS BY DEFENDANTS			
Types of cases removable	1. Criminal cases or criminal or civil contempt actions. 2. Any case involving freedom of expression used to advocate racial equality.	Civil actions or criminal prosecutions	
Basis for removal	1. If case is one in which defendant is a member of group discriminated against or a person advocating equality and if discrimination is shown under same criteria that apply in prosecution of State crime in Federal courts (see above). 2. If case involves free speech or other expression used for advocating racial equality.	1. If recordkeeping requirements regarding juries are not observed. 2. If jury selection procedures are not in conformity with Federal procedures, unless it is established that procedures used do not discriminate on basis of race, color, or sex.	

[1] Title II of S. 2923 and H.R. 12807 covering this subject implements the recommendation of the Civil Rights Commission and has been reviewed by the Commission staff.

Source: Prepared for Leadership Conference on Civil Rights by J. Francis Pohlhaus.

Analysis of civil rights protection legislation pending in Congress—Continued

This analysis was made before the introduction of the administration's bill. It is based on advance reports of the bill's contents. Revision and expansion of the sections relating to the administration's program may be necessary when it is introduced.

[Whenever the term "race or color" is used in S. 2923 and H.R. 12307 it includes civil rights workers who are promoting racial equality]

	S. 2923, Douglas, Case, and other bypartisan Senators; H.R. 12807, Diggs and other Congressmen	H.R. 13323, Mathias (Maryland) and other Republican House Members	Administration program
CRIMINAL LAW—Continued			
CIVIL INDEMNIFICATION			
Who may recover	1. Any person injured in person or property because of race or color, while lawfully exercising a Federal right, or attempting or advocating the exercise of such a right or assisting another to exercise such a right. 2. Any person injured to coerce him or another person from seeking or advocating equality free from discrimination. 3. In event of death, award could be made to estate or dependents.	----------	
Method of recovery	A new agency, the Indemnification Board, is established in the Commission on Civil Rights. The Commission would investigate complaints and refer them to the Board for hearing. After hearing, Board could make a monetary award, payable from Federal appropriations.	----------	
Recovery from persons responsible for wrongdoing	Wherever an award is made, the United States would have the right to recover in a civil suit (to its full constitutional authority) from the persons responsible for the wrongdoing. If the injury occurred from action under color of law, recovery could be against the State or local subdivision.	Same as existing law, except where injury results from action under color of law, recovery may be against State or political subdivision.	

NONDISCRIMINATION IN STATE AND LOCAL GOVERNMENTAL EMPLOYMENT (In S. 2923 and H.R. 12807 only. No similar provisions in H.R. 13323 or administration program)	
Coverage	All State and local governmental employees and applicants for employment would be covered by amendment of title VII of Civil Rights Act of 1964.
Enforcement	Enforcement would be by compliants to the Equal Employment Opportunity Commission or by suits filed by Attorney General or individuals under title VII.
REMOVAL OF STATE OR LOCAL POLICE OFFICIALS (In H.R. 12807 only. Not in S. 2923 or administration program)	
Basis for removal	Grave bodily injury or death inflicted in violation of police official's constitutional duty and because of the race or color of the victim. Would also include willful failure to prevent such violence.
Method of removal	Due process hearing before Civil Service Commission, with appeal to Federal court of appeals. Order of Commission removing, suspending or disqualifying official from service, enforceable in court of appeals.
Who may file complaint	A complaint may be filed by the victim or someone on his behalf. The Attorney General may file a complaint if he certifies that it is of general public importance, and the Civil Service Commission may allow the Attorney General to intervene in proceeding conducted pursuant to a victim's complaint.
HOUSING (In administration program only. Not in S. 2923, H.R. 12807, or H.R. 13323).	
Acts prohibited	All discrimination because of race, color, religion, or national origin in the sale, rental, or financing of housing would be prohibited. Coercion and intimidation intended to interfere with a person's right to obtain housing without discrimination also prohibited.
Coverage	Property owners, real estate brokers, realtors, mortgage institutions, etc.
Enforcement	Enforcement would be by civil injunctive relief in a suit filed by the aggrieved party. Damages up to $500 could be allowed in the court's discretion. The Attorney General could institute case against a pattern or practice of discrimination and could intervene in private suits.
Effect on existing State laws	Would not affect existing State or local housing laws prohibiting discrimination, but would invalidate any law permitting such discrimination.
Other provisions	Would authorize Secretary of Housing and Urban Development to publish studies of housing discrimination, formulate proposed fair housing standards and codes, and to cooperate with governmental and private agencies in eliminating housing discrimination.

Mr. AUTRY. Mr. Chairman, the next witness is Prof. Sylvester Petro, of New York University.

Senator ERVIN. Professor Petro, we welcome you to the committee. I would like to make this statement. Prof. Sylvester Petro is an A.B. and J.D. graduate of the University of Chicago. He received his master of law degree from the University of Michigan. He is a member of the Illinois bar. He is the author of a number of articles in various legal publications and he is the author of two of the very finest books that have been written in our generation, one of them being "The Labor Policy of the Free Society," and the other being a book entitled "Power Unlimited" which dealt with and made an analysis of the findings of the McClellan committee. It is a great privilege, Professor Petro, to welcome you here, and the subcommittee certainly appreciates you taking the time to come down from New York to express your views concerning this bill, or such phases of it as you desire to discuss.

STATEMENT OF PROF. SYLVESTER PETRO, PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW

Mr. PETRO. Thank you very much, Senator Ervin, for having invited me down. I find that the subject to which I am going to address myself is one of the most fascinating that I have encountered in a long time, one of the most incredible as a matter of fact. I find it hard to this day to believe that in this country, which prides itself on freedom, so thoroughgoing an assault upon so intimately a significant freedom as the right of property should be possible.

I understand that there is a tremendous amount of confusion everywhere in the world, not only in this country today, concerning the meaning of key terms, such as freedom, voluntariness, compulsion, and so on. I sincerely hope, Senator, that I am going to make a contribution today toward the clarification of some of this confusion.

Freedom is a condition to which the right of private property is indispensable. If you tell me that I must sell my house to A instead of to B, or instead of taking it off the market, you have deprived me of my right of private property, and of my freedom. If you force me to sell without providing me with traditional safeguards, then you have not only deprived me of liberty and property, but you have done so without due process of law. The fundamental defect of title IV of Senate bill 3296 is that it proposes the most far reaching, the most offensive, and the most arrogant deprivation of property without due process in the history of the United States.

I address myself to title IV exclusively. I wish to emphasize this point, because title IV is it seems to me sharply distinguishable from the other titles of the bill. The other provisions propose to remedy denials of civil and personal rights. As such, they cannot be called defective in principle, though they might prove to be evil in policy and practice, and I believe that that is so, that they would prove evil in practice. Title IV, however, exercises me a great deal more. For it is a clear denial of right, vicious in both principle and practice, because it cannot possibly be administered in accordance with due process of law, and because it adds materially to the forces already at work to introduce the police state into this country. It is just possible that title IV will not work at all. And I shall try to explicate

my reasons for that statement before long. But if it does, if it does work, it will do so at the expense of liberty, property, and due process. I propose now to demonstrate the accuracy of this charge.

My first point is that freedom and the right of private property are one and the same thing.

It is customary among proponents of such legislation as title IV to praise it in the name of freedom. However, the briefest examination of the legislation and the barest acquaintance with the condition known as freedom will expose the error of identifying title IV with freedom.

Title IV would force individual homeowners, real estate brokers, and financing institutions to sell and finance the sale of homes in circumstances in which they would prefer not to do so. Homeowners are told in section 403 that, no matter what their own preferences may be, they are compelled by law to sell, rent, or lease their dwellings without regard to the race, color, religion, or national origin of prospective purchasers or tenants. Brokers and financial institutions are subjected to corresponding and implementing deprivations of their rights. Sections 406 and 407, as we shall see, encourage the most aggressive possible prosecution of the policies of the legislation.

No great acumen and no tortured analysis are necessary in order to perceive how drastically title IV invades and restricts freedom and property, and therefore how incorrect and deceptive it is to identify title IV with freedom. A man is free precisely to the extent that his property rights are intact, because the condition of freedom and the condition of slavery are distinguished on the basis of the right of private property. A freeman owns himself and whatever he comes by lawfully. A slave owns nothing. He does not own himself, and, if he is in full slavery, he can own nothing else; not even his children are his. They belong to his master.

Ownership, however, means more than the possession of formal legal title to things. It means control. Control means authority over use, and over disposition as well. It means the condition in which one has the authority to follow his own preferences. Obviously it does not mean that one may use his property in a way which destroys the property of others. The rights and the freedom of others are entitled to the same status and condition as his. But that qualification poses no serious problem. It is easy to see that property rights and freedom cannot exist where some are permitted to invade the rights of others.

Legislation such as title IV is sometimes advocated on the theory that freedom involves the right to live wherever one chooses. Indeed, I infer that this is Senator Douglas' position. It is the position of people who speak in those terms that one is not free unless he is in a position to buy whatever he wants to buy. But this is an incorrect usage of the term "freedom", and it is very easy to demonstrate the error. For if I have the right to live wherever I choose, then someone else must have the duty to permit me to do so. Suppose I prefer my neighbor's home to my own. Have I the right to force him to sell to me? Obviously I do not—not in a free country, anyway. For if I did, I should possess, not freedom, but power. And if he were obliged to sell, it would be foolish to speak of him as a freeman with his property rights intact.

The same is true of the so-called "right to buy." No one in a free country, when one thinks seriously about these matters, has a right to buy anything. If he is a freeman, what he has is a right to offer to buy. And if the man on the selling side is a freeman, in a free country, he has the right to offer to sell or to refuse to offer to sell. A completed transaction occurs, in a free country, when a willing and able buyer encounters a willing and able seller and they get together on terms which are mutually satisfactory.

Title IV does not promote freedom. It destroys freedom and creates power on one side. To speak of it in the name of freedom is to engage in an ugly perversion of the central principle of the good society.

I read the Attorney General's statement before the House Judiciary Committee, and there were a number of things in the Attorney General's statement that I thought interesting enough to call for comment. It brought out some of the issues that I think are paramount, in a particularly striking way. He said, for example, that "the ending of compulsory residential segregation has become a national necessity." His use of the terminology "compulsory residential segregation," to speak kindly, is strained. Taking the words in their natural meaning, one would have to conclude that the Attorney General is engaged in fantasy or science fiction. I am not aware of the existence of "compulsory residential segregation" anywhere in the United States. Indeed, since the Supreme Court's decision in *Shelley* v. *Kraemer*, even contractual residential segregation is no longer possible, for that case held racially restrictive covenants unenforcible.

The truth is that the only kind of residential segregation which exists in the United States today is purely voluntary. The further truth is that the persons ultimately responsible for such voluntary housing segregation as exists are individual homeowners. The Attorney General seeks to shift the onus. He said to the House Judiciary Committee:

> I believe it is accurate to say that individual homeowners do not control the pattern of housing in communities of any size. The main components of the housing industry are builders, landlords, real estate brokers and those who provide mortgage money. These are the groups which maintain housing patterns based on race.

Everywhere in the United States today homeowners are free to sell their homes to whomever they wish among those who bid. Nowhere are they prevented from selling to Negroes, Jews, Puerto Ricans, or any other so-called minority. It is unlawful everywhere for anyone to interfere with a man's right to dispose of his property as he sees fit. If one real estate broker refuses to deal with members of a given race, the homeowner is free to seek another. If he can find no broker who will deal indiscriminately, the homeowner may take over the selling function himself, as many do. I am confident that there is not a newspaper in the United States which would reject an advertisement offering a house for sale or for rent to all comers.

The Attorney General's strained use of the strange terminology, "compulsory residential segregation," I believe must be accounted for by his natural reluctance to describe the effect of title IV accurately. But no valid purpose is served in beating about the bush. The purpose and effect of title IV are to deny freedom and to restrict the right of private property, not to protect and advance them. The

particular and ultimate victim is the homeowner—not the builder, not the real estate broker, and certainly not the banker. For them, in their commercial roles, housing is purely a commercial matter. They will not be hurt in those roles by a law forbidding the discriminate sale or renting of private homes. But the individual homeowner will be. He will find his freedom and his most cherished values savagely mauled.

I want to refer to another aspect of the Attorney General's strained terminology about compulsory residential segregation: his reference to "national necessity."

When one removes the tortured indirectness from the Attorney General's language, what remains is this assertion:

> The policy of this Administration is to favor a compelled amalgamation of all races, colors, and creeds in residential areas; individual preferences, the right of private property, and personal freedom must all be sacrificed to this overriding policy.

Senator ERVIN. There is a vote call. We will dash over there and get back just as soon as possible. When we scheduled this hearing we had no reason to anticipate that we were going to have a constant succession of record votes.

(Short recess.)

Senator ERVIN. The subcommittee will resume.

Mr. PETRO. Shall I resume, Senator?

Senator ERVIN. Yes, sir.

Mr. PETRO. I was speaking about the Attorney General's use of the term "national necessity."

Senator ERVIN. I would just like to join you in emphasizing your statement on page 7 that taking this bill as it stands, the policy of the administration in advocating this housing provision is to compel amalgamation of all cultures and creeds in all residential areas. Individual preferences, the right of private property, and personal freedom must all be sacrificed to this overriding policy.

Mr. PETRO. I think we have the heart of the bill there.

Senator ERVIN. It seems to me that yours is a most effective statement, in a nutshell, of the policy which underlies this bill.

Mr. PETRO. Thank you, Senator. I would like to continue in plain talk, because verbal byplay must not be allowed to conceal the real meaning of the Attorney General's statement. He refers to "national necessity." What meaning are we to give to "national necessity" when that expression runs counter to individual preference? The purpose of title IV, to repeat, is to produce a racial mixture in residential areas. If that mixture does not now exist it is because individual homeowners have preferred something else. But this is a nation of homeowners. Is not the residential pattern therefore an expression of their desires, and as such an expression also of national policy? By what right does the administration arrogate to itself the authority to frustrate such desires and to identify contrary wishes as "national necessities"?

A man's family and his home are dear to him, the things he cherishes most in the world. He will work for them as he will work for nothing else. In fact I have a considerable number of callouses right now on my hands, Senator, from clearing several acres of woods, a living testimonial to the drive built into a man to take care of his home. A man will work for his family and his home as he will work for nothing

else. And out of such striving great things have emerged. America as we know it today, with all its power and wealth, is a byproduct of the efforts that men have expended in building their families and homes. All the massive edifices in Washington, D.C., all the vast means at the disposal of the Government of the United States, are mere incidentals to the main business of the ordinary American, who works for his family and his home—not for "national necessity," whatever that pompous phrase may mean.

We must get these things straight. Governments do not produce either men, families, or wealth. Men produce those things. The only thing that government produces is more government. If, in producing more and more government, a country should destroy the mainspring of human striving, the fact that the destruction has been cloaked in the verbiage of "national necessity" will not change the consequences. The country will regress; its wealth diminish; its government become a fourth-rate power; its general tone will become puny.

I take no position one way or the other on the desirability of racially amalgamated residential areas, and I do not see how any other mere mortal can do so, for it seems to me to be entirely a matter of personal preference.

I believe it was the right of the people in Senator Douglas' Hyde Park-Kenwood area to undergo the integration experience that they have undergone, and I might add from personal direct knowledge that the experience was a good deal more horrifying than Senator Douglas suggested. To repeat, I don't know what the pattern of any residential neighborhood should be. What I do know and assert is that the goodness, wealth, and power of this country are products of the striving of freemen in the pursuit of their preferences; in short, products of the right of private property. I know, furthermore, that title IV, whatever the Attorney General may say about it, is the most far-reaching and thoroughgoing invasion of the right of private property that has ever been proposed in this country. The Attorney General refers to title IV as a "national necessity." I believe it better described as a national disaster.

Senator ERVIN. Again, I am going to have to vote.

(Short recess.)

Mr. AUTRY. Pursuant to the request of the chairman, the witness will continue with his prepared statement. The chairman will return as soon as the vote is completed.

Mr. PETRO. All right, Mr. Autry. I turn now to the procedural aspects of this bill. I find the procedural aspects of title IV as questionable as its substantive policy, perhaps far more serious in the inroads it makes on the rights of homeowners.

It encourages unmeritorious and vexatious litigation despite the crowded conditions of court dockets all over the country. It creates evidential problems which are likely to make a mockery of due process of law. Its provision for remedies are likely to intimidate the decent citizen. The powers of intervention granted the Attorney General are vague and ill defined and smack more of the police state than of a society ruled by law.

Consider the matter of unmeritorious and intimidatory litigation. Section 406(b) authorizes the Federal courts, whenever they "deem just," to subsidize proceedings against homeowners who have allegedly

refused to sell or rent on the basis of race, creed, or national origin. No such subsidy is made available to the defending homeowner. Thus a disappointed purchaser has everything to gain and nothing to lose by suing the homeowner. Under section 406(b) the would-be purchaser may commence a civil action "without the payment of fees, costs, or security * * *." This means he may secure even an ex parte restraining order, preventing the homeowner without notice or hearing from selling to another, without forfeiting a bond or security. This is different from the situation which prevails in the case of any other kind of litigation whatsoever.

There is no need to dwell at length upon the evils of this provision. They are obvious. Every homeowner in the country is a potential victim when he puts his house up for sale, whether or not he has violated the law. The normal restraints upon vexatious litigation are gone.

Mr. AUTRY. May I interrupt for just a moment, Professor? Senator Smathers is back, and he will assume the chair in Senator Ervin's absence.

Senator SMATHERS. Will you go right ahead?

Mr. PETRO. Thank you, Senator. The normal restraints upon vexatious litigation are gone. As we shall see, it is likely that the burden of proof will come to rest swiftly upon the homeowner, rather than, as is traditional, at least in due-process countries, upon the complaining party. The difficulty of sustaining the burden of proof together with the subsidizing of the complainant add up to a massive instrument for the intimidation of homeowners.

Even without the subsidy provision, title IV, if enacted, is likely to produce a flood of litigation, and litigation of a peculiarly complicated character. With the subsidy, of course, there will be even more. I do not suggest that the litigation-breeding charge is ever a valid argument against an otherwise meritorious law, for I believe that if a proposal has merit, it should pass even though it increases the burden on the courts. The trouble with title IV, however, is that it is both bad in principle and likely to encourage great volumes of unmeritorious and purely vexatious litigation, when the Federal courts are already heavily burdened.

The probable result is that proceedings under title IV will work the most vicious kind of injustice. Complainants, that is to say, disappointed purchasers from a minority, will ask for restraining orders, pending a full trial, which is likely to be long and drawn out. Homeowners will thus lose their purchasers, while the complaining parties, on the other hand, will have nothing to lose, especially when even their attorneys' fees and security costs are covered by the taxpayers. The net effect is likely to create discrimination in favor of members of minority groups. Indeed, that seems to be the object of all the procedural features of title IV. The compulsions and the denials of freedom which characterize the substantive features of title IV will probably be surpassed by the compulsions inherent in its procedural features.

I turn now to problems of proof and due-process implications.

Every time a belligerent member of an identifiable minority bids unsuccessfully on a home, or a rental, he is in a position to make life miserable for the hapless homeowner. Suppose a Jewish homeowner, with his house up for sale, receives equal bids from two persons, one a

Jew, the other an Italian. If he sells to the Jew, the disappointed Italian has the basis for a suit. The Italian may petition for a temporary restraining order, thus blocking the sale to the Jew, pending full trial. How long will the Jewish purchaser keep his offer open?

And what will happen at the trial? The law is vague. It forbids refusing to sell to any person because of race, color, religion, or national origin. How much proof is required? What kind? On whom will the burden of proof come ultimately to rest?

We have considerable experience with a similarly vague law. An analogous provision in the National Labor Relations Act prohibits discrimination by employers which tends to discourage union membership. The National Labor Relations Board considers itself as having a prima facie case of discrimination when a union man is discharged by an employer who has betrayed antiunion sentiment. At that point the burden of proof shifts to the employer. He must show that there was some good cause for the discharge—a violation by the discharge of some strictly enforced rule, or a failure by him to meet objectively demonstrable standards. If he fails in this showing, the employer will be found guilty of unlawful discrimination.

The homeowner under title IV is in a much more difficult position than the employer under the National Labor Relations Act. How is the homeowner to prove—in the case I give—that he had some objectively demonstrable cause—other than race or religion—when the Italian made the same offer that the Jew made?

It is possible that the Federal courts, unlike the National Labor Relations Board, will require objective evidence of discriminatory motivation before they hold homeowners guilty of title IV violations. But if the courts take that position, title IV will become a dead letter; ocular proof of discriminatory motivation is in the nature of things unavailable. Hence the probability, if title IV is to be viable, is that the courts will do what the Labor Board has done; that is, rely upon presumptions and inferences. In that case title IV will become an even more pervasive instrument for the denial of due process that the Labor Act has been. The burden of proving lack of discriminatory motivation will fall upon the homeowner, and in 99 cases out of a hundred, he will be unable to carry that burden. He will not be able to prove, in the case I have cited, that there was a nondiscriminatory basis for his refusal to sell to the Italian.

Add this to the fact that he will probably have been restrained by the court from conveying to the Jewish purchaser, pending trial, and it becomes evident that title IV puts the homeowner into an impossible position when he is confronted with purchasers from different minorities. No matter which he chooses to sell to, the other is in a position to make life miserable for him. An age-old instinct of the common law was to conceive rules in the manner most likely to encourage and promote the alienability of realty and chattels. It would appear that the aim of title IV is, at least, in part, to frustrate realty transactions.

If the homeowner is confronted with offers from a Negro and a white Anglo-Saxon Protestant, he has no choice under title IV at all. Preferring the Anglo-Saxon will, if the disappointed Negro is belligerent or fronting for a pressure group, produce an immediate restraining order, frustrating an immediate sale and probably inducing the purchaser to go elsewhere, for many important family matters hinging

upon the timing of home purchases. Again, there will be a trial, probably prolonged, and how will the homeowner establish that his choice was not on the basis of race or religion? He has everything to lose and nothing to gain from fighting the case.

Title IV takes away his precious freedom, his right of private property, and makes a mockery of due process while doing so. "National necessity" is cited as the justification for this vicious betrayal of some of the best of the American tradition. But I am unable to understand how it can be nationally necessary to destroy what is good and strong in a nation. Title IV is an instrument useful only to beat the country's homeowners into a state of supine submission. Perhaps they will rebel against it, however, in which case there will be chaos.

Perhaps title IV will stimulate evasive hypocrisy on a universal scale, an even more repulsive possibility. But meek submission is what the bill seems to aim at, and I can think of nothing more foreboding than the realization of that aim. No great society was ever built by sheep or cattle.

Intimidatory remedies: There is an infinity of evil in title IV. Section 406(c) provides that—

> the court may grant such relief as it deems appropriate, including a permanent or temporary injunction, restraining order, or other order, and may award damages to the plaintiff, including damages for humiliation and mental pain and suffering, and up to $500 punitive damages.

Section 406(d) authorizes the court to—

> allow a prevailing plaintiff a reasonable attorney's fee as part of the costs.

In the light of these penalties, the homeowner will have to be foolhardy indeed who refuses to sell to the member of any minority group.

The bill puts no limit on the amount that may be awarded for "humiliation and mental pain and suffering." Apparently the sky is the limit. It is true that there is a "reasonable" limitation on the amount which may be assessed against the defendant for a successful plaintiff's attorney's fees. The fee may still grow to a substantial amount, however. Equity proceedings and a prolonged trial may easily involve work and time for which thousands of dollars constitute a reasonable fee. And it must never be forgotten that the victim of title IV will usually be an individual homeowner. More than that, he will usually be a man of modest means, for the wealthy will never have problems under title IV, and even the well off will rarely have trouble with it.

Special note must be taken of the variety of court orders authorized by section 406(c): "permanent or temporary injunction, restraining order, or other order." Obviously there is plenty of room in this catalog for the most extreme type of court order, the mandatory injunction. In short, a homeowner may be ordered to convey his property to a person to whom he does not wish to sell it, or even, indeed, after deciding to withdraw it from the market. Consider this type of case, which occurs often enough: after getting only one offer for his home, and that from a Negro, the homeowner decides after all that he does not wish to sell; the Negro, or some supporting organization, gets its wind up, creates a great deal of publicity, leading to what may be called humiliation for the would be purchaser, and then files suit, demanding a mandatory injunction and all kinds of damages

allowed for in the bill. Moreover, the Negro convinces the court that he lacks means and thus acquires a subsidy for all court costs, fees, and other costs.

What is the position of the homeowner in such a case? He made no formal announcement that he was withdrawing his house from the market. Born and raised a freeman he felt no obligation to clear his change of mind with anyone. He just went ahead and adjusted numerous complicated and intimate family plans to his new decision. But how will he prove that there was no discriminatory motivation in the face of the evidence—the prima facie case—against him? Should he fight the case? If he fights, the costs will be heavy, and his means in all probability slender. There is no provision in the law covering his costs, if he wins. Can one afford to fight such a case? Why fight, anyway? Why not just let the court take away the house and convey it to the person who wishes to purchase. It's only a house, after all, and the family can adjust to a move.

I said title IV would stimulate the growth of police state conditions. What I had in mind was sections 407 (a) and (b) which give the Attorney General a roving commission to institute or to intervene in title IV proceedings pretty much as he pleases. Section 407(a) permits him to institute suit whenever he (not the court)—

> has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted to this title.

All the forms of relief available in private suits are made available in suits instituted by the Attorney General.

The Attorney General has even broader and more vaguely defined power to intervene in actions commenced by private parties. Under 407(b) he has the authority to intervene if he merely certifies that the action is of "general public importance."

The effect of these two sections is to authorize the Attorney General to police every real estate transaction in the United States. Obviously even the enormous tax revenues of the United States and its prodigious number of officeholders are not sufficient to permit the Attorney General to intervene in every transaction yet. He will have to pick and choose. The picking and choosing is likely to be dictated in title IV cases largely as it is in all similar instances of governmental intervention. Political, publicity, and psychological considerations will play an important part. Thus the full power of the Federal Government will be thrown against the homeowner who happens for one or another of these reasons to constitute a suitable target. The police state implications of this boundless grant of power are too obvious to require comment. Pity the poor homeowner who finds himself caught in the middle.

In conclusion, there is no doubt in my mind of the proper disposition of title IV of S. 3296. It should be rejected. I repeat: I take no position on the question whether racial amalgamation of residential neighborhoods is desirable; in a free country, residents should make that decision each for themselves—not politicians or government agents, or courts. What I am convinced of is that compulsory amalgamation has no place in a free country. What I am convinced of further is that title IV is a measure devilishly and deviously contrived in each of its provisions to work a compulsory amalgamation. Title IV is advertised by its proponents as a "national necessity"

designed to promote freedom and justice. In fact, it is a national disaster which destroys freedom while spreading injustice across the land. Whatever the Attorney General may say about it, the principal target and ultimate victim is the individual homeowner. This lonely individual will find himself in title IV proceedings fighting against preposterous odds for the things most dear to him. He will finance his opponent in individual proceedings in many cases, and his tax money will be used against him in proceedings brought by the Attorney General. Title IV is a stacked deck against the individual homeowner, his liberty and property. If title IV is passed it will amount to a declaration of war by the Government of the United States against its sturdiest and most productive citizens, the homeowners of the United States. The consequences for the country cannot be anything but evil.

That concludes my statement, Mr. Chairman.

Senator ERVIN. As I construe your statement, your position is that title IV of this bill is inimical to the basic freedom of Americans to acquire homes for themselves wherever they desire to acquire those homes, so far as they can obtain those homes by free action on part of the persons from whom they acquire them.

Mr. PETRO. Precisely.

Senator ERVIN. In other words, the basic issue you see here is the fundamental issue of freedom.

Mr. PETRO. Freedom and human rights.

Senator ERVIN. And your position is that except insofar as they may have been altered by artificial actions of government, all the residential patterns now existing in the United States are patterns which have been created by Americans acting in accordance with the freedom given them by the right of private property and the right to contract freely with reference to private property.

Mr. PETRO. Yes, sir. It cannot possibly be anything else. Where the Attorney General got the idea that there is compulsory residential segregation is beyond my understanding.

Senator ERVIN. And can we not act upon the assumption that the residential patterns which have been established by freemen acting in the exercise of their right of private property and in the exercise of their right to freedom of contract in reference to private property are the racial patterns which express the will and purpose of the people themselves?

Mr. PETRO. Yes, Senator. I think perhaps this should be amplified somewhat. It is not correct to view this enormous, beautiful, varied and fantastically interesting country as a monolith, you know. The residential patterns of this country are as varied as the rest of the country.

I find this is good. Of course I stay away from Washington, Senator, and therefore I do not get this thing you call Potomac fever, the idea that I have to impose my will on everyone else.

I mean that I find it interesting that in some areas the residential patterns go one way and in other areas they go another way. That is a life, because only in a dead society are patterns fixed and rigorous.

God knows, 100 years from today, a voluntary society may have produced a perfect mix, one that will please even so stanch a New Dealer as Senator Douglas. But it would do so voluntarily, if we maintain the free character of the country.

Senator ERVIN. In other words, you say that whatever pattern may be evolved by the exercise of freedom on the part of freemen is a pattern we should have, and we should not have a pattern which is fashioned by the artificial use of the coercive power of law contrary to the wishes of the people.

Mr. PETRO. Sure, and there are an infinite number of examples indicating the disastrous consequences of interfering with the free course of life.

Consider how the Japanese, I believe it was, used to bind the feet of their women. The result was deformed feet, very much like the desire of some of the people in our Government to bind the Nation up into a pattern that they think appropriate. It is no man's right to tell another man how to live or how to dispose of his property.

Senator ERVIN. I will not do any bragging on myself except to one extent, and that is I rejoice to say that I have been here 12 years without contracting Potomac fever. I still believe that the people who sent me here can manage their personal affairs, such as that of selecting homes for themselves and selecting the persons with whom they wish to contract or associate and in so doing can build a far better country than could be done by direction and control of the people on the banks of the Potomac.

It is one of the odd things that so many men elected to the Congress of the United States come to the conclusion that the people who sent them here have not got sense enough to manage their own affairs, but that on the contrary the affairs of those people who sent them here must be managed by some bureaucracy up here on the banks of the Potomac.

Mr. PETRO. You know, it creates a really paradoxical situation, if such a man thinks it true. The people that he is not willing to permit to run their own lives are the people who selected him. Did they have sense enough only to elect somebody to be their slave driver? Is that the extent of their competence?

Senator ERVIN. To me——

Mr. PETRO. Wait a minute, Senator, please let me interrupt, because I think there is no one who has greater respect for the Government of the United States than I do, and I want to make it perfectly clear that I do not believe that every man who comes to Washington contracts this fever.

Senator ERVIN. That is true. If all of them had contracted it, all of our differences would now be vanished dreams.

Mr. PETRO. Yes.

Senator ERVIN. And the only reason we still maintain many of them is the fact that all people do not contract Potomac fever. If they did, we would have a thoroughly regimented society with no freedom of choice whatsoever left to the individuals, and that is what I understand your position fundamentally is. I know your books have been an inspiration to me, because you have said things with reference to maintaining a free society which express what I feel is the great truth about this country. This country was made great by freedom, and this country will remain great so long, and so long only, as it adheres to the belief that the most precious value of civilization is freedom.

Senator SMATHERS. I would merely like to state this, Mr. Chairman. I do not know when I have listened to a more powerful and

persuasive statement with respect to any question that we had before us that equals that just made by Professor Petro. I congratulate you on it.

I wish that every Member of the Senate had had the opportunity to listen to you as we had. I would like to wish and hope that each Member of the Senate would read it, and I do not believe that will be the case, but I hope that many of them do. If they do read it, I do not see how they could then in any manner support or vote for title IV of this so-called civil rights bill.

I would like to get for the record once more what I think the chairman has already stated, but I did not hear it very clearly when you introduced the witness. I would just like to have you repeat. Where did you get your law degree, from what university was it?

Mr. PETRO. The University of Chicago, a very great and a very misunderstood university.

Senator SMATHERS. And then you got a master's degree in law from where?

Mr. PETRO. The University of Michigan.

Senator SMATHERS. And do you have any other degrees?

Mr. PETRO. A bachelor's degree.

Senator SMATHERS. You have a bachelor's degree. And you are now teaching?

Mr. PETRO. New York University.

Senator SMATHERS. New York University. All right, that is all I have. I again want to congratulate you.

Mr. PETRO. Thank you very much, Senator.

Senator ERVIN. Counsel said he had just one or two technical questions about the enforcement provisions of title IV.

Mr. AUTRY. Mr. Chairman, I hesitate to open my mouth. I think that everything that needs to be said about title IV has just been said. But for the record, I would like to know if the professor knows of any precedent, State or Federal, in tort law, where plaintiffs are provided with court appointed attorneys? I know workman's compensation——

Mr. PETRO. This is a big country and there are a lot of fantastic laws on the books of the various States, but to my knowledge no such law exists, as obviously the common law would not have provided for anything like this.

It would not have been so insane as to attempt to exacerbate the already litigious instincts of so many people. This is a perfectly solid way to make the courts real barriers to getting anything done. Fill them up with people whose litigations have been subsidized.

Mr. AUTRY. Thank you. And do you know of any tort statutes in which are enumerated damages for humiliation plus damages for mental pain plus damages for mental suffering plus punitive damages?

Mr. PETRO. No. Again this proposed legislation breaks entirely new ground in the destruction of due process of law.

Mr. AUTRY. Thank you, Mr. Chairman.

Senator ERVIN. I just want to reiterate what I have said before. You have made a magnificent statement. I do not believe it could be improved on as to the fundamental defects in the proposal embodied in title IV of this bill. You have rendered a distinct public service.

I would like to have your permission to insert your statement in the Congressional Record for myself and Senator Smathers, in order to give it as wide a dissemination in the printed page as possible.

Mr. PETRO. Thank you kindly, Senator. Permission granted of course.

Senator ERVIN. The subcommittee will stand in recess until 10:30 in the morning.

(Whereupon, at 5:05 o'clock p.m., the subcommittee adjourned to reconvene at 10:30, Friday, June 10, 1966.)

CIVIL RIGHTS

FRIDAY, JUNE 10, 1966

U. S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:30 a.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin, Jr. (chairman) presiding.

Present: Senator Ervin.

Also present: George Autry, chief counsel; H. Houston Groome, Lawrence M. Baskir, and Lewis W. Evans, counsel; and John Baker, minority counsel.

Senator ERVIN. The subcommittee will come to order. Counsel will call the first witness.

Mr. AUTRY. Mr. Chairman, the first witness on the witness list is Senator Sparkman. He has agreed to allow Senator Philip A. Hart, Senator from the State of Michigan and principal sponsor of S. 3296 to be the first witness this morning.

Senator ERVIN. Senator, you are welcome before the subcommittee.

STATEMENT OF HON. PHILIP A. HART, U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator HART. Mr. Chairman, thank you very much for having me. While I shall thank Senator Sparkman when I see him, I should like the record to reflect my appreciation for the courtesy he has shown. As Senator Ervin knows, there are too many subcommittees, and I left the Antitrust Subcommittee to come up to this one. I am doubly grateful to Senator Sparkman.

Mr. Chairman, as the primary sponsor of S. 3296 and a cosponsor of S. 2923, I appreciate this opportunity to appear before the subcommittee in support of these bills.

Although encouraging progress in civil rights has resulted from the enactment of recent civil rights acts and the Voting Rights Act of 1965, much remains to be done before the democratic ideals upon which our country was founded become a reality for all of our people.

The President recognized this fact in his recent message on civil rights when he stated that—

> No civil rights act, however historic, will be final. We would look in vain for one definitive solution to an injustice as old as the Nation itself.

The importance of S. 3296 lies in the possibility it offers of further alleviating discrimination in three vital areas: the administration of justice, education, and housing. Who is to say which is more important? All three areas are but parts of this whole complex problem.

While we may analyze and study one area separately, we must never forget that every advancement reveals the interrelationship of all aspects of civil rights. It is impossible to deal with the employment problems of Negroes without also taking into consideration discrimination in education, training, housing, and personal security.

Titles I, II, and V are designed to modify our system of administering justice so as to tighten the protection of physical security of all Americans and assure them of equal justice under the law.

In some regions the record of continuing violence against the advancement of equal rights is frightening.

The primary purpose of such terror and violence becomes crystal clear when we see its effects extending far beyond the victims and encompassing the entire community. No Negro American failed to understand the intended message carried in the photographs from Mississippi in newspapers of 2 days ago.

Every assault, every murder, every bombing which goes unpunished, has encouraged and reinforced efforts to stop the advancement of equal rights through violence and intimidation. Such assaults on the free exercise of constitutional rights constitute a compelling reason for immediate enactment of proposals such as title V which is designed to insure that all who work for and advocate equality are protected from interference and violence. May I interpolate here that there is no one in the Senate, in my judgment, who is more offended by violence of this character, more distressed by it, than the chairman of this subcommittee.

Senator ERVIN. I thank the Senator. That is certainly true.

Senator HART. Titles I and II are concerned with assuring equal opportunity to participate in jury service by strengthening the constitutional guarantee that accused persons will be judged by impartial juries. It is generally agreed that a jury drawn from people of different backgrounds, races, and religions, a jury from which their peers have not been arbitrarily excluded, would be most likely to adhere to this constitutional mandate. Opponents of this provision argue that we should be very careful about tampering with the jury system, one of our basic institutions. I suggest that the jury system as originally conceived has already been tampered with by the widespread practice of omitting members of certain groups from juries. Because of the variations among our people, it is highly unlikely that a jury system which systematically excludes members of a certain race or group could provide the type of impartiality contemplated in the Constitution.

The weaknesses of the administration of justice are dramatically portrayed in the failure of juries to convict killers of dedicated civil rights workers. Without the possibility of conviction in this area, there is encouragement for such crimes to multiply. A strong jury system is essential to deter future violence of this type.

The Attorney General, I understand, is reported to have said that at the time of the Meredith shooting on Tuesday at least 15 lawmen were within yards of him. Yet the fact that the presence of these officers did not prevent the shooting is an indication that Congress should tighten the laws relating to administration of justice to the point where no man can mistake that justice of the courts will be prompt, effective, and unwavering. I admit there is one possibility. If a madman is surrounded by 15 police officers, the presence of that

deterrent pressure which would operate on the normal mind would not apply. But absent the madman, it seems strange to me that a man in possession of his senses could, when surrounded by 15 policemen, commit another assault, unless he felt that the justice that would result would not be the kind of justice that we preach to the world that we apply here.

It was in this spirit that S. 2923 was introduced by Senator Douglas, who testified yesterday, and the cosponsors. In this proposal we have attempted to provide the statutory provisions we believe required to completely handle the breakdown of machinery for the fair administration of justice. This goes beyond the administration's bill, which I introduced. But I believe the events of the past few days underline the reasons why it is important that this subcommittee and the Congress review proposals such as the following:

1. The removal of certain types of prosecutions from State courts to the Federal courts.
2. Provisions for civil indemnification of those killed or injured because they participated in lawful civil rights activities.
3. The removal of defendants from jurisdictions where a breakdown of effective justice has occurred.
4. More direct and automatic methods of reaching the problem of jury exclusion.

Both bills contain provision for broadening the power of the Attorney General to permit him to institute suits for the desegregation of schools and public facilities. The continued slowness of the school desegregation effort speaks more clearly than ever why there should be little disagreement over this long-delayed provision.

Finally, S. 3296 contains a provision against discrimination in the sale, rental, and financing of housing. This clearly has touched the most sensitive nerve.

Most of the opposition to this proposal is based on the argument that it represents an unconstitutional interference with property rights. This argument was also made with respect to the public accommodations provision of the Civil Rights Act of 1964. However, experience has shown that this provision was the effective and the constitutional way to accomplish the national goal of equal access to public accommodations.

In the metropolitan areas of our country are many independent local jurisdictions. In many such metropolitan complexes there are two or three State jurisdictions. I can think of no greater problem than attempting to coordinate the adoption of local fair housing ordinances or State statutes to cover residential and rental housing in these independent jurisdictions.

The opportunity for manipulating real estate markets in a situation where one local jurisdiction has an effective fair housing ordinance and others do not are obvious.

Clearly uniform national action is required. Many of the metropolitan problems—freeway location, downtown renewal, outdated educational facilities—are compounded by the open practice of closing new rental and homeownership opportunities to Negro families.

It would seem to me the very economics of expanding the potentials for homebuilding and apartment construction to fill the obvious market available for better homes and apartments for these families

would mean that the real estate and home construction industry would welcome a uniform and effective national policy.

Certainly we will never rebuild the American city to its fullest economic and human potential until we have met squarely this problem of housing discrimination. Here, Mr. Chairman, as we all know, we are not talking about a region of the country, a section where history has a long-reaching arm. We are talking about every neighborhood in the country, north and south, east and west, in the middle, in the mountains, everywhere.

I know, Mr. Chairman, you and other members have expressed grave doubts concerning the constitutional powers available to the Congress to enact such a statute. I hope that the excellent legal memorandum prepared by the American Law Section of the Library of Congress would be a part of this hearing record, if it has not been introduced to date. It was prepared by Vincent Doyle, and I reviewed Mr. Doyle's discussion of the powers available under the commerce clause and the 14th amendment.

Senator ERVIN. Senator, do you have available copies there?

Senator HART. Yes, Mr. Chairman.

Senator ERVIN. If you desire the chairman to do so, I will have that printed in the body of the record as part of the record immediately after the conclusion of your remarks.

Senator HART. Thank you, Mr. Chairman. I would appreciate it. I think a reading of that admittedly not short memorandum fairly establishes that Congress does have a constitutional basis.

We had much this same argument 2 years ago in discussing title II of the Civil Rights Act of 1964. The Court upheld our actions under the commerce clause. I believe this would occur if we enact title IV of the proposed bill.

Some weeks ago I asked the Department of Defense to prepare a report for this hearing on the problems faced by Negro enlisted personnel and officers of the armed services in finding adequate housing for their families in off-base housing. Mr. Chairman, I would ask leave to have this report printed in the record at the conclusion of my remarks. I think it describes certainly factually and eloquently the problem we are attempting to meet in title IV.

Attorney General Katzenbach referred to a few instances mentioned in this study, and I would like to read an excerpt from it:

> Adequate, decent off-base housing for Negro personnel in the Armed Forces is the most stubborn and pervasive form of segregation and discrimination affecting Negroes in the Army, Navy (including the Marine Corps) and the Air Force. The problem is nationwide. It is encountered in the North, as well as the South. It is along the Atlantic, as well as the Pacific Coast, and it is also found in the Middle West.

Some of the cases described here would shame all but the most insensitive American. The report, by way of general conclusion I think, says:

> Commanders at 102 Defense installations (43 percent) reported that their men encountered many forms of severe discrimination in seeking either to buy or rent. They were refused rental houses and apartments because of their color. They were required to live at places distant from their duty stations, in inferior dwellings in deteriorated neighborhoods and often charged inordinately high rentals and often when attempting to purchase, the price would be doubled. It was reported that 39 trailer parks situated near the 235 installations refused to accept Negro soldiers, sailors and airmen.

Mr. Chairman, I close my statement with the observation that we live in the midst of many anomalies which are difficult for our citizens, let alone the people of the world, to understand. But, one of the toughest ones to explain, and the one that ought to be resolved in this year 1966, is our Nation's willingness to call a man to expose himself to fire in Vietnam and not ask him what his skin color is, but be unwilling to see that when he goes to a rental agent or a real estate office near his base, he is treated as any other man wearing the uniform of his country should be treated.

That may sound a little emotional. However, I think it is hard to discuss it even in its barest outlines without having that tone come through. I know the legal skill that is represented on this subcommittee, and I am sure that the record that will be developed here will reflect fully all the varying points of view, as it should.

(The reports previously referred to follow:)

REPORT: "RACIAL DISCRIMINATION AGAINST NEGRO AND OTHER MINORITY GROUP SERVICEMEN AND THEIR DEPENDENTS IN OFF-BASE HOUSING"—JUNE 2, 1966

The Department of Defense and the Military Departments place high priority on the housing available to Armed Forces personnel and their dependents. This applies to the quarters provided on-base by the Services and to the housing required off-base in the communities adjacent and near defense installations. The kind and quality of housing afforded our personnel is an important factor affecting morale and military effectiveness.

The adequacy of off-base housing for military personnel is measured by specific criteria:

1. Proximity of housing to the duty station.
2. Cost of housing. When the rental costs, including utilities (except telephone) exceeds the maximum allowable housing cost, the unit is considered inadequate. Under certain conditions costs of transportation to and from the duty station are considered part of the total housing cost.
3. Physical condition and environment. The unit must be a complete dwelling unit with private entrance, with bath and kitchen for sole use of the occupants, and so arranged that both kitchen and bedrooms can be entered without passing through bedrooms. The unit must be well constructed and in good state of repair with heating and kitchen equipment provided, and it must be located in a residential area which meets acceptable standards for health and sanitation and which is not subject to offensive fumes, industrial noises, and other objectionable features. The unit must be adequate in size for military families.

The problem of adequate housing for military personnel takes on added significance when other facets of his situation are recognized. First, the soldier, sailor or airman is not in a community by personal choice, but because of the necessary requirements for the nation's security and defense. Second, the frequency of change of duty station places an additional serious hardship on the serviceman and his family in terms of adjustments, dislocations and uprooting. Assuming normal circumstances a civilian employee and his family come to a community, locate a home, puts their children, if any, in school, establish a relationship with the institutions and their services, adjusts to the social and physical environments and sinks roots in the community. Stability and relative permanence is achieved. The situation for military service personnel is quite different. The Army states that their personnel move on the average every 2½ years, while the Navy moves its personnel every 3 to 3½ years. This means that there is a high frequency of mobility causing the soldier, sailor and airman and their families to pull up tent and roots, move to a new community and start all over again the process of searching for and locating housing, establishing new relationships, having the children adjust to new schools and school situations. In fact, they must start all over again.

The very nature of the process incident to adequate housing with frequency of change is a difficult matter of accommodation and adjustment. Add to this segregation and discrimination based on race and color and the difficulty becomes compounded and aggravated. Adequate, decent off-base housing for Negro

personnel in the Armed Forces is the most stubborn and pervasive form of segregation and discrimination affecting Negroes in the Army, Navy (including the Marine Corps) and the Air Force. The problem is nation-wide. It is encountered in the North, as well as in the South. It is along the Atlantic, as well as the Pacific Coast, and it is also found in the Middle West.

Since 1963 the Department and the Military Services have given increasing attention to eliminating every vestige of segregation and discrimination in the Armed Forces, both on-base and off-base in the communities near defense installations. In 1963 the United States Commission on Civil Rights published a Staff Report—*Family Housing and the Negro Serviceman.*[1] The report reflected the findings of the Commission's staff on the patterns of discrimination and segregation in housing to which the Negro soldier, sailor and airman had been subjected.

In June 1963 the President's Committee on Equal Opportunity in the Armed Forces, in its Initial Report,[2] called attention to the difficulties and problems experienced by Negro servicemen in their quest for housing in communities near their duty stations. On the basis of the many complaints directly called to their attention, base commanders were seeking guidance in dealing with these difficult problems from the Chiefs of the Military Departments.

By March of 1963 the Department of Defense was sufficiently cognizant of the dimensions of the problem to take the first of its corrective actions. On March 8, 1963, DOD issued a Memorandum on Nondiscrimination in Family Housing[3] that, among other things, required that the leases for all family housing include a nondiscrimination clause consistent with the provisions of the President's Executive Order No. 11063 of November 20, 1962. The Memorandum also directed the housing offices at defense installations not to maintain any listings of housing units that were not available to all personnel without regard to race, color, creed or national origin.

A further step was taken on July 26, 1963 when the Secretary of Defense issued a Directive on Equality of Opportunity in the Armed Forces[4] clearly reaffirming and articulating the Department's commitment to equal treatment for all of its military and civilian personnel. The Directive said:

"It is the policy of the Department of Defense to conduct all of its activities in a manner which is free from racial discrimination, and which provides equal opportunity for all uniformed members and all civilian employees irrespective of their color.

"Discriminatory practices directed against Armed Forces members, all of whom lack a civilian's freedom of choice in where to live, to work, to travel and to spend his off-duty hours, are harmful to military effectiveness. Therefore, all members of the Department of Defense should oppose such practices on every occasion, while fostering equal opportunity for servicemen and their families, on and off-base."

The Directive also provided the Military Commander with renewed and reinforced authority to deal with discriminatory conditions, including segregation and discrimination in housing, affecting his men off-base. It said:

"Every military commander has the responsibility to oppose discriminatory practices affecting his men and their dependents and to foster equal opportunity for them, not only in areas under his immediate control, but also in nearby communities where they may live or gather in off-duty hours. In discharging that responsibility a commander shall not, except with the prior approval of the Secretary of his Military Department, use the off-limits sanction in discrimination cases arising within the United States."

Military Commanders provided with this new Directive of July 1963 began to give leadership through negotiation, conciliation and conference in getting the real estate industry in the adjacent communities to remove racial barriers in the housing field. In some few instances the commanders were successful in overcoming the resistance to accord equality of opportunity in housing to Negro servicemen. During 1964, the Office of the Deputy Assistant Secretary of Defense for Civil Rights conducted informal negotiations and conferences with the Intergroup Relations Office in the Federal Housing Administration with a view toward obtaining their cooperation in respect to alleviating discrimination against

[1] U.S. Commission on Civil Rights Staff Report—Family Housing and the Negro Serviceman.

[2] The President's Committee on Equal Opportunity in the Armed Forces Initial Report, "Equality of Treatment and Opportunity for Negro Military Personnel Stationed Within the United States," dated June 1963.

[3] Memorandum dated March 8, 1963, "Nondiscrimination in Family Housing"

[4] Department of Defense Directive 5120.36, "Equal Opportunity in the Armed Forces," dated July 26, 1963.

Negro servicemen in communities near defense installations. It was informally understood that they would lend their good offices in affected communities and would provide information upon request of the commanders as to the properties covered by FHA insured mortgage loans. On February 8, 1965 [5] a formal understanding was arrived at in which the FHA agreed to maintain current listings with base commanders showing the housing units in their area covered under the provisions of the FHA and which were subject to Executive Order 11063. It was agreed to provide base commanders with a list showing properties which had been obtained through FHA mortgage insurances and were either being repossessed or placed in the default status because of default in the terms of the mortgage.

The Department of the Army on July 2, 1964 issued their Army Regulation "Equal Opportunity and Treatment of Military Personnel",[6] and the Air Force issued its revised Air Force Regulation of the same title on August 19, 1964.[7] The Navy in February 1965 issued its Sec Nav Instruction entitled "Equal Opportunity and Treatment of Military Personnel." [8] In each of the aforementioned documents, guidance was provided the commanders in reference to their responsibility in using their good offices and leadership resources to achieve equal and adequate housing for Negro and other minority group personnel in off-base housing.

Another action taken by the Department was in June and July 1964 when it undertook to obtain from state and local Commissions on Civil and Human Rights their cooperation in eliminating racial discrimination and making available their good offices in assisting local base commanders in carrying out their responsibility.[9] Twenty-four such state commissions agreed to participate in this effort. In spite of these actions the problem still persists.

In a recent survey required by the Department of Defense of 235 installations of the Army, Navy and Air Force it was found that Negro servicemen encountered discrimination in meeting their needs for off-base private housing. Commanders at 102 Defense installations (43%) reported that their men encountered many forms of severe discrimination in seeking either to buy or rent. They were refused rental houses and apartments because of their color. They were required to live at places distant from their duty stations, in inferior dwellings in deteriorated neighborhoods and often charged inordinately high rentals and often when attempting to purchase the price would be doubled. It was reported that 39 trailer parks situated near the 235 installations refused to accept Negro soldiers, sailors and airmen.

Even though our Base Commanders have exercised more affirmative leadership, mobilized community support, utilized existing state and local agencies in the field of civil and human rights the fact still remains that our Negro and other minority servicemen and their families still encounter racial discrimination in off-base housing. While there has been some substantial progress made in the reduction of this form of segregation and discrimination, it still remains the most pervasive and stubborn, morale impairing social evil confronting the Negro servicemen off-base.

Set forth below are brief descriptions of cases cited to the Department of Defense by the Military Departments as illustrative of the problems and difficulties encountered by Negro and other minority group servicemen in their attempts to obtain off-base housing:

Abstracts of Case Histories Off-Base Housing Discrimination Encountered by Members of the Armed Forces

CASE NO. 1

The Commander of a Defense installation in the northeastern part of the United States says:

"An analysis of the housing conditions affecting Negro personnel reveals that white and Negro personnel of comparable economic status do not in fact enjoy equal opportunity for adequate off-base housing in this state, particularly in the vicinity of this installation. White personnel can rent or purchase a home any

[5] Memorandum dated February 8, 1965, "Family Housing Units Covered by Executive Order 11063 (Equal Opportunity in Housing)."
[6] Department of the Army Regulation 600-21 dated 2 July 1964, "Equal Opportunity and Treatment of Military Personnel."
[7] Department of the Air Force Regulation 35-78 dated August 19, 1964, "Equal Opportunity and Treatment of Military Personnel."
[8] Department of the Navy SecNav Instruction 5350.6 dated January 1965, "Equal Opportunity and Treatment of Military Personnel."
[9] Memorandum dated July 30, 1964, "State Commissions on Civil Rights."

place they desire provided, of course, they can afford to pay the cost. There is little difficulty for white personnel to secure mortgage loans. Generally they need only a perfunctory credit check. Conversely, in order for Negro personnel to get a mortgage loan, credit checks are thorough, cumbersome, and delayed over a protracted period of time. As a result, Negro personnel find themselves forced to accept properties in predominantly Negro or mixed areas. Also, as a general rule, desirable housing for sale is about twice the cost for Negro personnel as for white personnel for the same piece of property. It can be readily seen that the high cost of desirable property places Negro personnel in a position of financial hardship considering the initial cost and the maintenance outlay."

CASE NO. 2

A Commander at an installation near the Nation's Capitol states:

"An allegation was made by a Staff Sergeant that he was refused housing when he attempted to rent living quarters from a private apartment project that advertised in the base newspaper. He was told by the apartment management that they did not rent to Negroes. The matter was investigated and finding the facts to be substantially as alleged the base newspaper discontinued acceptance of advertising from this and any other private housing projects that might be identified with such a policy in the future."

CASE NO. 3

A commander at a Defense installation in a Southern state says:

"It is anticipated that off-base housing will not improve in the immediate future as concerns Negro personnel assigned to this station. This, in all probability, will be that last area to remain segregated, in the local area. The local community is essentially a resort community of a high level with careful and studious efforts to allow only the 'acceptable' modes of construction and occupancy in the primary areas of the city. In view of the fact that this is an area not fully covered by the proscriptions of the 1964 Civil Rights Act, the officials of the base are left to few devices except the power of persuasion. In the past, this effort, however skillfully applied, has not changed in a very serious condition."

CASE NO. 4

From a Defense installation in the far northern region of the Middle West it is stated:

"In December 1965, a Negro Lieutenant complained that he was refused housing by ten landlords in the largest civilian community near this base because of his race. The Equal Opportunity Officer referred him to the Fair Housing Committee, with instructions to return if he did not get satisfaction. He did not return and elected not to file an official complaint."

CASE NO. 5

It is reported from an installation in the central northwestern portion of the United States that:

"During 1965, one of our Negro servicemen answered a newspaper ad looking for living quarters for his family. The agent would not rent him the house when it was discovered that he was a Negro."

CASE NO. 6

In the north central United States, the Commander of a Defense installation states:

"A Negro Sergeant attempted to purchase a house through a real estate broker. When the broker realized the prospective purchaser was a Negro, he advised him that the owner of the home would not sell to a Negro. This complaint was referred to the Federal Housing Administrator at the nearest regional office who indicated that he would investigate this matter. Shortly thereafter, the Negro indicated he desired to withdraw the complaint as he had found another house to purchase."

CASE NO. 7

A Commander of a Defense installation in the central midwest of the United States says:

"Three cases of discrimination in off-base housing occured in the Spring of 1965 in which military personnel assigned to this installation were involved. Two cases involved off-base housing and the third involved off-base trailer courts."

CASE NO. 8

The Commanding Officer of an important training center in the southwest reports:

"A female Negro nurse assigned to our hospital registered a complaint against one of the apartments in August 1965, alleging refusal by the manager to rent her an apartment because of her race."

"Another female Negro nurse rented an apartment in the largest city adjacent to this installation on February 3, 1966, making an advance payment of rent. On February 4, 1966 the apartment manager informed her that because of complaints from other tenants he was returning the advance rent and asking her to move. She was served with a three-day notice to vacate."

CASE NO. 9

The Commander of an important Defense installation guarding the security of the Nation's Capitol states:

"Off-base housing in the form of separate houses and/or apartments can be obtained within reasonable commuting distance. However, there are both apartments and separate houses where Negro personnel can neither buy or rent. During the past year, three off-base housing complaints have been investigated with no solution provided nor available since the property constructed did not involve the use of Federal Government funds."

CASE NO. 10

From a Defense installation in the central Midwest of the United States comes the report:

"On 27 October 1964, a serviceman en route overseas complained that he had attempted to obtain parking space for his mobile home throughout the greater portion of this large metropolitan area without success. Trailer parks in local areas were also contacted and most professed to be 'filled up.' The serviceman departed for overseas on 12 November 1964. A desirable convenient site was obtained at ------, ------, however, the serviceman's dependents residing in the metropolitan community failed to accept same since they were now going overseas to join the serviceman.

"On 22 November 1965, a female officer attempted to rent in the ---------- Apartments, in the community near the installation by telephone. She was advised that vacancies existed, however, upon arrival she could not obtain a commitment until further checking by the resident agent. Later she was advised all apartments were taken, that the last family was expected to move in within three weeks. The officer subsequently located an apartment in the nearby area.

"On 9 May 1966, a serviceman complained that he was unable to obtain suitable quarters for his family in the nearby community, though he did find and is occupying housing he describes as not suitable. This case is still being processed."

CASE NO. 11

From an important Defense installation along the Atlantic Coast in the northeastern United States it is reported:

"On 25 April 1966, a Staff Sergeant complained that he was unable to find a suitable trailer camp in which to place his trailer. At that time, the sergeant was given the names of six trailer courts in the areas near the Defense installation which were listed in base family services as trailer courts which did not discriminate against renters on the basis of race, creed, color or national origin. Shortly thereafter, he chose one of the six trailer courts in which to relocate his trailer and says he is very satisfied at this time.

"On 2 May 1966, a female officer complained that she was unable to rent an apartment in ---------- Apartments, Inc., located in the adjacent community because of her race. She was advised that she had no redress under the existing laws. The law expressly excludes the sale or rental of houses, apart-

ments and other dwellings as a place of public accommodation. The Federal Housing Administration office in the community has advised us that the subject apartments have not been financed by federal loans, nor have any loans to the apartments been guaranteed or insured by the federal government. The officer was advised that she had no redress under either the Civil Rights Act of 1964, or the President's Executive Order for Equal Opportunity in Housing."

CASE NO. 12

From a Defense installation in the southern portion of the United States, the Commander reports that:

"On April 7, 1965, a formal complaint was received from a serviceman stationed at the base against the owners of newly built apartments in one of the cities adjacent to the installation. Inquiry revealed that these apartments were not subject to the Civil Rights Act of 1964, however, the officer received assistance in preparation of a formal request for suit over his own signature.

"On September 20, 1965, a 26 year old serviceman with four and one-half years service complained about off-base housing accommodations available to Negro military personnel and their dependents."

CASE NO. 13

The Commander from a large Defense installation in the southwestern United States reports:

"A Negro Lt. Col. on 7 December 1965, indicated that he had signed a contract with a large construction firm for the construction of a home. The president of the firm refused to fulfill the contract after it was determined that the Negro Colonel desired to have the house constructed in a district that did not contain other Negro homes. The president of the company directly stated to the Commander that the construction would not be accomplished because of the Colonel's race.

"The Post Staff Judge Advocate provided assistance to the Negro Colonel in transmitting the circumstances to the FHA. In addition, the Commanding General wrote the Chamber of Commerce requesting an inquiry and corrective action. The Colonel departed for Vietnam without favorable resolution of the problem."

CASE NO. 14

From the same Defense installation, the Commander writes:

"A Sgt. First Class on 13 April 1966 contracted with the agent for a realty company for purchase of a home in a suburban community near the Defense installation. The Sgt. presented $250 as a contract binder on 17 April and offered additional funds to the builders. Subsequently, changes were made in the contract without the Sgt's agreement involving payment for certain miscellaneous services and materials. These additional requirements made it impossible for the Sgt. to comply with the new purchase price. This appeared to be a deliberate attempt by the owners to void the contract. A letter was initiated by the Sgt. to FHA providing details of the transaction and requesting assistance. The Commanding General has contacted the local Chamber of Commerce for assistance."

CASE NO. 15

From an important training center and military department school, the Commanding Officer reports:

"A Staff Sgt. on 12 April 1966 contacted a realty company in the community almost at the gate of the installation to rent a house. He was advised that the house could not be made available because of his race. He subsequently contacted another representative of the firm and was again denied consideration because of his race. The Commanding General of the installation advised the Mayor, the Secretary of the Board of Realtors, and the Biracial Civic Committee of the refusal to rent to the Negro Staff Sgt. and requested corrective action."

CASE NO. 16

An important Defense installation near the Nation's Capitol reports:

"A Negro Lt. Col. during January 19, 1966 attempted to secure rental housing in two communities neighboring the installation and was denied because of his race. As a result of this denial the Negro officer found it necessary to purchase

a home in another community further away from his duty station and incurring increased financial burdens because of the racial discrimination he had encountered.

"The Commanding Officer contacted the realtors and management personnel involved in the rental and sale of housing in the communities and communicated with various civic organizations in efforts to secure housing without discrimination for Negro applicants. Notwithstanding these efforts, except in the case of FHA-sponsored units, rental housing on a nondiscrimination basis is generally not available in the area near the defense installation."

From the same Defense installation the Commander reports that:

"A Negro Lt. Col. was scheduled to depart for Vietnam and desired to relocate his family from on-post quarters prior to his departure for overseas. He attempted to purchase a home in several communities near the base. His purchase application, however, was denied because of his race. The Colonel contracted in November for the construction of a home in another community and immediately left for Vietnam. The Commanding Officer of the base has authorized the continued occupancy of on-post quarters for the Colonel's family until completion of their home."

CASE NO. 17

A high-level official of one of the Military Departments in reporting on their findings of discrimination in housing in the farwest state said:

"One of the Military Departments made an extensive survey in order to determine family housing needs for the FY–1967. From data obtained in the survey, the department stated that 89 service members stated that their dependents did not accompany them to their present duty station because of racial discrimination in off-base housing. These persons were presently located in 13 states in every section of the country. An officer of one of the Military Departments says that the area in which discrimination is felt most severely is in off-base housing. Continuing, the officer said that although there has been a great deal of progress recently made in this area, the attitudes and practices of some realtors, landlords and home owners associations still reflect discriminatory policies."

CASE NO. 18

The Commander of one of the Defense installations in the West Coast stated that:

"Whereas families of minority groups are found in virtually all areas of the base city and the surrounding communities, it is a fact that Negroes are concentrated and located in one particular area. Trailer parks, with two exceptions, are not available to Negroes in the community and adequate housing is not available except in a particular area in a city near the base."

CASE NO. 19

From a Defense installation in a farwestern state the Commander reports:

"One man stated that, in the Summer of 1963, he arrived from overseas and attempted to contract for several rentals. On one occasion he was denied a rental because of his racial origin. Another man reported that, in May 1965, on two or three occasions he was told frankly that the landlords would not rent to him because he was a Negro.

"In another community, the Commander reported a complaint in which a Negro alleged discrimination in a trailer park because of his race. Another factor contributing to the refusal was the size of the serviceman's trailer which was too large for accommodation in the trailer park. The commander pointed out that some Negroes have to be separated from their families who can only find housing accommodations in a larger metropolitan community, thus causing additional expenses for increased commuting time, commuting expenses and family separation."

CASE NO. 20

The Commander of a Defense installation in the south says:

"Negro personnel do not have equal opportunity as to the location of adequate housing off-base, but in one of the communities near the installation they do have equal opportunity in the quality of the dwellings.

"In another nearby community the Commander reports that all off-base housing for personnel in that area is substandard, inadequate and is separated from the white areas. Recently, however, new units of low cost for off-base housing have been built. 26 are designated for occupancy by whites and the remaining

14 are set aside for non-whites. As to trailer parks the commander says: Trailer parks in the area, with one exception profess to be nonsegregated. About one-half of them would probably accept colored tenants and the others, except one, grudgingly. One will positively accept only white tenants. The only specific complaint by an individual concerning housing involved a newly married officer of Mexican extraction and swarthy complexion, who was refused dwelling accommodations in white neighborhoods. He was transferred by headquarters as a solution to the problem. It is not believed that he would have been offered suitable housing in this area although the president of the local real estate board was brought in on the case. He was offered government housing which was refused."

CASE NO. 21

From another southern state the Commander of a Defense installation says:
"There is limited integration in housing. Segregation is practiced on an individual basis. The community is divided into the white community and the Negro community. Sales and rentals are handled on a racial basis and the majority of houses available to Negroes are below average. Negro visitors in housing occupied by whites are resented by landlords. Tenants may be evicted if they have Negro guests."

CASE NO. 22

From far away outpost of the United States, a Commander relates that:
"A large number of his military personnel, approximately 80 in number, reported experiencing difficulties in securing adequate rental housing. The command stated that the evidence was sufficient to conclude that discriminatory practices against Negroes by individual realtors and landlords is prevalent."

CASE NO. 23

The Commander of a Defense installation of a midwestern state says:
"The only apparent condition adversely affecting equal opportunity for military personnel and their dependents is off-base housing which tends to be segregated. Our off-base located Negroes live in areas that are predominantly all Negro. These areas are not created by governmental restrictions in any way, but are rather imposed by local property-home owners and real estate men whose personal prejudices and interests foster segregation. All other services and facilities are completely integrated. However, those facilities in predominantly all-white or all-Negro residential areas tend to be segregated. This segregation, it appears, is due to choice of the clientele and/or the owner, or operator, but not by local or state governmental directives.
"The letter from twelve officers assigned to various base activities addressed to the Secretary of Defense, dated 8 October 1965, also discusses the housing problem in the area near the base."

CASE NO. 24

The Commander of a Defense installation of a northern state says:
"Two complaints were received alleging that de facto discrimination exists, despite the command's requirements that the landlord or owner certify that they will not object to a person on the basis of color, creed or national origin when listed with the base housing office. The landlords involved were de-listed."

CASE NO. 25

The Commander of a Defense installation of an eastern state says that:
"Generally, segregation exists, either admitted or de facto, in the entire off-base housing community (20-mile radius). Housing available to Negroes is almost entirely limited to that located in time-honored Negro housing neighborhoods. Most personnel live in title 8 housing, now Public Quarters, adjacent to the base. Other apartments and homes are available. Usually there are few homes available for purchase by Negroes, and these are frequently in substandard areas. About half of all off-base apartment owners will rent to Negroes. There is no local "fair housing law" and there is general, passive resistance to any change in historically established general segregation by color.
"A Negro Sgt. was refused an apartment for rent in 1965 in this area and another Negro Sgt. was refused realty service."

CASE NO. 26

The Commander of an installation in a southern state says:

"Negro personnel are restricted to housing in the colored sections of the city. In most cases this is substandard. However, Negro personnel living off-base do so by their own choice in that Capehart housing is available with an average four to six weeks waiting period. In addition, there are no integrated trailer parks in this area."

CASE NO. 27

From another southern state, the Commander of a Defense installation says:

"In one area, 83% of the Negroes who have dependents presently live in public quarters. Only 55 live off-base. Housing is in segregated areas.

"Trailer parks and the 'for sale' and 'for rent' housing in one of the counties in this area remain largely segregated. The housing problem for Negro personnel at one of the camps in this area is mitigated to a degree by the availability of government housing. Approximately 10% of the government-owned trailers, now disposed of, were rented to Negro families in 1965. 88% of the Negroes who have dependents presently live in public quarters. There is a deficient military-civilian community housing market. An annual survey completed on 31 May 1963 confirmed a gross deficit of 4,224 adequate family housing units in the military and civilian communities."

CASE NO. 28

From another southern state the Commander says:

"New apartments are being constructed. It is reported that these are segregated, being located in either all-white or all-Negro neighborhoods.

"Local housing pattern has predominantly Negro and white areas. Most housing available is on a segregated basis. The elimination of government trailers caused a problem since there was no other suitable available housing aboard the base. There are no trailer parks which lease to Negroes."

CASE NO. 29

A First Lt. of the Marine Corps tells in a letter to his Commanding Officer some of the details of discrimination encountered in the effort to get off-base housing:

"Since my arrival in this area on 6 January 1966, or there about, I have been trying to rent a house for myself and my wife, without success. As I stated to you when I made my request for a waiver of children requirement to Capehart I had tried almost a dozen places. Over the phone, they all had places 'to show and rent.' However, upon seeing me in person, * * * 'have just rented or * * * nothing left.' As example:

"(*a*) A First Lt. who rented his place from a realty company, called the realtor and told him he had a friend, me, looking for a place to rent. The realtor's wife took the call as her husband was in the hospital for a few days. She stated they had two (2) places coming up for rent within the week, and I could have my pick; one at $105.00 per month and the other at $110.00 per month. She told the First Lt. to bring me by and she would talk to me about the apartments. When I met her in person * * *. 'Don't know when they will be vacant.'

"(*b*) The manager and his wife, reside in one of the apartments. I went there with a First Lt. and ENS who wanted an apartment. There were two available, they took one. A week later, I called the manager and his wife answered the phone. I identified myself, she stated she remembered me. I asked what they had available in two bedroom apartments. She stated there were two (2) unfurnished and I could have my choice; (this was on Monday, 31 January 1966). I told her I would be down Wednesday to give a $50.00 deposit on one of the apartments. She said fine, she would hold one for me. The next day, I heard from the First Lt. telling me not to send a deposit as the manager stated * * *. 'We have nothing available.' I called the manager the following morning and asked him the reason for the sudden change. He simply stated * * *. 'Fella, we don't have anything nor do I know when anything will be available.' 'Fella' Nice address.

(*c*) I was riding with a First Lt. and we made a wrong turn. I saw a sign "House for Rent." I called the mentioned number, and spoke to the realtor. He stated the house was for rent. I made an appointment to see the house that afternoon. The First Lt. drove me to the house. We got out of the car and approached the realtor. There was a smile on his face as he looked at the First

Lt. When I spoke and introduced myself, the smile left. He showed us the house and told me he would "call me tomorrow." The call never came. I called his office for the next four (4) days. His secretary answered each time, and when I introduced myself * * * "He is not in, I'll have him call you." The call never came.

(*d*) I made an appointment with a man of a realty company as a last effort to get housing (buy). Upon meeting me in person, he asked * * * "Are you a Syrian?" If you are, O.K., if not, we cannot rent to non-white skin people! He stated also * * * "The real estate men are not allowed to rent or sell to non-white skin people in this block of homes." FHA Financing even!

(*e*) And so it went with several other realty companies and a private house for sale, "Nothing available."

CASE NO. 30

Twelve commissioned officers of one of the Military Departments forwarded a memorandum to the Secretary of Defense via the chain of command and the Civilian Secretary of their Department in reference to racial discrimination, and recommendations concerning the subject. Their comments on discrimination in housing are relevant. They said:

We would all readily agree that this (housing) has been our greatest problem area. All of us are married, most have children, and we were all subjected to overt racial discrimination as we sought to find decent public housing for our families. In some cases, civilian advertisers who indicated to housing authorities that they would rent or sell without regards to race refused to accommodate us. We often saw white non-rated men move into facilities which were "unavailable" to us. In many cases we were separated from our families for long periods as we watched persons reporting to the area after us acquire accommodations and rejoin their families. Often persons have recommended "nice colored" locations usually served by "nice colored" schools which offer our children substandard education. Fortunately and unfortunately most of us have been given priority on the base housing list due to our "handicap." Whereas we realize that this was necessary, in fact we usually requested it; we take no pride in being given "special consideration." We simply want to be able to find decent housing just as easily (or with as much difficulty) as anyone else. When a door is slammed in our faces because we are Black, we feel that the full stature and determination of (the Military Departments) should back us up. * * * It appears that something more than a half promise from a local official is needed. Often it is said that our situation is understandable and everyone sympathizes with us but very little can be done. * * *

We suggest that the full economic and diplomatic weight of the government be brought to bear in areas where this problem is proven to be prevalent. (That would include most of the country.) This has been suggested and in fact ordered in the past but the situation remains basically unchanged. We feel that if certain accommodations are not open to all military personnel, no military personnel should be allowed to acquire those accommodations. With regards to housing we are desperately in need of assistance and support.

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The Power of Congress To Prohibit Racial Discrimination in the Rental, Sale, Use, and Occupancy of Private Housing

(By Vincent A. Doyle, legislative attorney, American Law Division, June 2, 1966, Washington, D.C.)

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FRONTISPIECE

"It is the policy of the United States to prevent, and the right of every person to be protected against, discrimination on account of race, color, religion, or national origin in the purchase, rental, lease, financing, use and occupancy of housing throughtout the nation." H.R. 14765, S. 3296, Title IV, Section 401.

"Title IV applies to all housing and prohibits discrimination on account of race, color, religion or national origion by property owners, tract developers, real estate brokers, lending institutions and all others engaged in the sale, rental or financing of housing.

"It also prohibits coercion or intimidation intended to interfere with the right of a person to obtain housing without discrimination—for example, the coercion of a mob attempting to prevent a Negro family from moving into a neighborhood.

"And it prohibits retaliatory action by real estate boards or associations against real estate agents who refused to discriminate against Negroes or other persons of minority groups.

"Title IV provides a judicial remedy. An individual aggrieved by a discriminatory housing practice would be enabled to bring an action in either a Federal district court or a state or local court for injunctive relief and for any damages he may have sustained. In the court's discretion, he could also be awarded up to $500 exemplary damages.

"The title empowers the Attorney General to initiate suits in Federal courts to eliminate a 'pattern or practice' of discrimination, and to intervene in private suits brought in Federal courts.

"Title IV is based primarily on the Commerce Clause of the Constitution and on the Fourteenth Amendment. I have no doubts whatsoever as to its constitutionality." (Italic added.)

(Statement by Attorney General Katzenbach before Subcommittee No. 5, House Committee on the Judiciary in support of H.R. 14765, May 4, 1966.)

THE POWER OF CONGRESS TO PROHIBIT RACIAL DISCRIMINATION IN THE RENTAL, SALE, USE AND OCCUPANCY OF PRIVATE HOUSING

Title IV of the Administration's proposed Civil Rights Act of 1966 would prohibit discrimination on account of race, religion or national origin in the sale or rental of every house and every apartment or room in every house in the United States. The Administration's spokesmen have no doubt that constitutional bases for its proposal are to be found in the Fourteenth Amendment and the Commerce Clause. There are others, however, who have pronounced doubts about the efficacy of the one or the other of these constitutional provisions as a basis for federal legislation restricting rights which have heretofore been considered so personal and transactions which have been considered so local that no power of Congress could reach them.

Those who doubt that the Fourteenth Amendment is an adequate basis for such legislation point out that in 1883 the Court held unconstitutional some provisions in the Civil Rights Act of 1875 because they purported to prohibit privately-owned inns, places of amusement and carriers from refusing service on account of race. The Fourteenth Amendment prohibited acts of discrimination under color of State law but not private acts of discrimination. *Civil Rights Cases*, 109 U.S. 3 (1883). Administration spokesmen point out that there have been hints in recent cases that the 1883 decision will be overruled and that Congress, under Section 5 of the Fourteenth Amendment, will be held to have the power to protect Fourteenth Amendment rights against any acts which interfere with them whether or not there is any color of State participation in them. E.g. *United States* v. *Guest*, 383 U.S.— (decided March 28, 1966), concurring opinion of Mr. Justice Clark and opinion, concurring in part and dissenting in part, of Mr. Justice Brennan.

Those who doubt that the Commerce Clause is an adequate basis for such legislation point out that, even in the decisions which interpret the commerce power very broadly, the Court has recognized the existence of transactions so local that they have no substantial effect upon interstate commerce and therefore cannot be reached by Congress. They argue that the selection by a home owner of the person to whom he will sell it and more especially the rental by a home owner of an apartment or room in the house he lives in are such transactions. Among the cases to which the Administration would point in refutation of this argument are *Wickard* v. *Filburn*, 317 U.S. 111 (1945), which held that Congress could penalize a man for growing more wheat than the law allowed even though it was to be consumed on his own farm rather than sold, and *Katzenbach* v.

McClung, 379 U.S. 294 (1964), which held that Congress could prohibit a local barbecue stand from refusing service on account of race because some of the products it sold had moved in commerce.

The first part of this paper will deal with some of the cases most relevant to a determination of the adequacy of the Fourteenth Amendment as a basis for Title IV. The second part will deal with the scope of the power of Congress under the Commerce Clause.

The ultimate resolution of the constitutional issues raised by Title IV must of course await action by the Supreme Court. The Congress, however, has an obligation to make its own initial determination. Indeed, when Congress, in its deliberations, explores the constitutional issues thoroughly, when it sets forth in the record the facts which occasion the enactment of a law, its determination that a measure is constitutional is given great weight by the Court in its subsequent deliberations. It is hoped that this paper will have served its purpose if it describes the constitutional issues raised by Title IV as well as the principles enumerated by the Court in its earlier opinions and on which it might rely in resolving them.

THE POWER OF CONGRESS UNDER THE FOURTEENTH AMENDMENT [1]

From 1883, when it decided the *Civil Rights Cases*, 109 U.S. 3 (1883), through March 28, 1966, when it decided *United States* v. *Price*, 383 U.S. 786, and *United States* v. *Guest*, 383 U.S. 745, the Supreme Court has consistently held that the Fourteenth Amendment protects the individual against state action, not against wrongs done by individuals. As it stated in *Shelly* v. *Kraemer*, 334 U.S. 1, 13 (1948):

"* * * the action inhibited by the First Section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

Most recently, in *United States* v. *Guest*, *supra* (decided March 28, 1966, slip opinion, p. 9), the Court said:

"It is a commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority. The Equal Protection Clause 'does not * * * add anything to the rights which one citizen has under the Constitution against another.'" *United States* v. *Cruikshank*, 92 U.S. 542, 554–555. As Mr. Justice Douglas more recently put it, "The Fourteenth Amendment protects the individual against *state action*, not against wrongs done by *individuals*." *United States* v. *Williams*, 341 U.S. 70, 92 (dissenting opinion). This has been the view of the Court from the beginning. *United States* v. *Cruikshank*, *supra*; *United States* v. *Harris*, 106 U.S. 629; *Civil Rights Cases*, 109 U.S. 3; *Hodges* v. *United States*, 203 U.S. 1; *United States* v. *Powell*, 212 U.S. 564. It remains the Court's view today. See e.g. *Evans* v. *Newton*, —— U.S. ——; *United States* v. *Price*, 383 U.S. 786.

In the *Civil Rights Cases*, *supra*, the Court did more than hold that the Fourteenth Amendment itself did not reach an individual's acts of discrimination; it held that Congress, in the exercise of its power to enforce the Fourteenth Amendment, could not reach an individual's acts of discrimination. It held unconstitutional Sections 1 and 2 of the Civil Rights Act of 1875 (c. 114 §§ 1 & 2, 18 Stat. 335, 336) which guaranteed all persons the right to equal enjoyment of the accommodations and privileges of inns, public conveyances on land and water, theaters and other places of public amusement without regard to race or color, and punished violations of those rights. Although this case has not been overruled, that aspect of it which would deny to Congress the power to punish individuals for interfering with rights guaranteed by the Fourteenth Amendment may well be overruled as soon as the Court is presented with a case in which such a holding would be appropriate. Before discussing the separate opinions in *United States* v. *Guest*, *supra*, in which a "majority of the Court express the view * * * that § 5 [of the Fourteenth Amendment] empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amend-

[1] Sections 1 and 5 of Amendment XIV provide as follows:

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

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy" (*United States* v. *Guest, supra,* opinion of Mr. Justice Brennan, joined by the Chief Justice and Mr. Justice Douglas, concurring in part and dissenting in part, slip opinion, pp. 8–9), and their possible effect upon the constitutionality of Title IV, it would be well to consider the cases in which the Court has dealt with discrimination in housing.

The City of Louisville had an ordinance which prohibited Negroes from occupying residences in any block of houses predominantly occupied by white persons and which prohibited white persons from occupying residences in any block predominantly occupied by Negroes. In *Buchanan* v. *Warley,* 245 U.S. 60 (1917) the Court considered a suit for specific performance brought by a white house-owner who had contracted to sell his house to a Negro. The Negro, though willing to purchase the house, conditioned the sale upon his being permitted to occupy the house. The Court reveiwed the provisions of the Fourteenth Amendment and the statutes enacted to enforce it, then asked:

"In the light of these constitutional and statutory provisions, can a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence?" *Id.* at 78.

The Court answered that question in the negative and in holding the ordinance invalid it stated:

"The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person." *Id.* at 81.

It went on to say:

"It is urged that this proposed segregation will promote public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created and protected by the Federal Constitution. *Id* at 81.

"We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law." *Id.* at 82.

Although the Court's holding was based upon the ordinance's violation of the due process clause by interfering with the white owner's right to sell, it should be pointed out that it also recognized the Negro's right to be free from the discriminatory operation of such ordinances, stating:

"The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without without state legislation discriminating against him solely because of color." *Id* at 79.

When "homogeneous" neighborhoods could not longer be maintained by municipal ordinances, there was a widespread resort to restrictive covenants. Real estate developers and groups of neighboring householders caused to be included in their property deeds prohibitions on sale to or occupancy by Negroes and, depending upon their particular prejudices, by Jews, Catholics, Orientals, Mexicans, or Arabs, as well. The users of such covenants were given aid and comfort by the Supreme Court when it held that the covenants themselves did not violate the Fifth, Thirteenth or Fourteenth Amendments. *Corrigan* v. *Buckley,* 271 U.S. 323 (1926). The Fifth and Fourteenth Amendments are directed at acts of the Federal and State Governments, respectively and not at acts of individuals; the Thirteenth Amendment, though directed at acts of individuals as well as governments, prohibits slavery and involuntary servitude but does not protect individual rights of Negroes in other matters. *Id.* at 330.

The issue of judicial enforcement of racially restrictive covenants, left undecided in *Corrigan, supra,* was reached in *Shelley* v. *Kraemer,* 334 U.S. 1 (1948). Covenants restricting occupancy to members of the Caucasian race had been enforced by State court orders which enjoined Negro purchasers from continuing to occupy the properties. The Supreme Court held that judicial enforcement of racially restrictive covenants was state action prohibited by the Fourteenth Amendment. In an opinion to which there was no dissent, though three Justices did not participate, Mr. Chief Justice Vinson noted, however, that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful" and stated:

"We conclude therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth

Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated." *Id.* at 13.

On the same day, the Court considered arguments that enforcement of such covenants by courts in the District of Columbia violated the due process clause of the Fifth Amendment. In *Hurd* v. *Hodge*, 334 U.S. 24 (1948), the Court found it unnecessary to decide that constitutional question, holding instead that enforcement by District of Columbia courts violated a statute derived from § 1 of the Civil Rights Act of 1866. That statute provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." [Now found at 42 U.S.C. § 1982 (1964)]

Of that statute, the Court said:

"We may start with the proposition that the statute does not invalidate private restrictive agreements so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms. The action toward which the provisions of the statute under consideration is directed is governmental action." *Id.* at 31.

The Court also stated, however, that, even in the absence of the statute, the District of Columbia courts could not have enforced such restrictive covenants because it would have been contrary to the public policy of the United States to permit them "to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the equal protection of the laws." *Id.* at 35. It should be emphasized that in both of these cases third parties sought the aid of the courts to defeat the rights of a willing seller and a willing purchaser.

In *Shelly* and *Hodge* the Court had held that restrictive covenants could not be enforced by injunction. It was in *Barrows* v. *Jackson*, 346 U.S. 249 (1953), that the Court held that judicial enforcement of such covenants by assessment of damages was prohibited. But again in *Barrows*, the Court cited with approval the language of *Shelley* indicating that racially restrictive covenants were not prohibited by the Fourteenth Amendment. *Id.* at 253. Here again, a third party had sought the aid of the Court to penalize a seller because he was willing to sell his property to a willing Negro purchaser.

In 1954, the Court had an opportunity to explore another aspect of the restrictive covenant question: Does the Fourteenth Amendment prohibit a state court from permitting a racially restrictive covenant to be raised as a defense in an action for money damages? At first, an evenly divided Court affirmed, *per curiam*, an Iowa decision that it did not. *Rice* v. *Sioux City Memorial Park Cemetery*, 348 U.S. 880 (1954). It would be rather difficult to find a case more highly charged with emotional factors. Sgt. John Rice, who was 11/16 Winnebago Indian, had been killed on active duty in Korea. His widow, who was white, had purchased a plot and made arrangements for burial at a private cemetery. While the graveside service was being held, the cemetery managers noticed that most of the mourners were American Indians. They inquired of the funeral director whether Sgt. Rice had been an Indian and upon learning that he had, removed the body from the gravesite and informed Mrs. Rice that they could not bury her husband because he was not a Caucasian. In Mrs. Rice's suit for damages, the Iowa court permitted the cemetery to interpose its contract with Mrs. Rice, as a defense, refusing to hold that the restriction of burial privileges only to Caucasians was invalid even though it was unenforceable.

After it had affirmed the Iowa Court's decision, the Supreme Court granted a petition for rehearing when its attention was called to an Iowa statute, enacted since the commencement of the suit, which prohibited cemeteries, other than those operated by churches or established fraternal organizations, from refusing burial solely because of the race or color of the decedent. *Rice* v. *Sioux City Cemetery*, 349 U.S. 70 (1955). Delivering the opinion of the Court, Mr. Justice Frankfurter, after reviewing the facts, stated:

"The basis for [Mrs. Rice's] resort to this Court was primarily the Fourteenth Amendment, through the Due Process and Equal Protection Clauses. Only if a State deprives any person or denies him enforcement of a right guaranteed by the Fourteenth Amendment can its protection be invoked. Such a claim involves the threshold problem whether, in the circumstances of this case, what Iowa, through its courts, did amounted to "state action". This is a complicated problem which for long has divided opinion in this Court. [Citations omitted.]

Were this hurdle cleared, the ultimate substantive question, whether in the circumstances of this case the action complained of was condemned by the Fourteenth Amendment, would in turn present no easy constitutional problem.

"The case was argued here and the stark fact is that the Court was evenly divided." 348 U.S. 880. *Id.* at 72–3.

Thereafter, the opinion discussed the Iowa statute prohibiting racial discrimination by cemeteries, and in the light of it, vacated its earlier affirmance of the Iowa court's decision, and dismissed its original writ of certiorari as having been improvidently granted. *Id.* at 75–80.

There stands the matter of racially restrictive covenants. They are not enforceable but they are not void. Though the Court was evenly divided in *Rice*, an additional vote to reverse the Iowa court would not have had the necessary results of invalidating such covenants, or even of subjecting all such covenantors to damage suits. The Court could have adopted with respect to cemeteries the approach it adopted in *Marsh* v. *Alabama*, 326 U.S. 501 (1946) with respect to discrimination by a privately owned company town:

"The more an owner, for his own advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Id.* at 506.

Such an approach would be more consistent with earlier, as well as more recent, decisions with respect to Fourteenth Amendment violations than to hold that the right to purchase or occupy property without discrimination on account of race is so secured by that Amendment that the individual home owner cannot with imputy refuse to sell or rent his home or any part of it on such a ground.

The more recent decisions, though they do not deal with residences, do deal with privately owned facilities or private acts of one kind or another. The rationale the Court has used to find in them violations of the Fourteenth Amendment is to find in them links with the State which convert them from individual action to "state action". Thus, in *Terry* v. *Adams*, 345 U.S. 461 (1953), the Court prohibited the Jaybird Party in Texas, a private club, from excluding Negroes because the function it performed was an integral part of the election process even though not formally recognized by State law. The function the club performed was so much a public one that its private act of discrimination constituted "state action" prohibited by the Fourteenth Amendment.

The Court found another kind of link with the State in the discriminatory act of a private restaurant operator in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). This case involved refusal of service to a Negro by a private restaurant operator on premises leased from an agency of the State of Delaware. The restaurant was located in a building constructed with public funds and used for a public purpose, that is, a municipal parking facility. The restaurant was one of several leased areas in the facility which the Court found to be an "indispensable part of the State's plan to operate its project as a self sustaining unit." *Id.* at 723–24. The opinion by Mr. Justice Clark very carefully pointed out that the Court's conclusions in this case could not be considered "universal truths on the basis of which every state leasing agreement is to be tested." *Id.* at 725. In defining the limits of its inquiry, the Court stated:

"* * * What we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with as certainly as though they were binding covenants written into the agreement itself." *Id.* at 726.

The "sit-in" cases offered the Court several opportunities to broaden the thrust of the Fourteenth Amendment. In those cases, Negroes had been arrested for trespass or disorderly conduct for remaining at white-only lunch counters after the owners had refused to serve them because of their race and then asked them to leave. Some had thought the Court would extend the principle of *Shelley* and *Barrows* by finding the arrests and convictions to be state action in support of private discriminatory acts and therefore violative of the Fourteenth Amendment. Others thought the Court might extend the principle of *Marsh* v. *Alabama* and find that the restaurant owner, because he opened up his property, for his own advantage, for use by the public in general, had circumscribed his right to discriminate among his patrons on account of race. The Court did neither of these things in any of the cases, though in each of them it found some link between the acts of the proprietors and the government to warrant striking down the convictions as violative of the Fourteenth Amendment.

In *Peterson* v. *Greenville*, 373 U.S. 244 (1963), the link was found in a city ordinance requiring separation of the races in restaurants. In *Lombard* v. *Louisiana*, 373 U.S. 267 (1963), there was neither a State statute nor a city ordinance

requiring separation of the races. In reversing convictions for violation of a trespass statute, the Court did not hold the statute invalid or even inapplicable to enforce refusals of service because of race, but simply unenforceable in these particular cases because there had been statements by the Mayor and the Superintendent of Police to the effect that the City of New Orleans would not permit Negroes to seek desegregated service in restaurants. The statements of these officials linked the discrimination to the State. An earlier sit-in case arising in Louisiana had been disposed of on the ground that evidence that the defendants sat peacefully in a place where custom decreed they could not sit was not sufficient to convict them of the crime of disturbing the peace as defined in the Louisiana statutes. *Garner* v. *Louisiana*, 368 U.S. 157 (1961).

Perhaps the most remarkable thing about these sit-in cases is not what the Court did but what it did not do. It did not hold that restaurant owners were not free to refuse service on account of race. In *Peterson* the Court said:

It cannot be disputed that under our decisions "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it." [citations omitted] 373 U.S. 244, 247 (1963).

And in his concurring opinion, Mr. Justice Harlan stated:

"The ultimate substantive question is whether there has been "State action of a particular character (*Civil Rights Cases*, *supra* (109 U.S. at 11))—whether the character of the State's involvement in an arbitrary discrimination is such that it should be held *responsible* for the discrimination.

"This limitation on the scope of the prohibitions of the Fourteenth Amendment serves several vital functions in our system. Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: liberty and equality. Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden, in the name of equality, if the strictures of the Amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority." *Id.* at 249–50.

In the *Lombard* case, *supra*, in which the link with the State was found in the statements of the Mayor and Chief of Police, Mr. Justice Douglas, though he joined in the Court's opinion, wrote a separate concurring opinion in which he stated his view that even in the absence of any exhortations by governmental officers the convictions could not stand. He would have extended the rule of *Marsh* v. *Alabama*, *supra*, and held that the Fourteenth Amendment prohibited discrimination in all privately owned public restaurants just as *Marsh* prohibited discrimination in a privately owned company town. He drew a careful distinction, however, between a restaurant business and a home:

"If this were an intrusion of a man's home or yard or farm or garden, the property owner could seek and obtain the aid of the State against the intruder. For the Bill of Rights, as applied to the States through the Due Process Clause of the Fourteenth Amendment, casts its weight on the side of the privacy of homes. The Third Amendment with its ban on the quartering of soldiers in private homes radiates that philosophy. The Fourth Amendment, while concerned with official invasions of privacy through searches and seizures, is eloquent testimony of the sanctity of private premises. For even when the police enter private precincts they must, with rare exceptions, come armed with a warrant issued by a magistrate. A private person has no standing to obtain even limited access. The principle that a man's home is his castle is basic to our system of jurisprudence." 373 U.S. 267, 274–75.

Remarkable also, is the fact that the Court in these sit-in cases did not apply the doctrine of *Shelley* v. *Kraemer*, *supra*, and find prohibited "state action" in the judicial enforcement of the trespass statutes when the reason for asking customers to leave was on account of race. Perhaps this is less remarkable if it be remembered that in *Shelley* the property owner was willing to sell, while in the sit-in cases the property owner was unwilling to serve.

The Court had a further opportunity to extend the principle of either *Shelley* or *Marsh* in *Bell* v. *Maryland*, 378 U.S. 226 (1964). Negro sit-in demonstrators were convicted of violating Maryland's criminal trespass law when they refused to leave a Baltimore restaurant after being asked to do so solely because of their race. Neither the Mayor nor the Police Chief had made any statements; there

was no city ordinance; at the time of the arrest, conviction and affirmance by Maryland's highest court, there was no State statute requiring or encouraging racial discrimination by restaurant operators, unless the criminal trespass statute, itself, could be said to have that effect. However, after the State court had affirmed the convictions, the State legislature had enacted a law, applicable in Baltimore, making it unlawful for restaurants to refuse service because of race. What the Court did was vacate the Maryland judgments and remand the case to the Maryland court for reconsideration in the light of the subsequently enacted statute, with some rather strong suggestions that the convictions be reversed. It did not consider at all the question whether the trespass statute could have been enforced against these defendants had there been no subsequent anti-discrimination law.

There were five Justices, however, who did consider that question. Mr. Justice Douglas and Mr. Justice Goldberg, in two separate concurring opinions, would have held in effect that the Fourteenth Amendment imposes an obligation upon the States to prohibit racial discrimination in restaurants and other places of public accommodation. Mr. Justice Goldberg, in his opinion, was careful to draw a distinction between the protection afforded a man's private and his public choices, between civil rights and social rights:

"* * * Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.

"Indeed, the constitutional protection extended to privacy and private association assures against the imposition of social equality. As noted before, the Congress that enacted the Fourteenth Amendment was particularly conscious that the 'civil' rights of man should be distinguished from his 'social' rights."

He went on to say:

"This is not to suggest that Congress lacks authority under § 5 of the Fourteenth Amendment, or under the Commerce Clause, Art. I, § 8, to implement the rights protected by § 1 of the Fourteenth Amendment. In the give-and-take of the legislative process, Congress can fashion a law drawing the guide-lines necessary and appropriate to facilitate practical administration and to distinguish between genuinely public and private accommodations." *Id.* at 317.

Mr. Justice Black, who was joined by Mr. Justice Harlan and Mr. Justice White, would have held in effect that the Fourteenth Amendment did not prohibit the State from enforcing its trespass statute under these circumstances:

"The Amendment does not forbid a State to prosecute for crimes committed against a person or his property, however prejudiced or narrow the victim's views may be. Nor can whatever prejudice and bigotry the victim of a crime may have be automatically attributed to the State that prosecutes. Such a doctrine would not only be based on a fiction; it would also severely handicap a State's efforts to maintain a peaceful and orderly society * * *. The worst citizen no less than the best is entitled to equal protection of the laws of his State and of his nation. None of our past cases justifies reading the Fourteenth Amendment in a way that might well penalize citizens who are law-abiding enough to call upon the law and its officers for protection instead of using their own physical strength or dangerous weapons to preserve their rights." *Id.* at 327–28.

It should be noted, however, that even this opinion was prefaced by the observation that "This case does not involve the constitutionality of any existing or proposed state or federal legislation requiring restaurant owners to serve people without regard to color." *Id.* at 318. It might be well to add that by the date the opinion was handed down, June 22, 1964, the House of Representatives and the Senate had passed differing versions of the Civil Rights Act of 1964 which prohibited racial discrimination in several kinds of public accommodation.

This then was the state of the law before the Court handed down its opinions in *United States* v. *Price*, *supra*, and *United States* v. *Guest*, *supra*. While continuing to acknowledge that the Fourteenth Amendment did not of itself reach acts of private racial discrimination, the concept of prohibited "state action" was broadened to prohibit such acts because of their link with the State as in *Burton* v. *Wilmington Parking Authority*, *supra*, or, while not prohibiting the acts themselves, to prohbit enforcement of them by specific performance or recovery of damages as in *Shelley* and *Barrows* with respect to restrictive covenants. The Court had not, and has not yet, held that a State cannot enforce a restaurant owner's right to refuse service on grounds of race through its trespass statutes, though the enactment of Title II of the Civil Rights Act of 1964 has all but removed that issue from the Court's ken. It has not yet held that the Fourteenth Amendment in any way

limits an owner's right to refuse to sell or lease a home or apartment on racial grounds.

None of these 20th Century cases, however, had held anything with respect to the power of Congress under Section 5 of the Fourteenth Amendment to prohibit private acts of discrimination which were not prohibited by the Fourteenth Amendment itself. It was the *Civil Rights Cases*, 109 U.S. 3, decided in 1883, which had held invalid an attempt by Congress to prohibit such acts insofar as they involved discrimination in inns, carriers and theaters. Because the rationale of this opinion so shaped the subsequent thinking of the Congress and the Court, it is important to examine, at some length, what was said about the Fourteenth Amendment and the power of Congress to enforce it:

"It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action, of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous.*" *Id.* at 11 [italic added].

"Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of private right between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that because the denial by a State to any persons, of the equal protection of the laws, is prohibited by the amendment, therefore Congress may establish laws for their equal protection. *In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the State may commit or take, and which, by the amendment, they are prohibited from committing or taking.*" *Id.* at 13–14 [italic added].

Although the majority opinions in *United States* v. *Price*, 383 U.S. 786, and *United States* v. *Guest*, 383 U.S. 745, contain no new departures with respect to the meaning of Section 1 of the Fourteenth Amendment or the extent of the power of Congress under Section 5 to enforce it, the concurring opinion in *Guest* of Mr. Justice Clark joined by Mr. Justice Black and Mr. Justice Fortas, as well as the opinion of Mr. Justice Brennan, joined by the Chief Justice and Mr. Justice Douglas, concurring in part and dissenting in part, must be combed rather carefully for portents of changes to come. The principal holding in *Price* was that a prosecution would lie under 18 U.S.C. § 241 for a violation of the Fourteenth Amendment's guaranty of due process. The case, which arose out of the 1964 murders of three civil rights workers in Philadelphia, Mississippi, presented "an issue of construction, not of constitutional power." (*Id.* slip opinion, at 1.) It had been thought that § 241 protected only rights which are conferred by or flow from the Federal Government but not Fourteenth Amendment rights because the section reached individuals not acting under color of law and there could be no violations of Fourteenth Amendment rights except under color of law. *Price* did not hold that § 241 reached violations of Fourteenth Amendment due process by individuals who were not acting under color of law. It did not hold that under its power to enforce the Fourteenth Amendment Congress could punish violations of due process by individuals who were not acting under color of law. The indictment the Court considered alleged "that the defendants acted 'under color of law' and that the conspiracy included action by the State through its law enforcement officers to punish the alleged victims without due process of law in violation of the Fourteenth Amendment's direct admonition to the States." (*Id.* slip opinion at 11.) The Court's conclusion was "that § 241 must be read as it is written—to reach conspiracies 'to injure * * * any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United

States * * * ;' that this language includes rights or privileges protected by the Fourteenth Amendment; *that whatever the ultimate coverage of the section may be, it extends to conspiracies otherwise within the scope of the section, participated in by officials alone or in collaboration with private persons; and that the indictment * * * properly charges such a conspiracy in violation of § 241.*" (*Id.* slip opinion at 10–11; underlining added.) As an appendix to its opinion the Court printed the remarks of Senator Pool of North Carolina who introduced the provisions of what is now §241 as an amendment to the Enforcement Act of 1870. Although the Court stated that the Senator's remarks were included only to show that he intended § 241 to cover Fourteenth Amendment rights, the Court went on to say:

"He acknowledged that the States as such were beyond the reach of the punitive process, and that the legislation must therefore operate upon individuals. He made it clear that 'It matters not whether these individuals be officers or whether they are acting on their own responsibility.' We find no evidence whatever that § 241 should not cover violations of Fourteenth Amendment rights, or that it should not include state action or actions by state officials." *Id.* slip opinion at 17.

United States v. *Guest, supra,* grew out of an alleged conspiracy of terror against Negro citizens around Athens, Georgia, cluminating in the killing of Col. Lemuel Penn, a Negro educator from the District of Columbia, as he was driving through Georgia on his way back to the District. An indictment charging a conspiracy in violation of 18 U.S.C. § 241 was set forth in five numbered paragraphs. None of the individuals charged was in any way connected with the State nor was any alleged to have acted "under color of law". The first numbered paragraph which alleged a conspiracy to injure Negro citizens in their right to equal enjoyment of the accommodations of theaters, restaurants and other places of public accommodation, was framed in language drawn from Section 201(a) of the Civil Rights Act of 1964 (42 U.S.C. § 2000a(a) (1964 ed.)) though that statute was not cited. The District Court dismissed the indictment as to that paragraph because it failed to include an allegation that the defendants were motivated by race which it thought to be essential in describing an offense under that section of the Civil Rights Act of 1964. The Supreme Court held that it had no jurisdiction to consider a direct appeal from a judgment which rests on the deficiencies of an indictment as a pleading.

The second numbered paragraph charged that the conspiracy infringed:

"2. The right to equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia, owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof;".

The indictment also alleged that it was the purpose of the conspiracy to achieve its objects, that is, interference with the rights set forth in the five numbered paragraphs by the following means:

"(1) By shooting Negroes;
"(2) By beating Negroes;
"(3) By killing Negroes;
"(4) By damaging and destroying property of Negroes;
"(5) By pursuing Negroes in automobiles and threatening them with guns;
"(6) By making telephone calls to Negroes to threaten their lives, property, and persons, and by making such threats in person;
"(7) By going in disguise on the highway and on the premises of other persons;
"(8) *By causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts;* and
"(9) By burning crosses at night in public view." (Italic added.)

The District Court had two things to say about the second paragraph of the indictment: (1) it described rights protected by the Equal Protection Clause of the Fourteenth Amendment and § 241 does not purport to protect any Fourteenth Amendment rights, and (2) if § 241 purported to protect Fourteenth Amendment rights, it would be void for vagueness. The Supreme Court accepted the lower court's conclusion that this part of the indictment described rights protected by the Equal Protection Clause of the Fourteenth Amendment but rejected both its conclusions that § 241 did not purport to protect Fourteenth Amendment rights and that if it did it would be void for vagueness.

For its own conclusion that § 241 protected Fourteenth Amendment rights, the Supreme Court relied on *Price, supra.* It pointed out that although *Price* had held that § 241 embraced offenses against the Due Process Clause of the Fourteenth Amendment, there is no reason to suppose that if it embraces due process it does not embrace equal protection. For its conclusion that thus inter-

preted § 241 was not void for vagueness, it relied upon *Screws* v. *United States*, 325 U.S. 91 (1945), pointing out that since the essence of the offense described by § 241 is conspiracy it requires a specific intent to interfere with the federal rights involved.

But, unlike the indictment in Price, this indictment named no individuals alleged to be acting under color of law, and as the Court stated:

"It is a commonplace that rights under the Equal Protection Clause itself arise only where there has been an involvement of the State or of one acting under the color of its authority. The Equal Protection Clause 'does not * * * add anything to the rights which one citizen has under the Constitution against another.' *United States* v. *Cruikshank*, 92 U.S. 542, 554–555. As Mr. Justice Douglas more recently put it, 'The Fourteenth Amendment protects the individual against *state action*, not against wrongs done by *individuals*.' *United States* v. *Williams*, 341 U.S. 70, 92 (dissenting opinion). This has been the view of the Court from the beginning. *United States* v. *Cruikshank*, *supra*; *United States* v. *Harris*, 106 U.S. 629; *Civil Rights Cases*, 109 U.S. 3; *Hodges* v. *United States*, 203 U.S. 1; *United States* v. *Powell*, 212 U.S. 564. It remains the Court's view today. See, e.g. *Evans* v. *Newton*, — U.S. —; *United States* v. *Prive*, 383 U.S. 786. *Id.* slip opinion at 9."

Since the Fourteenth Amendment of itself does not protect an individual against wrongs done by individuals and since this indictment named only individuals without alleging that they were acting under color of law, the Court might have had to affirm the dismissal unless it was prepared to find that § 241 was intended to reach equal protection offenses by individuals who were not acting under color of law and further that Congress had the power to reach such offenses. It did not so find. After stating that "the Equal Protection Clause speaks to the State or those acting under the color of its authority", it went on to say that:

"In this connection, we emphasize that § 241 by its clear language incorporates no more than the Equal Protection Clause itself; the statute does not purport to give substantive, as opposed to remedial, implementation to any rights secured by that Clause. Since we therefore deal here only with the bare terms of the Equal Protection Clause itself, nothing said in this opinion goes to the question of what kinds of other and broader legislation Congress might constitutionally enact under § 5 of the Fourteenth Amendment to implement that Clause or any other provision of the Amendment." *Id.* slip opinion at 8–9.

What the Court did instead was find in the indictment an allegation of State involvement linking the acts of the individuals to the State. It found such an allegation in the charge that the objects of the conspiracy were to be achieved, among other ways, "by causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts". The Court conceded that "the allegation of the extent of official involvement in the present case is not clear" and that the bill of particulars or the proofs, if the case went to trial, might disclose no state action prohibited by the Fourteenth Amendment. Nevertheless it held that the allegation was enough to prevent dismissal of the second paragraph of the indictment.

The opinion of the Court in *Guest* was delivered by Mr. Justice Stewart. In addition, there were three separate opinions, in which a total of seven Justices joined. In a concurring opinion, Mr. Justice Clark, who was joined by Mr. Justice Black and Mr. Justice Fortas, felt it necessary to say an additional word about the Court's disposition of the second paragraph of the indictment. Noting that the indictment with respect to the conspiracy to deny Negro citizens the right to equal utilization of State controlled public facilities was upheld because it alleged that the conspiracy was accomplished, in part, "by causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts", Mr. Justice Clark said:

"The Court reasons that this allegation of the indictment might well cover the active connivance by agents of the State in the making of these false reports or in carrying on other conduct amounting to official discrimination. By so construing the indictment, it finds the language sufficient to cover a denial of rights protected by the Equal Protection Clause. The Court thus removes from the case any necessity for a 'determination of the threshold level that State action must attain in order to create rights under the Equal Protection Clause.' A study of the language in the indictment clearly shows that the Court's construction is not a capricious one, and I therefore agree with that construction as well as the conclusion that follows." *Id.* concurring opinion of Mr. Justice Clark, slip opinion at 1–2.

Noting that this interpretation of the indictment avoided any question of the power of Congress "to punish private conspiracies that interfere with Fourteenth

Amendment rights, such as the right to utilize public facilities". Mr. Justice Clark went on to say that *"there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without State action—that interfere with Fourteenth Amendment rights."* *Id.* at 2 (*italic* added).

Mr. Justice Harlan, in his separate opinion, concurred with the Court's disposition of the second paragraph of the indictment without any additional comment upon it, although he made the following comment upon the concurring opinion in which Mr. Justice Black and Mr. Justice Fortas joined Mr. Justice Clark:

"The action of the three Justices who join the Court's opinion in nonetheless cursorily pronouncing themselves on the far-reaching constitutional questions deliberately not reached [in disposing of paragraph 2 of the indictment] seems to me, to say the very least, extraordinary." *Id.*, opinion of Mr. Justice Harlan, concurring in part and dissenting in part, slip opinion at 1.

Mr. Justice Brennan, with whom the Chief Justice and Mr. Justice Douglas joined, concurred in part and dissented in part. He could not agree with the Court's construction of §241, stating:

"I am of the opinion that a conspiracy to interfere with the right to equal utilization of state facilities described in the second numbered paragraph of the indictment is a conspiracy to interfere with a 'right * * * secured * * * by the Constitution' within the meaning of §241—without regard to whether state officers participated in the alleged conspiracy. I believe that §241 reaches such a private conspiracy, not because the Fourteenth Amendment of its own force prohibits such a conspiracy, but because §241, as an exercise of congressional power under § 5 of that Amendment, prohibits *all* conspiracies to interfere with the exercise of a 'right * * * secured * * * by the Constitution' and because the right to equal utilization of state facilities is a 'right * * * secured * * * by the Constitution' within the meaning of that phrase as used in §241. *Id.*, opinion of Mr. Justice Brennan, concurring in part and dissenting in part, slip opinion at 4.

He went on to say:

"For me, the right to use state facilities without discrimination on the basis of race is, within the meaning of §241, a right created by, arising under and dependent upon the Fourteenth Amendment and hence is a right 'secured' by that Amendment. * * * The Fourteenth Amendment commands the State to provide the members of all races with equal access to the public facilities it owns or manages, and the right of a citizen to use those facilities without discrimination on the basis of race is a basic corollary of this command. Cf. *Brewer* v. *Hoxie School District No. 46*, 238 F. 2d 91 (C.A. 8th Cir. 1956). Whatever may [be] the status of the right to equal utilization of *privately owned facilities*, see generally *Bell* v. *Maryland*, 378 U.S. 226, it must be emphasized that we are here concerned with the right to equal utilization of *public facilities owned or operated by or on behalf of the State.* To deny the existence of this right or its constitutional stature is to deny the history of the last decade, or to ignore the role of federal power, predicated on the Fourteenth Amendment, in obtaining nondiscriminatory access to such facilities." *Id.* at 7.

It is perhaps the following statements from the opinion of Mr. Justice Brennan, however, which must be weighed most carefully in considering the availability of the Fourteenth Amendment as a basis for Congress to prohibit racial discrimination in private housing:

"A majority of the members of the Court express the view today that § 5 empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy." *Id.* at 8–9.

"I acknowledge that some of the decisions of this Court, most notably an aspect of the *Civil Rights Cases*, 109 U.S. 3, 11, have declared that Congress' power under § 5 is confined to the adoption of 'appropriate legislation for correcting the effects of . . . prohibited State laws, and State acts, and thus to render them effectually null, void, and innocuous.' I do not accept—and a majority of the Court today rejects—this interpretation of § 5. It reduces the legislative power to enforce the provisions of the Amendment to that of the judiciary; and it attributes a far too limited objective to the Amendment's sponsors." *Id.* at 9–10.

And the following, of which the italic sentence was quoted by the Attorney General in his testimony before Subcommittee No. 5 of the House Committee on the Judiciary, 1966:

"Viewed in its proper perspective, § 5 appears as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens. No one would deny that Congress could

enact legislation directing state officials to provide Negroes with equal access to state schools, parks and other facilities owned or operated by the State. Nor could it be denied that Congress has the power to punish state officers who, in excess of their authority and in violation of state law, conspire to threaten, harass and murder Negroes for attempting to use these facilities. And I can find no principle of federalism nor work of the Constitution that denies Congress power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals—neither state officers nor acting in concert with state officers—who engage in the same brutal conduct for the same misguided purpose." *Id.* at 11.

Though there were other aspects to *Guest*, most notably a holding that an allegation of a conspiracy to infringe upon the right of Negro citizens to travel freely to and from a State and to use highway facilities and other instrumentalities of interstate commerce within a State charges an offense under 18 U.S.C. § 241, it is the comments on the power of Congress to enforce Fourteenth Amendment rights and the considerations of what rights are secured by the Fourteenth Amendment which are most relevant to a discussion of the adequacy of the Fourteenth Amendment as a basis for Title IV of the Administration's bill.

Conclusions on the fourteenth Amendment as a basis for a federal fair housing law

The Supreme Court has not yet held that where a State or political subdivision exercises no element of coercion upon a home owner to discriminate, the home owner is not free to discriminate without violating the provisions of the Fourteenth Amendment. The Court has not even been able to muster a majority to hold that the Fourteenth Amendment prohibits the owner of a restaurant or other place of public accommodation from discriminating among customers on account of race, which is a much easier conclusion to support. See *Bell* v. *Maryland*, 378 U.S. 226 (1964).

To conclude that the Fourteenth Amendment, itself, does not prohibit the home owner from discriminating on account of race is not necessarily to conclude that, in the exercise of its power to enforce the Fourteenth Amendment, the Congress could not prohibit such discrimination. However, the Court has held, in the *Civil Rights Cases*, *supra*, that the Fourteenth Amendment does not empower the Congress to prohibit owners of inns, carriers and places of amusement from discriminating on account of race. Although Congress, in 1964, enacted new legislation prohibiting owners of certain inns, restaurants, and places of amusement affecting commerce from discriminating on account of race, basing the Act in part on its power to enforce the Fourteenth Amendment, the Court has held the legislation constitutional on the basis of the Commerce Power. Two of the Justices would have upheld the law on the basis of § 5 of the Fourteenth Amendment. *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964).

To the extent that the *Civil Rights Cases*, *supra*, would confine the power of the Congress under § 5 of the Fourteenth Amendment to the adoption of "appropriate legislation for correcting the effects of * * * prohibited State laws, and State acts, and thus to render them effectually null, void, and innocuous", three Justices have indicated a readiness to overrule it. *United States* v. *Guest*, *supra*, opinion of Mr. Justice Brennan, joined by the Chief Justice and Mr. Justice Douglas, concurring in part and dissenting in part, slip opinion at 9. To the extent that the *Civil Rights Cases* would be inconsistent with the conclusion that "the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights" three additional Justices have indicated a willingness to overrule it without specifically naming it. *Id.* concurring opinion of Mr. Justice Clark, joined by Mr. Justice Black and Mr. Justice Fortas, slip opinion at 2. Can these three and three be put together to add up to a majority that would hold Title IV to be a valid exercise of congressional power under § 5? Not necessarily.

Let us assume for a moment, what would seem to be, or at least about to become, a completely valid assumption, that § 5 does empower Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights. Is the right of a prospective home-buyer not to have his purchase offer refused on account of his race such a right? It has never been held to be and the combined opinions in *Guest*, *supra*, would not seem to compel such a conclusion. *Guest* dealt with the question whether there was a Fourteenth Amendment right to utilize public facilities, that is, facilities owned or managed by State or local government. Mr. Justice Brennan, in his separate opinion in *Guest*, would consider the Fourteenth Amendment to command to the

State to provide all races with equal access to the public facilities it owns or manages and would infer that "the right of a citizen to use these facilities without discrimination on the basis of race is a basic corollary of this command." 383 U.S.—separate opinion of Mr. Justice Brennan, slip opinion at 7. He went on to emphasize that *Guest* was concerned only with the right to equal utilization of *public facilities owned or operated by or on behalf of the State*, not with *privately owned facilities*.

In measuring the breadth of Federal power to be inferred from the dictum, in *Guest*, that section 5 of the Fourteenth Amendment "empowers the Congress to enact laws punishing all conspiracies—with or without State action—that interfere with Fourteenth Amendment rights", it should be noted that the acts with which the Court was there concerned, were conspiracies carried out in part "by shooting Negroes; by beating Negroes; by killing Negroes." They were acts clearly criminal and the only question was whether the United States had made them punishable or had the power to make them punishable by Federal law. To the extent that Title IV prohibits the intimidation or coercion of a mob attempting to prevent a Negro family from moving into a neighborhood, the dicta in *Guest* would seem to indicate that the Fourteenth Amendment is a sound constitutional basis for Title IV. The acts reached are clearly criminal and the only question is whether the Congress has a concurrent jurisdiction with the States to punish them. To the extent that Title IV forbids an individual home owner to refuse to sell his home, or rent an apartment or room in it because of the race of a prospective purchaser, there would seem to be a leap beyond the dicta in *Guest*. Nothing in the Fourteenth Amendment makes the discriminatory act of the home owner in refusing to sell or rent on account of race unlawful. Nothing in the Fourteenth Amendment, as it has been construed until now, requires the State to make such discriminatory act unlawful. What Fourteenth Amendment right would Congress be enforcing?

It is true that Congress in the exercise of its power to enforce the Fourteenth Amendment, as well as the Fifteenth Amendment or any other constitutional prohibition, may prohibit acts which the Amendment or constitutional provision itself does not prohibit. Thus, although the Eighteenth Amendment prohibited only the sale of intoxicating liquors for beverage purposes, Congress, under the necessary and proper clause, as well as the power to enforce the Amendment by appropriate legislation, was held to have the power to prohibit the sale of intoxicating malt liquors for medicinal purposes. *Everard's Breweries* v. *Day*, 265 U.S. 545 (1924). As the Court said, in that case:

"The ultimate and controlling question then is, whether in prohibiting physicians from prescribing intoxicating malt liquors for medicinal purposes as a means of enforcing the prohibition of traffic in such liquors for beverage purposes, Congress has exceeded the constitutional limits upon its legislative discretion.

"*In enacting this legislation Congress has affirmed its validity. That determination must be given great weight; this Court by an unbroken line of decisions having "steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt."* *Adkins* v. *Children's Hospital*, 261 U.S. 525, 544." *Id.* at 560 (italic added).

The Attorney General argues persuasively that Federal prohibition of discrimination in the sale or rental of housing is an appropriate exercise of the power of Congress to enforce the Fourteenth Amendment;

"Segregated housing is deeply corrosive both for the individual and for his community. It isolates racial minorities from the public life of the community. It means inferior public education, recreation, health, sanitation and transportation services and facilities. It means denial of access to training and employment and business opportunities. It prevents the inhabitants of ghettos from liberating themselves, and it prevents the federal, state and local governments and private groups and institutions from fulfilling their responsibility and desire to help this liberation." *Statement of Attorney General Katzenbach, supra*, at p. 16.

"I have pointed out already how segregated living is both a source and an enforcer of involuntary second-class citizenship. To the extent that this blight on our democracy impedes states and localities from carrying out their obligations under the Fourteenth Amendment to promote equal access and equal opportunity in all public aspects of community life, the Fourteenth Amendment authorizes removal of this impediment." *Id.* at p. 20.

It may be Mr. Justice Harlan, in his concurring opinion in *Peterson* v. *Greenville*, 373 U.S. 244, 250 (1963), who has given the most eloquent answer to this argument:

"Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: liberty and equality. Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be arbitrary, capricious, even unjust in his personal relations are things entitled to a large measure of protection from governmental interference. This liberty would be overridden, in the name of equality, if the strictures of the [Fourteenth] Amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should more properly be left to the more precise instruments of local authority."

There is not much doubt that Title IV lays a heavy Federal hand on areas of rights which had heretofore been considered private. It admits no exceptions to its restrictions. The private religious home which rents accommodations to the elderly of its faith would no longer be able to exclude members of other faiths. The Swedish Old Folks Home would be required to open its doors to the elderly of other ancestries. The owner of a home who has fallen upon hard times and decides to rent a few rooms to tide him over would have his choice of tenants circumscribed.

If the Federal power can reach this far into individual private lives, is there anything to prevent it from reaching into private associations—private clubs, private schools, private organizations of any kind?

It might not be illogical to conclude that Title IV, insofar as it is directed at "institutionalized" discrimination in housing—that is, discrimination by people and organizations in the housing business: bankers, brokers, developers, owners of large apartment buildings—is a valid exercise of the power of Congress to enforce the Fourteenth Amendment. Insofar as it circumscribes the freedom of the individual home owner to sell or refuse to sell his home or the freedom of the freedom of the individual home owner to choose the tenant for the apartment or room in the house in which he lives, however, it may not be illogical to assume that Congress has failed to "fashion a law drawing the guidelines necessary and appropriate to facilitate practical administration and to distinguish between genuinely public and private accommodations" which Mr. Justice Goldberg was certain it could do to enforce section 1 of the Fourteenth Amendment. *Bell* v. *Maryland*, *supra*, 317 (concurring opinion).

There would seem to be little doubt, now, that the constitutionality of legislation to enforce the Fourteenth Amendment will be measured by the test formulated by Mr. Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 420 (1819):

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

The question to be answered by the Court, should Title IV be enacted, would seem to be "Is this law prohibited? By the First Amendment prohibition against denials of the right to freedom of association? By the Fifth Amendment prohibition against deprivations of property without due process of law or against the taking of property for public use without just compensation? By the Ninth Amendment's recognition of the existence of rights retained by the people, with the classical expression of one such right perhaps being that 'a man's home is his castle'? Or by the Tenth Amendment, which is more than a State's rights amendment, reserving as it does those 'powers not delegated to the United States by the Constitution, nor prohibited by it to the States * * * to the States respectively or *to the people*' " (italic added). The Court's answer to that question is less likely to be "Yes" the less the law attempts to limit the home-owner's choice of a tenant and the more it concentrates on the regulation of discrimination in the housing business. But, as we shall see, it may be easier for Congress to reach the housing business under the Commerce Clause than under the Fourteenth Amendment.

THE POWER OF CONGRESS UNDER THE COMMERCE CLAUSE [2]

Perhaps more than any other one factor it was the failure of the Articles of Confederation to provide for regulation of commerce by the Federal Government which led to the adoption of the Constitution. Because of the almost universal agreement that Congress should have the power to regulate commerce, there is very little difference between the first draft of the clause submitted by Charles

[2] Article I, Section 8, clause 3 of the Constitution gives Congress the power "To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes".

Pinckney and the one ultimately adopted. "The Legislature of the United States shall have the power * * * To regulate commerce with all nations, and among the several States;" was the language first placed before the convention. 2 *Madison Papers* (1841) 739-40. "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;" was the language finally incorporated in Article I, Section 8, clause 3 of the Constitution. The debates at the convention throw very little light on the intentions of the Framers with respect to this power. It is in the opinions of the Supreme Court that its meaning is explored.

In the first case the Supreme Court considered under the commerce clause, Mr. Chief Justice Marshall made the following comment upon the scope of the power:

"We are now arrived at the inquiry—What is this power? It is the power to regulate; that is to prescribe the rule by which commerce is to be governed. This power, like the others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. *Gibbons* v. *Odgen*, 9 Wheat. 1, 196-197 (1824).

Until relatively recently, not since the days of Marshall has the Court given the commerce clause a scope as broad as Marshall thought it was intended to have. The narrowness crept into the Court's opinions during the Taney era, and, oddly enough, it was based upon the existence of a "completely internal commerce of a state" outside the reach of the commerce clause which Marshall had recognized in *Gibbons* v. *Ogden*, *id.*, at 195.

Characteristic of the approach of the Court during the years when the spirit of Taney was dominant was a dictum in *Kidd* v. *Pearson*, 128 U.S. 1, 21 (1888), to the effect that if the power to regulate commerce were held to include any power to regulate manufacturing, "The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market?" This *Kidd* dictum influenced many subsequent holdings which took entire industries out of the scope of the commerce power and restricted Congress in a fashion which Marshall would have thought defeated the results desired by the architects of the Constitution.

During the last three or four decades there has been a noticeable return to the Marshall view, perhaps, even as some think, a leap beyond it. It may be a statement from *United States* v. *Darby*, 312 U.S. 100, 118 (1939), which contains the best definition of the commerce power as it relates to the current proposals with respect to prohibiting discrimination in housing:

"The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate the interstate commerce."

Although the commerce power has been said to be plenary, this is not to say that every attempted exercise of it is constitutional. On several occasions, from the Taney era through the early days of the New Deal, the Supreme Court has held that Congress overreached its power. In *United States* v. *Dewitt*, 9 Wall. 41 (1869) the Court held unconstitutional an internal revenue provision making it a misdemeanor to mix for sale naphtha and illuminating oils, or to sell such mixture, on the ground that it was a police regulation, relating exclusively to the internal trade of the States and not supported by the commerce power. The *Trade Mark Cases*, 100 U.S. 82 (1879), held unconstitutional the original trademark act and certain penal provisions enforcing it because its language was intended to embrace commerce between citizens of the same State. More recently the original Child Labor Law was held unconstitutional in *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918). In *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), the commerce power was said not to reach the sale of unfit chickens by a

wholesale poultry dealer who purchased chickens shipped in from other States for resale to retail dealers. While acknowledging the power of Congress to regulate intrastate matters "affecting" commerce as well as commerce itself, the Court thought that it could not reach acts having only an indirect effect:

"But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government." *Id.* at 546.

In *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), the Court held that the Bituminous Coal Conservation Act of 1935, which attempted among other things to regulate the wages and hours of coal miners, was not sustained by the commerce clause.

If, like the holding in the *Civil Rights Cases*, the holdings in these and other cases setting limits upon the power of Congress under the commerce clause had come down to us unimpaired or almost unimpaired, the commerce clause might be no better a basis for legislation prohibiting private acts of discrimination in housing than the Fourteenth Amendment would be. Unlike the *Civil Rights Cases*, however, many of these cases have been expressly overruled as was *Hammer* v. *Dagenhart* in *United States* v. *Darby*, 312 U.S. 100, 115–117; or limited, as was *Carter* v. *Carter Coal Co.* in the same case, *id.* at 123; or distinguished and explained so frequently that they might as well have been overruled, which is the fate the *Schechter* case has met in *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937), upholding provisions of the National Labor Relations Act of 1935 and *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 100 (1942), upholding the power of Congress to regulate *intrastate* commerce in milk affecting *interstate* commerce in that commodity.

In *United States* v. *Darby*, *supra*, the Court said:

"The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate the interstate commerce." 312 U.S. 100, 118 (1939).

Then, after noting that, in the absence of Congressional legislation on the subject, state laws which do not obstruct commerce are not forbidden even though they affect interstate commerce, the Court continued:

"But it does not follow that Congress cannot by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce. See *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U.S. 453, 466. A recent example is the National Labor Relations Act for the regulation of employer and employee relations in industries in which strikes, induced by unfair labor practices named in the Act, tend to disturb or obstruct interstate commerce. See *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1, 38, 40; *National Labor Relations Board* v. *Fainblatt*, 306 U.S. 601, 604, and cases cited. But long before the adoption of the National Labor Relations Act this court had many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the Congressional power over it." *Id.* at 119–20.

In footnote the Court listed some of the activities it had held Congress could regulate:

"It may prohibit wholly intrastate activities which, if permitted, would result in restraint of interstate commerce. *Coronado Coal Co.* v. *United Metal Workers*, 268 U.S. 295, 310; *Local 167* v. *United States*, 291 U.S. 293, 297. It may regulate the activities of a local grain exchange shown to have an injurious effect on interstate commerce. *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1. It may regulate intrastate rates of interstate carriers where the effect of the rates is to burden interstate commerce. *Houston, E. & W. Texas Ry. Co.* v. *United States*, 234 U.S. 342; *Railroad Commission of Wisconsin* v. *Chicago, B & Q Ry. Co.*, 257 U.S. 563; *United States* v. *Louisiana*, 290 U.S. 70, 74; *Florida* v. *United States*, 292 U.S. 1. It may compel the adoption of safety appliances on rolling stock moving intrastate because of the relation to and effect of such appliances upon interstate traffic moving over the same railroad. *Southern Ry. Co.* v. *United States*, 222 U.S. 20. It may prescribe maximum hours for employees engaged in intrastate activity connected with the movement of any train, such as train dispatchers and teleg-

raphers. *Baltimore & Ohio Ry. Co.* v. *Interstate Commerce Comm'n*, 221, U.S. 612, 619." *Id.* at 120.

The Court then described the functions of Congress and the Court with respect to determining the scope and validity of such legislation:

"In such legislation Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act, or whether they come within the statutory definition of the prohibited Act, as in the Federal Trade Commission Act. And sometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power. See *United States* v. *Ferger, supra; Virginian Ry. Co.* v. *Federation*, 300 U.S. 515, 553.

"Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government. See *Jacob Ruppert, Inc.* v. *Caffey*, 251 U.S. 264; *Everard's Breweries* v. *Day*, 265 U.S. 545, 560; *Westfall* v. *United States*, 274 U.S. 256, 259. As to state power under the Fourteenth Amendment, compare *Otis* v. *Parker*, 187 U.S. 606, 609; *St. John* v. *New York*, 201 U.S. 633; *Purity Extract & Tonic Co.* v. *Lynch*, 226 U.S. 192, 201–202. A familiar like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled. *Shreveport Case*, 234 U.S. 342; *Railroad Commission of Wisconsin* v. *Chicago, B & O Ry. Co.*, 257 U.S. 563; *United States* v. *New York Central Ry. Co.*, *supra*, 464; *Currin* v. *Wallace*, 306 U.S. 1; *Mulford* v. *Smith*, *supra*. Similarly Congress may require inspection and preventive treatment of all cattle in a disease infected area in order to prevent shipment in interstate commerce of some of the cattle without the treatment. *Thornton* v. *United States*, 271 U.S. 414. It may prohibit the removal, at destination, of labels required by the Pure Food & Drugs Act to be affixed to articles transported in interstate commerce. *McDermott* v. *Wisconsin*, 228 U.S. 115. And we have recently held that Congress in the exercise of its power to require inspection and grading of tobacco shipped in interstate commerce may compel such inspection and grading of all tobacco sold at local auction rooms from which a substantial part but not all of the tobacco sold is shipped in interstate commerce. *Currin* v. *Wallace*, *supra*, 11, and see to the like effect *United States* v. *Rock Royal Co-op.*, *supra*, 568, note 37." *Id.*, at 120–122.

Under the Fair Labor Standards Act held constitutional in the *Darby* case, Congress regulated the wages of any employee engaged in any process or occupation "necessary to the production" of goods for interstate commerce in any State. Among the employees held covered under the Act were warehouse and central office employees of an interstate retail chain store system; the employees of an electrical contractor, locally engaged in commercial and industrial wiring and dealing in electrical motors and generators for commercial and industrial use, whose customers are engaged in the production of goods for interstate commerce; employees of a window-cleaning company, the greater part of whose work is done on the windows of industrial plants of producers of goods in interstate commerce. Even publishers of a daily newspaper only about one-half of one percent of whose circulation is outside the State were held to be engaged in the production of goods for commerce. *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178 (1946). (It should be noted that, in the Fair Labor Standards Act, Congress did not intend to reach *every* activity which could be reached under its commerce power. For a longer list of occupations held to fall both within and without the scope of the Act, as well as citations to the cases, see note 78, pp. 189–91, *The Constitution of the United States of America, Analysis and Interpretation, 1964*, Senate Document No. 39, 89th Cong., 1st Sess.; pages 150–296 of that volume discuss the Supreme Court cases interpreting the commerce clause.)

The National Labor Relations Act has a broader scope than the Fair Labor Standards Act and enables the NLRB to reach activities "affecting commerce" as defined in § 2(7). (61 Stat. 138, 29 U.S.C. § 142(7)). In *Meat Cutters* v. *Fairlawn Meats*, 353 U.S. 20 (1957), the Court held the Act applicable to a retailer operating three meat markets in and around Akron, Ohio even though all of its sales were intrastate and only slightly more than $100,000 of its annual purchases of almost $900,000 came directly from outside Ohio, saying:

"We do not agree that respondent's interstate purchases were so negligible that its business cannot be said to affect interstate commerce within the meaning of § 2(7) of the National Labor Relations Act." *Id.* at 22.

In another comment upon the reach of § 2(7) the Court said, in *Polish Alliance* v. *Labor Board*, 322 U.S. 643, 638 (1944):

"Congress therefore left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress. Whether or no[t] practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far reaching in its harm to commerce."

It is perhaps the case of *Wickard* v. *Filburn*, 317 U.S. 111 (1942) which illustrates most dramatically the extent to which the commerce power can reach instrastate activities. Filburn harvested 239 more bushels of wheat than he was allowed to under an Agricultural Adjustment Act of 1938 allotment. This subjected him to penalties under the act which did not depend upon whether any part of his wheat, either within or without his quota, was sold or intended to be sold. Filburn contended that to penalize him for growing wheat on his own farm to be consumed on his own farm was beyond the reach of Congressional power since these are local activities and their effect on commerce is at most "indirect". The Court said that questions of the power of Congress were to be decided not by reference to any formula based on words like "direct" and "indirect" but rather upon "consideration of the actual effects of the activity in question upon interstate commerce", *id.* at 120. In holding that even as applied to wheat not intended for commerce but strictly for home consumption the Act was within the commerce power of Congress, the Court stated that the effect of the statute was "to restrict the amount of wheat which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id.* at 127–28. The Court also observed:

"This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices." *Id.* at 128–29.

The Supreme Court has also held that in the exercise of its commerce power Congress may prohibit racial discrimination. *Boynton* v. *Virginia*, 364 U.S. 454 (1960); *Heart of Atlanta Motel* v. *United States*, 279 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964).

In *Boynton* a Virginia Court had held that a Negro interstate bus passenger who refused to leave a white-only restaurant in the bus terminal after being denied service and ordered to leave was properly convicted of trespass under a Virginia statute. The Supreme Court held that under Section 216(d) of the Interstate Commerce Act (49 U.S.C. § 316(d)), which forbids any interstate common carrier by motor vehicle to subject any person to unjust discrimination, the Negro had a federal right to be served in the restaurant and Virginia could not convict him of trespass for remaining even after he had been ordered to leave. Though the restaurant was not operated by the carrier it was operated as a part of the carrier's terminal facilities and was therefore embraced within the prohibitions of the Act. The Court was careful to point out that it was not deciding that the Act required unsegregated service every time a bus stops at a roadside restaurant. On the other hand, the Court said nothing one way or the other about the power of Congress under the commerce clause to require unsegregated service every time an interstate bus stopped at a roadside restaurant.

Heart of Atlanta and *McClung* were decided after Congress had enacted Title II of the Civil Rights Act of 1964 which prohibited racial discrimination in hotels and motels providing lodging to transient guests and in restaurants and other

facilities selling food for consumption on the premises if they serve interstate travelers or a substantial portion of the food they sell has moved in commerce.

The plaintiff, Heart of Atlanta Motel, which had 216 transient rooms, sought an injunction against enforcement of the provisions of Title II claiming that it exceeded the power of Congress under the Commerce Clause, that by depriving it of its right to choose its customers Title II took its liberty and property without due process of law and without just compensation and that by requiring the motel to rent rooms against its will to Negroes Title II subjected it to involuntary servitude in violation of the Thirteenth Amendment. To the motel's objection that because its activities were local and therefore beyond the reach of the Commerce Clause, the Court said: [assuming that its operation be local] "[i]f it is interstate commerce which feels the pinch, it does not matter how local the operation which applies the squeeze." *United States* v. *Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464. 379 U.S. 241, 258 (1964).

To the due process and just compensation arguments, the Court replied:

"Nor does the Act deprive the appellant of liberty or property under the Fifth Amendment. The commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. If they are appellant has no "right" to select its guests as it sees fit, free from governmental regulation." *Id.* at 258–59.

The Court dismissed the other arguments of the plaintiff, as well, and, after holding Title II constitutional as applied to hotels, stated:

"It may be argued that Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination. But this is a matter of policy that rests entirely with the Congress not with the courts. How obstructions in commerce may be removed—what means are to be employed—is within the sound and exclusive discretion of the Congress. It is subject only to one caveat—that the means chosen by it must be reasonably adapted to the end permitted by the Constitution. We cannot say that its choice here was not so adpated." *Id.* at 261–62.

McClung's Barbecue had a seating capacity of 220, employed 36 persons, and during the year before Title II was enacted it purchased locally about $150,000 worth of food almost half of which was meat from a local supplier who had secured it from outside the State. As the Court did in *Heart of Atlanta*, in *McClung* it looked at some of the testimony at the congressional hearings on the Act linking racial discrimination to commerce, and conclude that Congress "had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce." 379 U.S. 294, 304 (1964). The Court continued:

"The power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere. The Civil Rights Act of 1964, as here applied, we find to be plainly appropriate in the resolution of what the Congress found to be a national commercial problem of the first magnitude. We find it in no violation of any express limitations of the Constitution and we therefore declare it valid." *Id.* at 305.

Conclusions on the Commerce Clause as a Basis for a Federal Fair Housing Law

From the cases thus far decided it is clear that, under its commerce power, the Congress can prohibit racial discrimination. It is also clear that under the commerce power, the Congress can regulate intrastate activities if they have a substantial effect upon commerce. The cases hold that the commerce power can reach retailers whose sales are wholly intrastate and only one-ninth of whose purchases are made out of state. *Meat Cutters* v. *Fairlawn Meats, supra.* The cases hold that Congress can reach a farmer who grows wheat on his own farm for his own consumption even though the amount he grows may be trivial. *Wickard* v. *Filburn, supra.*

Is there really any activity which can be considered so local that Congress cannot regulate it or is it true, as a cynic might suggest, that whenever money changes hands the transaction affects the GNP, therefore that's commerce and Congress can reach it? Are the limitations on the commerce power real or only theoretical? The question is one to which Mr. Chief Justice Marshall addressed himself in *Gibbons* v. *Ogden*, 9 Wheat. 1, 197 (1824):

"If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with

foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. *The wisdom and the discretion of Congress, their indentity with the people, and the influence which their constituents possess at elections, are in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people most often rely solely in all representative governments.*" (*Italics* added.)

As significant as the wisdom and discretion of Congress unquestionably are in imposing limits on the exercise of the commerce power, it is not too difficult to find some limits within the Constitution itself. We have seen from *Mabee* v. *White Plains Publishing Co., supra,* that even a daily newspaper, whose out-of-state circulation has only about one half of one percent of its sales, could be reached under the commerce power by way of the Fair Labor Standards Act. Suppose, however, that instead of trying to regulate the wages and hours of the newspaper's employees, Congress tried to regulate its editorial policy. Suppose, for instance, that there had been so much editorializing on automobile safety that people stopped buying automobiles which in turn caused plant shutdowns and threatened the entire economy of the nation. Suppose that Congress, after extensive hearings linking the economic depression to safety editorials, decided that the only way to relieve unemployment and get the nation back on its wheels was to prohibit editorials on automobile safety. Could this be a valid exercise of the commerce power?

In addition to the question whether the rental of a room or the sale of a house by its owner is a transaction so strictly local that the Congress cannot reach it under the commerce power, Title IV, as presently farmed, presents questions akin to that posed by an attempt to reach a newspaper's editorial policy under the commerce power. Does Title IV, by prohibiting a religious home from discriminating on account of race or religion in the disposition of its rooms, infringe upon the First Amendment right to free exercise of religion?

Does Title IV, by permitting a court to order a man to sell his home, on which he has invited bids, to a person whose bid was rejected on account of race, religion or national origin, interfere with any of the homeowner's constitutional liberties?

Does Title IV infringe on any constitutional liberty of a racial, religious or national group by prohibiting it from subdividing an island or other tract of land for homesites to be sold or leased only by approval of the group?

Does Title IV infringe any constitutional liberties of a man who rents a room or two in the house in which he lives by requiring him not to discriminate among prospective tenants on account of race, religion or national origin?

These are threshold questions very difficult to answer. When the Congress enacted an Equal Employment Opportunity Law in Title VII of the Civil Rights Act of 1964, it eliminated the need for raising similar questions with respect to constitutional liberties by carving out a series of exceptions: employers of less than 25 people were exempted; religious organizations were exempted with respect to employment of persons of a particular religion for work connected with religious activities; educational institutions were exempted with respect to employment connected with their educational activities; *bona fide* membership clubs were exempted. Similar threshold questions were avoided with respect to Title II, the public accommodations provisions, by carving out exceptions: private clubs and other establishments not in fact open to the public were not covered; proprietor-occupied establishments with not more than five rooms for hire were not covered.

Whatever determination the Congress makes with respect to these threshold questions will be entitled to great weight in the Court's deliberations. It is the Court, however, which will have the final word, since the Court is the ultimate arbiter of the meaning of the Constitution. Although the commerce power of the Congress may be plenary, it is the Court which will determine whether the activity reached is truly commerce as well as whether the method by which Congress has chosen to regulate it is prohibited by some other provision of the Constitution. Perhaps the fairest generalization which may be made is that the closer Congress comes to restricting the purely private prejudices of the individual home owner, the more likely will the Court be to find that the Congress has exceeded its power.

Senator ERVIN. Have you finished, Senator?

Senator HART. Yes.

Senator ERVIN. Don't you think there is quite a wide distinction between the Public Accommodations Act and the housing provisions of these proposed bills?

Senator HART. Yes, I think there is a distinction, Mr. Chairman, but with regard to the point of the constitutional foundation on which Federal action could reach the public accommodations and the private accommodations, I think that the support is as solid for the latter as for the former.

Senator ERVIN. But if you accord the commerce clause its plain meaning, it gives Congress the power to regulate the movement of persons, goods, and communications from one State to another, does it not?

Senator HART. It does.

Senator ERVIN. And the courts have elaborated on this to the extent of saying that the Congress can regulate intrastate activities insofar as the regulation of those intrastate activities is necessary or appropriate to the effective regulation of interstate commerce itself, that is to the movement of goods, persons, and communications from one State to another?

Senator HART. Correct.

Senator ERVIN. Now the Public Accommodations Act was upheld upon the theory that it dealt with interstate travelers, and upon the theory that it involved the sale of goods which had moved in interstate commerce, was it not?

Senator HART. It was.

Senator ERVIN. When a man buys a home, he is buying a place for a permanent residence and not lodging in interstate travel, isn't he?

Senator HART. That is correct.

Senator ERVIN. And there is exactly an opposite condition existing in the purchase of homes from that which exists where people are traveling in interstate commerce.

Senator HART. In the fuller sense; yes. Of course, there are those who travel in search of homes.

Senator ERVIN. Yes; but whenever they find the home, they end the travel as far as acquisition of the residence is concerned. Personally I have never yet seen any real estate moving in interstate commerce except when a hurricane threw some dust from one State to another. If this is valid under the interstate commerce clause, then every human activity is subject to regulation under the interstate commerce clause.

Senator HART. Any human activity where hundreds of millions of dollars of financing crosses State lines, it might be; yes. Any activity where commodities in the total sum of hundreds of millions of dollars cross State lines, yes.

Senator ERVIN. Is it your position, for example, that if I receive some dollars across a State line, any activity I may engage in thereby becomes subject to regulation as interstate commerce?

Senator HART. Not in and of itself, but when related to the entire picture that we are here discussing, as was, so I think, effectively outlined in the Attorney General's opening testimony to this subcommittee, we do feel that the commerce clause reaches.

Senator ERVIN. This would cover cases where no money at all passes through interstate commerce, wouldn't it?

Senator HART. That is correct.

Senator ERVIN. Now, on this housing proposition, is it not a fact that everywhere in the United States when this question has been voted on by the people, it has been rejected, without exception?

Senator HART. Knowing the care that the chairman applies to such research, if he says so, I am sure it is so, and I am not suggesting that that record is something that any of us can be proud of, even those who voted against open accommodation.

Senator ERVIN. Well, as a matter of fact, I don't ask the Senator to accept anything on my assurance, but doesn't the Senator know that in the city of Detroit there was a referendum on the question of so-called open occupancy, and that the people of Detroit rejected the proposal?

Senator HART. The chairman is correct, and I like to think that there have been some happy second thoughts. The leader of the drive on that referendum found his popularity such that he became a member of the Common Council of the City of Detroit. but happy second thoughts removed him last time.

Senator ERVIN. Yes, but so far as you know, the other 137,670 persons who voted against open occupancy in Detroit have not suffered any ill consequences.

Senator HART. In the sense that I described, the leader of the movement?

Senator ERVIN. Yes.

Senator HART. No, he was the only candidate.

Senator ERVIN. In the referendum, the proposition voted upon reads as follows:

> The purpose and substance of the proposed ordinance is as follows: To define certain rights of Detroit residents and owners of residential property to privacy and to the free use, enjoyment and disposition of residential property including the right of selection or rejection of any persons as tenants or purchasers, the free choice of real estate brokers and to require such brokers to follow the instructions of the owners, and to fix penalties for the violation of the provisions of the ordinance.

Wouldn't you infer from the vote in Detroit that the majority of the people participating in that referendum felt that open occupancy invaded the right of privacy as well as the freedom of persons to dispose of their property in such manner as they see fit?

Senator HART. Why don't I limit my answer to saying that the majority of those people voting in that election adopted the language of the referendum.

Senator ERVIN. Yes, and the language of the referendum was a very emphatic statement of the right of privacy, and the right of people to select their own tenants and to sell their property to whom they pleased, free from governmental interference on the part of the city council or the city of Detroit.

Senator HART. Again I would content myself with the statement of the proposition. I should add also, Mr. Chairman, the next chapter to that story. The State of Michigan adopted a new constitution, and there are two relevant sections.

The first is article I, section 2, equal protection under the law:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

Section 29——

Senator ERVIN. But that wouldn't cover this situation in my judgment.

Senator HART. No——

Senator ERVIN. Because no one has the civil right to compel somebody else to sell him his property or rent him his property.

Senator HART. The attorney general of Michigan and you are in disagreement. That is part of this next chapter.

Senator ERVIN. Yes, but I am in thorough disagreement with him because there is no book in the world that says any man has the civil right to compel somebody else to sell him any property.

Senator HART. I would assume he is in thorough disagreement with you.

Senator ERVIN. Yes.

Senator HART. This is article V, section 29:

> There is hereby established a civil rights commission which shall consist of eight persons, not more than four of whom shall be members of the same political party, who shall be appointed by the governor, by and with the advice and consent of the senate, for four-year terms not more than two of which shall expire in the same year. It shall be the duty of the commission in a manner which may be prescribed by law to investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution, and to secure the equal protection of such civil rights without such discrimination. * * *

It shall establish procedures. The commission is given the power to investigate instances of alleged discrimination against any person because of religion, race, color, or national origin, and so on.

Now, why is this the next and necessary second chapter in the story of that homeowners ordinance? This constitution also was adopted by, not alone the people of the city of Detroit, but the people of the State of Michigan, and under the civil rights commission, after it was constituted, sought the opinion of the attorney general as to their status.

The attorney general expressed the opinion that the action of the people in adopting this constitution had preempted the field. That the authority of the civil rights commission extended throughout the State; that the Detroit ordinance was in effect annulled. And on that basis, Federal funds then were released for certain hard-core center city urban renewal projects.

Now I should have, and with the leave of the chairman, would like to file the attorney general's opinions. I do not have them.

Senator ERVIN. Yes, they will be accepted and printed as part of the record.

(The document referred to follows:)

STATE OF MICHIGAN—FRANK J. KELLEY, ATTORNEY GENERAL

Civil Rights Commission: Powers of.

Legislature: Powers over Civil Rights Commission.

The Civil Rights Commission, established by Article V, Sec. 29 of the Revised Constitution, has plenary power in its sphere of authority to protect civil rights in the fields of employment, education, housing and public accommodations.

The Civil Rights Commission has authority to enforce civil rights to purchase, mortgage, lease or rent private housing.

The legislature is without authority to abrogate or limit the power of the Civil Rights Commission in the fields of employment, education, housing and public accommodations.

The Constitution empowers the legislature to make annual appropriations to finance the effective operation of the Civil Rights Commission. The legislature may in its discretion prescribe the mode and manner in which investigations are to be conducted by the Civil Rights Commission. Failure to enact such legislation is in no way a restriction upon the authority of the Commission.

In its rule-making power the Civil Rights Commission is not subject to Article IV, Sec. 37 of the Revised Constitution. The legislature is without power to set aside the rules of the Civil Rights Commission.

The Civil Rights Commission in promulgation of its rules is bound by the due process clause of both the state and federal constitutions.

JULY 22, 1963.

Opinion No. 4161.

Hon. WILLIAM G. MILLIKEN,
State Senator,
Traverse City, Mich.:

You have requested my opinion relative to the authority of the Civil Rights Commission created under the Revised Constitution. Specifically, your questions are:

"1. Does the Civil Rights Commission establish by Art. V, Section 29, of the new Constitution have the plenary power to secure the equal protection of civil rights in the fields of employment, education, housing and public accommodations?

"2. Does the authority of the Civil Rights Commission over housing extend to the enforcement of civil rights to purchase, mortgage, lease or rent private housing?

"3. Is the Legislature empowered to abrogate or limit in any way the authority of the Civil Rights Commission in the fields of employment, education, housing and public accommodations?

"4. Must the Civil Rights Commission await appropriate legislation before it may undertake the investigation of alleged discrimination against any person in the fields of employment, education, housing and public accommodations?

"5. Are the rules and regulations adopted by the Civil Rights Commission pursuant to Article V, Section 29, subject to legislative authority contained in Article IV, Section 37, or any other provision of law?"

In the Revised Constitution approved by the electorate on April 1, 1963, the people have established a Civil Rights Commission in Article V, Section 29 thereof.

Article V, Section 29 provides as follows:

"There is hereby established a civil rights commission which shall consist of eight persons, not more than four of whom shall be members of the same political party, who shall be appointed by the governor, by and with the advice and consent of the senate, for four-year terms not more than two of which shall expire in the same year. It shall be the duty of the commission in a manner which may be prescribed by law to investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution, and to secure the equal protection of such civil rights without such discrimination. The legislature shall provide an annual appropriation for the effective operation of the commission.

"The commission shall have power, in accordance with the provisions of this constitution and of general laws governing administrative agencies, to promulgate rules and regulations for its own procedures, to hold hearings, administer oaths, through court authorization to require the attendance of witnesses and the submission of records, to take testimony, and to issue appropriate orders. The commission shall have other powers provided by law to carry out its purposes. Nothing contained in this section shall be construed to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state.

"Appeals from final orders of the commission, including cease and desist orders and refusals to issue complaints, shall be tried de novo before the circuit court having jurisdiction provided by law."

The people have mandated in Article I, Section 2 of the Revised Constitution that:

"No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation."

In the Address to the People, the framers of the Revised Constitution made the following comment relative to Article I, Section 2 of the Constitution:

"This is a new section. If protects against discrimination because of religion, race, color or national origin in the enjoyment of civil and political rights and grants

equal protection of the laws to all persons. *The convention record notes that 'the principal, but not exclusive, areas of concern are equal opportunities in employment, education, housing and public accommodations.'*

"The legislature is directed to implement this section by appropriate legislation and the proposed constitution establishes a Civil Rights Commission in the Article on the Executive Branch." (Emphasis supplied)

Consideration must be given to Article I, Section 4 of the Revised Constitution, which states in pertinent part:

"* * * The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief."

Article VIII, Section 2 of the Revised Constitution provides in part as follows:

"* * * Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin."

The people, by self-executing provisions of the Revised Constitution, have established a constitutional body possessed of jurisdiction over the investigation of alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of civil rights guaranteed by law and by the Constitution. This entity is designed to secure the equal enjoyment of such civil rights without discrimination, to adopt rules and regulations for its own procedures, to hold hearings, to administer oaths, to require the attendance of witnesses and the submission of records through court authorization, to issue appropriate orders including cease and desist orders, and to have such other powers as shall be privided by law to carry out its purposes.

From a plain reading of Article V, section 29, it is clear that the people have conferred plenary power upon the Civil Rights Commission in its sphere of authority as a constitutional commission to investigate and to secure the enjoyment of civil rights without discrimination. *Plec* v. *Liquor Control Commission* (1948), 322 Mich 691.

The authority of the Civil Rights Commission is limited only by the Revised Constitution and the Constitution of the United States. *State* v. *Mountain States Telephone and Telegraph Company* (N.M. 1950), 224 P 2d 155.

The grant of power in the Constitution carries with it by implication the authority to do all things necessary and appropriate to accomplish the purpose intended by the people. Thus the Civil Rights Commission created by the people in the Constitution is not limited to the powers expressly granted, and the Commission may exercise all powers necessary and essential in the performance of its duties. *Board of Supervisors of Atala County* v. *Illinois Central Railroad Company* (Miss. 1939), 190 So. 241; *Gavey* v. *Trew* (*Ariz.* 1946), 170 P 2d 845.

The powers of the Commission should be liberally construed and every power explicitly granted or fairly implied from the language used which is necessary to enable the Commission to exercise the powers expressly granted should and must be accorded. *City of Portsmouth* v. *Virginia Railway and Power Company* (Va. 1925), 126 SE 362, 39 ALR 1510.

Thus there can be no question but that Article V, Section 29 of the Revised Constitution empowers the Civil Rights Commission to conduct investigations, hold hearings and issue final orders upon its own motion when the public interest demands.

It is equally clear that the Commission has been commanded by the people to serve the cause of elimination of discrimination in the fields of employment, education, housing and public accommodations because of religion, race, color or national origin and to advance equal opportunities therein through the fostering of educational programs, studies, and reports. This furthers both the public interest and the interest of the individual.

The legislature cannot decrease or abrogate the constitutional powers of the Civil Rights Commission. It may increase its authority and delegate additional powers to the Commission. *Oliver* v. *Oklahoma Alcoholic Beverage Control Board* (Okla. 1961), 359 P 2d 183.

There can be no question that the people have conferred authority not subject to legislative restraint on the Civil Rights Commission to investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of civil rights guaranteed by law and by the Michigan Constitution and to secure the equal protection of such civil rights without such discrimination. The provision is self-executing.

Since the authority of the Civil Rights Commission is limited only by the State Constitution and the Constitution of the United States, the legislature may not restrict the Commission in the exercise of such authority. Article V, Section 29, empowers the legislature, in its discretion, to prescribe the manner in which

investigations are to be conducted by the Commission. But this power in the legislature is circumscribed by the terms of the Constitution itself as set forth in the section. Where the people use the word "may" and the word "shall" in the same provision of the Constitution, the words should be given their ordinary and accepted meaning. *Smith* v. *School District No. 6, Fractional, Amber Township* (1928), 241 Mich. 366.

It must follow that within its sphere of authority the Civil Rights Commission is supreme in the exercise of the powers entrusted to it by the people.

The law appears to be well settled that the citizens of a community enjoy certain basic civil rights which are inherent and derived from citizenship in a particular body politic. In discussing civil rights, Corpus Juris Secundum expresses in Volume 14, page 1159, Section 1, the textbook view that:

"A civil right may be defined as one which appertains to a person by virtue of his citizenship in a state or community, a right accorded to every member of a distinct community or nation. * * *

"In its broadest sense the term 'civil rights' includes those rights which are the outgrowth of civilization, the existence and exercise of which necessarily follow from the rights that repose in the subjects of a country exercising self-government.

"The term 'civil rights' is also applied to certain rights secured to citizens by the Thirteenth and Fourteenth Amendments to the Constitution of the United States, or by various acts, state and federal."

In the field of employment, the public policy of the State has been spelled out by the Michigan Fair Employment Practices statute, being Act 251, PA 1955, as amended; CLS 1956, § 423.301; MSA 1960 Rev Vol § 17.458(1), which defined the civil right to equal opportunity in employment. In Section 1 of the Michigan Fair Employment Practices statute it is said:

"The opportunity to obtain employment without discrimination because of race, color, religion, national origin or ancestry is hereby recognized as and declared to be a civil right."

The new Constitution by establishing the Civil Rights Commission marks a further development of the same public policy.

In the field of public education, Michigan has long maintained a well-defined public policy that public education was to be afforded to all of its citizens without discrimination. This public policy was first enunciated by the Michigan Supreme Court in *People* v. *Board of Education of Detroit* (1869), 18 Mich 400, where the court ruled that resident children have an equal right to public education without exclusion because of religion, race or color.

The legislature has confirmed this public policy in section 355 of Act 269, PA 1955, being CLS 1956 § 340.355; MSA 1959 Rev Vol § 15.3355, in proscribing Michigan school districts from maintaining separate schools or departments for any person or persons on account of race or color.

Finally, public policy has been inscribed in Article VIII, Section 2 of the Revised Constitution, supra.

In addition to the above declaration of public policy at the state level, the United States Supreme Court, in the case of *Brown* v. *Board of Education of Topeka* (1953), 347 US 483, struck down racial discrimination practiced in state supported schools. In its historic decision the court declared:

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.* * *"

In the area of public and private housing, we have clear and decisive public policy in Michigan establishing a citizen's civil right to purchase, lease or rent both public and private housing. The Michigan Public Accommodations statute in Section 146 of Chapter XXI of Act 328, PA 1931, CLS 1956 § 750.146; MSA 1962 Rev Vol § 28.343, sets forth:

"All persons within the jurisdiction of this state shall be entitled to full and equal accommodations, advantages, facilities and privileges of inns, hotels, [motels,] *government housing* * * *." (Emphasis supplied)

In addition to this statute regulating government housing, the United States Supreme Court held in the cases of *McGhee* v. *Sipes*, which originated in Michigan, and *Shelley* v. *Kraemer* (1948), 334 U.S. 1, 11, that the enforcement by state courts of covenants restricting the use or occupancy of real property to persons of the Caucasian race constitutes state action and is in violation of the equal protection clause of the Fourteenth Amendment. The United States Supreme Court, in the *Shelley* case, stated:

"It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. Thus, § 1978 of the Revised Statutes, 8 USCA § 42, 2 FCA title 8, § 42, derived from § 1 of the Civil Rights Act of 1866 which was enacted by Congress while the Fourteenth Amendment was also under consideration, provides:

" 'All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.' "

Thus, it is clear that the Civil Rights Act of 1866 creates a civil right to inherit, purchase, lease, sell, hold and convey real and personal property. It is significant to note that the Civil Rights Act of 1866 draws no distinction between public and private housing. Consequently, one must conclude that Congress intended to create a civil right in the area of private housing as well as public housing. Moreover, the civil right to purchase, hold and convey both private housing and public housing necessarily embraces the right to mortgage both private and public housing, for mortgages are part and parcel of the right to convey and purchase property.

The civil rights afforded by the Civil Rights Act of 1866 were safeguarded by the promulgation and adoption of the Fourteenth Amendment to the Constitution of the United States, thus placing the provisions of the Civil Rights Act beyond the destructive reach of an ordinary majority of Congress forever, within the haven of a constitutional provision. Charles L. Palmer, "The Fourteenth Amendment: Some Reflections on Segregation in Schools," *American Bar Association Journal*, July 1963, Vol 49, page 645.

The Civil Rights Act of 1866 was re-enacted in Section 18 of the Act of May 31, 1870, subsequent to the adoption of the Fourteenth Amendment.

That the equal opportunity to housing, both public and private, is a civil right protected by the Michigan Constitution is supported by a reading of Article I, Section 2 of the Revised Constitution, Article V, Section 29 of the Revised Constitution, and the Address to the People in support of Article I, Section 2, as well as the Debates of the framers of the Revised Constitution approving the organic law for submission to the people of this State.

In the area of public accommodations, the public policy of the State of Michigan has been established since 1885 when the legislature established a civil right of all Michigan citizens pertaining to the use of all places of public accommodation. The Equal Accommodations Act, being Section 146 of Chapter XXI of Act 328, PA 1931, supra, provides:

"All persons within the jurisdiction of this state shall be entitled to full and equal accommodations, advantages, facilities and privileges of inns, hotels, (motels,) government housing, restaurants, eating houses, barber shops, billiard parlors, stores, public conveyances on land and water, theatres, motion picture houses, public educational institutions, in elevators, on escalators, in all methods of air transportation and all other places of public accommodation, amusement, and recreation, subject only to the conditions and limitations established by law and applicable alike to all citizens and to all citizens alike, with uniform prices."

The public policy of the State is declared by constitution, by statute and by judicial decision. *Groehn* v. *Corporation and Securities Commission* (1957), 350 Mich 250; *Skutt* v. *City of Grand Rapids* (1936), 275 Mich 258.

In addition to the foregoing review of civil rights created by the Revised Constitution, legislation and case law, it is appropriate for us to review the pertinent aspects of the deliberations of the framers of the new Michigan Constitution for the purpose of determining the scope of the authority of the new Civil Rights Commission as understood by the delegates to the Constitutional Convention. The law in Michigan is well settled that a court, in attempting to interpret the meaning of the language of a constitution, shall consider the proceedings of the Convention which approved the language and the official Address to the People upon the subject in question. *Kearney* v. *Board of State Auditors* (1915), 189 Mich. 666.

On March 29, 1962, the 110th day of the proceedings of the Convention, the Convention adopted an amendment sponsored by Delegates Austin, Barthwell, Binkowski, Nord, Norris, Young and Mrs. Daisy Elliott, which created a Civil Rights Commission and asserted that the Commission shall have jurisdiction

over the specific fields of employment, education, housing and public accommodations. That amendment stated in part:

"It shall be the duty of the Commission * * * to investigate violations of, and to secure the protection of the civil right to employment, education, housing, public accommodations, and to such other rights as provided for by law and the constitution." Uncorrected Journal of the Constitutional Convention, Part 2, page 840, March 29, 1962.

On April 5, 1962, the 115th day of the proceedings of the Convention, Delegates Van Dusen, J. B. Richards, John Hannah, Goebel, King, Martin and Bentley offered a substitute amendment which deleted explicitly the aforementioned four areas. Delegate Van Dusen said:

"Mentioning them again in this section would in our opinion be redundant. There is no intention to change, in any respect, the nature of the civil rights protected by this commission from the amendment as adopted by the committee of the whole, to the substitute."

Delegate Van Dusen continued:

"In the final paragraph, which spells out the powers of the commission, it has been made clear that the powers granted by the constitution are self executing as in the case of the Austin amendment. * * * No newlaw would be necessary. * * * There is nothing in the substitute which in any way vitiates the amendment adopted by the committee of the whole. It established a civil rights commission. It provides for the powers of that commission. It is self executing in both of those respects."

Delegate Binkowski, in addressing himself to the subject matter of the jurisdiction of the new Civil Rights Commission, remarked:

"For the record, I would like to defer to Mr. Van Dusen because I think that this point should be clarified in case we have a judicial review of this section so that it is clear if this Convention does not go on redord as adopting the Austin and Elliott amendment that certainly it is not to be construed that we do not want a civil rights commission operating in those enumerated areas."

Delegate Van Dusen, in answer, stated:

"Mr. President, I would answer Mr. Binkowski's question very clearly. I don't think that the substitute amendment intends any substantive difference in this area. I thought I made that reasonably clear in my opening remarks. The only reason for omitting the 4 enumerated areas of discrimination was that in view of the report of the committee on declaration of rights, suffrage and elections in connection with Committee Proposal 26, that committee made it very clear *that among the civil rights protected by the constitution and among the civil rights, therefore, to be within the area of concern of this commission, are the matters of equal opportunity in employment, education, housing and public accommodations.* If I may, in further response to Mr. Binkowski's question, I would like to just read very briefly from this report in which the committee on declaration of rights stated. (The following report is from Dr. Pollock's opening statement in support of Committee Proposal 26 at the first reading of that proposal):

" 'Several factors have impressed the committee with the advisability of incorporating an equal protection and civil rights section in the new constitution. Delegate John Hannah, who it will be observed is the chairman of the United States Commission on Civil Rights, gave impressive and moving testimony before the committee upon the wisdom and necessity of such a clause to protect Negroes and other minorities against discrimination in housing, employment, education, and the like.' " (Emphasis supplied)

Delegate Van Dusen (continuing):

"Later on in the same report they state that:

" 'The principal but not exclusive areas of concern are equal opportunities in employment, education, housing and public accommodations.' " Uncorrected Journal of the Constitutional Convention, 1961, Part 1, p. 354. See Also Address to the People, Article I, Section 2, supra.

Delegate Van Dusen (continuing):

"The only reason for the mention of the specific areas of discrimination from the substitute amendment now in consideration was that it would be redundant to mention them in the light of the action already taken with respect to committee Proposal number 26; and further it would be construed perhaps as a limitation upon the powers of the commission which was not intended by the sponsors of the Austin amendment or by the sponsors of the substitute now before the Convention."

After Delegate Van Dusen concluded, Delegate Pollock commented:

"Mr. President, I merely want to make this observation as the chairman of the committee on rights, suffrage and elections, that precisely the same point as Mr.

Van Dusen has pointed out, was thoroughly discussed in our committee. It was then thoroughly discussed on the floor of this Convention in connection with the minority report which Mr. Norris prepared and we agreed unanimously, a little bit later, that these words were not necessary; they were not good constitutional language, and it is nobody's intention to exclude these areas; * * *."

The "Norris" report referred to by Dr. Pollock is found in the Uncorrected Journal of the Constitutional Convention 1961, Part 1, pp. 360–62. The report subscribed to by Delegates Norris, Dade, Hatcher, Hodges and Buback recommended the following language for the equal protection clause:

"Each person in Michigan shall enjoy the equal protection of the law. No person shall, because of his race, color, religion, national origin or ancestry, be discriminated against in employment, housing, public accommodations, education, or in his enjoyment of all other of his civil rights, by the state or any political or civil subdivision thereof, or any firm, corporation, institution, labor organization or any other person."

It is readily apparent that it was the clear and unmistakable intention of the framers of the Constitution that the substitute amendment which was adopted, yeas 111, nays 10, granted authority to the Civil Rights Commission to protect and secure the equal opportunity in employment, education, housing and public accommodations. Nor can there be any question that the framers of the Revised Constitution intended that the Civil Rights Commission would implement the protection afforded by Article I, Section 2 of the Revised Constitution.

My reading of the Revised Constitution is supported by an examination of the Proceedings of the Convention after the substitute amendment to Article V, Section 29, was adopted on April 5, 1962, supra.

On the 129th day of the Proceedings of the Convention, April 26, 1962, Delegate Stevens offered an amendment to Article I, to add a new section 22 to read as follows:

"The right of the owner of real property to convey, grant, or devise said property shall be limited only by law."

The amendment was not adopted. See Uncorrected Journal of the Constitutional Convention 1961, Part 2, Page 1151.

Another unsuccessful effort to amend Article I of the Revised Constitution in a similar manner was made on May 7, 1962, the 133rd day of the Proceedings of the Constitutional Convention, through amendment offered by Delegates Stevens and Kuhn to add section 24 to Article I to read as follows:

"The right of the owner of real property to convey, grant, or devise said property shall be limited only by general law. The Legislature shall not delegate this power."

The amendment was not adopted. Uncorrected Journal of the Constitutional Convention 1961, Part 2, Page 1244.

It is most significant that the fruitless efforts to amend the Revised Constitution were made after provision for the Civil Rights Commission through Article V, Section 29 of the Revised Constitution had been approved by the delegates.

The intent of the framers is therefore clear that the Civil Rights Commission has plenary power to investigate and to secure equal opportunity in the field of housing.

Article V, Section 29 of the Revised Constitution is the supreme law of the State of Michigan after January 1, 1964. Because the people have conferred exclusive power upon the Civil Rights Commission to investigate and secure civil rights in the field of employment, education, housing and public accommodations, the Fair Employment Practices Commission, authorized by section 5 of Act 251, PA 1955, as amended, being CLS 1956 § 423.305; MSA 1960 Rev Vol § 17.458(5), shall be without authority to investigate and to hold hearings because of discrimination in employment practices in the State of Michigan after January 1, 1964, the effective date of the Revised Constitution.

It should be stressed that the authority of the Civil Rights Commission is plenary within the *sphere of its powers* as set forth in Article V, Section 29 of the Revised Constitution.

Because Article V, Section 29 of the Revised Constitution recognizes that the rights of any party to direct and immediate legal or equitable remedies in the courts of the state are not to be diminished, any persons aggrieved because of denial of any accommodations, privilege or facility afforded by Section 146 of Chapter XXI, Act 328, PA 1931, as amended, supra, could pursue legal remedies afforded by Section 147 of the act, and such other remedies as may be provided by law.

The Constitution expressly authorizes review of final orders of the Commission, including cease and desist orders and refusal to issue complaint to be tried *de novo* in the circuit court having jurisdiction as provided by law. In this regard consideration should be given to the decision of the Michigan Supreme Court in *Darling Company* v. *Water Resources Commission* (1955), 341 Mich 654, where the court, in construing a statute providing for an appeal from an administrative agency to the circuit court in chancery as a *"review de novo,"* held that the statute imposed a right and duty upon the court to pass judgment upon the decision in the order of the commission on the record of such proceedings before said Commission.

In the construction of constitutions, language used by the framers is presumed to be employed in the sense in which it has been judicially interpreted. See *People* v. *Powell* (1937), 280 Mich 699; *In re Chamberlain's Estate* (1941), 298 Mich 278; *Knapp* v. *Palmer* (1949), 324 Mich 694.

No. 1. Therefore, it is the opinion of the Attorney General that the new Civil Rights Commission, established by Article V, section 29 of the Revised Constitution, has plenary power within the sphere of its authority, to protect civil rights in the fields of employment, education, housing and public accommodations.

No. 2. No purpose would be served in restraining the authorities that have been advanced in support of the conclusion contained in answer to question No. 1. Suffice it to say that when the people conferred plenary power upon the Civil Rights Commission to protect civil rights in the field of housing, included within such grant is the enforcement of civil rights to purchase, mortgage, lease or rent private housing.

Therefore, the Civil Rights Commission has authority to enforce civil rights to purchase, mortgage, lease or rent private housing.

No. 3. Because the people have provided for the Civil Rights Commission in the Revised Constitution, the authority of the legislature over that constitutional body must be found in the Constitution.

I find no authority in the Constitution under which the legislature could abrogate or limit in any way the power of the Civil Rights Commission in the fields of employment, education, housing and public accommodations. It is equally clear that the legislature, in its discretion, *may* prescribe the mode or manner in which investigations are to be conducted by the Civil Rights Commission. Failure of the legislature to enact legislation relative to the manner or exercise of this power is in no way a restriction upon the authority of the Commission.

Nor may the legislature abrogate or limit the authority of the Civil Rights Commission through the admitted constitutional power of the legislature to appropriate moneys for operation of the Commission. Although the people have expressly provided that "the legislature shall provide for an annual appropriation for the *effective* operation of the Commission" (emphasis supplied), there is reason to believe that the legislature will fulfill the mandate of the people in this regard.

Therefore, it is my opinion that the legislature is without authority to abroagate or limit the power of the Civil Rights Commission in the fields of employment, education, housing and public accommodations.

No. 4. With the exception of appropriations to finance the operation of the Civil Rights Commission under the authorities listed herein, there appears to be no question but that the Civil Rights Commission is self-executing and shall exercise the authority vested in it by the people under Article V, section 29 on January 1, 1964, when the Revised Constitution becomes effective.

So that the Civil Rights Commission may discharge the duties imposed upon it by the people through constitutional mandate, appropriation to insure "effective" operation of the Commission on and after January 1, 1964 requires that the legislatrre fulfill the obligation reposed in it by the people in the year 1963. In this regard the Governor should consider the inclusion of an appropriation for the Civil Rights Commission within the call for a special session of the legislature contemplated for the fall of 1963.

No. 5. Article IV, section 37 of the Revised Constitution provides as follows:

"The legislature may by concurrent resolution empower a joint committee of the legislature, acting between sessions, to suspend any rule or regulation promulgated by an administrative agency subsequent to the adjournment of the last preceding regular legislative session. Such suspension shall continue no longer than the end of the next regular legislative sesison."

It is clear that the above provision applies to nonconstitutional adminhistrative bodies, and consequently this legislative power would not be applicable to a constitutional body such as the Civil Rights Commission, which is a constitutional

authority serving in the executive branch of the government. OAG 1943-44, p. 444. See, also, *Plec* v. *Liquor Control Commission, supra.* The people intended Article IV, section 37, to apply to those administrative agencies created by the legislature, to which the legislature has delegated the rule-making power.

The court in the case of *Sylvester* v. *Tindall* (1944), 18 So 2d 892, emphatically declares that the legislature cannot set aside the rules of constitutional bodies when it observes on page 900 of its opinion:

"Thus the people, when acting through a constitutional amendment set up an administrative commission, such as the one we are dealing with here, to accomplish certain public purposes, it can clothe the commission with power to adopt rules and regulations to carry out the purpose of the amendment which would have the effect of repealing any and all statutes relating to the same subject matter which are in conflict with the purpose and intent of the constitutional amendment and with the rules and regultions adopted pursuant thereto." See, also, *Price* v. *City of St. Petersburg* (1947), 29 So 2d 753, and *A. A. Beck and Joe Griffin, et al.* v. *Game and Fresh Water Fish Commission of the State of Florida* (1948), 33 So 2d 594.

In both cases the court followed the rule established in the case of *Sylvester* v. *Tindall, supra.*

In the promulgation of its rules, the Civil Rights Commission is bound by the due process clause of both the State and federal constitutions.

In answer to your inquiry, then, it is the opinion of the Attorney General that Article V, section 29 of the Revised Constitution is self-executing and confers upon the Civil Rights Commission plenary power within its sphere of authority which includes securing equal protection of civil rights in the fields of employment education, housing and public accommodations.

FRANK J. KELLEY,
Attorney General.

STATE OF MICHIGAN—FRANK J. KELLEY, ATTORNEY GENERAL

Civil Rights Commission: Power to declare and secure enjoyment of Civil Rights in field of housing.

Municipalities: Power to declare and secure enjoyment of Civil Rights in field of housing.

If either the "Open Occupancy Ordinance" or "Property Owners' Rights Ordinance" of the City of Detroit is adopted, it will be superseded by the Constitution on January 1, 1964, the effective date of the Revised Constitution.

Opinion No. 4195 OCTOBER 3, 1963.

Honorable MICHAEL J. O'BRIEN,
State Representative,
1010 City-County Building,
Detroit 26, Mich.:

You have requested the opinion of this office in regard to the following questions:

1. Does Section 29 of Article V of the new Constitution pre-empt the field of civil rights to the extent that any unit of government may not pass legislation of this type at a local level, specifically referring to the proposed ordinances in the City of Detroit known respectively as the "Open Occupancy Ordinance" and the "Property Owners' Rights Ordinance."

2. Whether or not the proposal known as the "Property Owners' Rights Ordinance" submitted by initiatory petition is unconstitutional and whether it may be placed on ballot.

Taking the second question first, this office is advised that this very question is being considered by the Circuit Court for the County of Wayne in a pending suit. It would, therefore, be inappropriate and unnecessary for this office to render its opinion inasmuch as a court determination is forthcoming.

Consideration will now be given to your first question.

Because the Revised Constitution, approved by the people on April 1, 1963, will not become effective until January 1, 1964, the provisions contained in Article V, Section 29 will not be the supreme law of the State of Michigan until that date. Should the ordinances referred to as the "Open Occupancy Ordinance" and the "Property Owners' Rights Ordinance" be adopted by the City of Detroit, the provisions of the Revised Constitution will not have any impact upon them until January 1, 1964.

The Civil Rights Commission is created by Article V, Section 29 of the Revised Constitution, which reads as follows:

"There is hereby established a civil rights commission which shall consist of eight persons, not more than four of whom shall be members of the same political party, who shall be appointed by the governor, by and with the advice and consent of the senate, for four-year terms not more than two of which shall expire in the same year. *It shall be the duty of the Commission in a manner which may be prescribed by law to investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution, and to secure the equal protection of such civil rights without such discrimination.* The legislature shall provide an annual appropriation for the effective operation of the commission.

"*The commission shall have power, in accordance with the provisions of this constitution and of general laws governing administrative agencies, to promulgate rules and regulations for its own procedures, to hold hearings, administer oaths, through court authorization to require the attendance of witnesses and the submission of records, to take testimony, and to issue appropriate orders.* The commission shall have other powers provided by law to carry out its purposes. Nothing contained in this section shall be construed to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state.

"Appeals from final orders of the commission, including cease and desist orders and refusals to issue complaints, shall be tried de novo before the circuit court having jurisdiction provided by law." (Emphasis supplied.)

The scope of the Commission's powers in regard to civil rights has been previously considered.

"From a plain reading of Article V, section 29, it is clear that the people have conferred *plenary* power upon the Civil Rights Commission in *its sphere of authority* as a constitutional commission to investigate and to secure the enjoyment of civil rights without discrimination.

"* * *.

"The intent of the framers is therefore clear that the Civil Rights Commission has *plenary* power to investigate and secure equal opportunity in the field of housing." (Emphasis supplied) OAG 1963, No. 4161, July 22, 1963. See also *Plec* v. *Liquor Control Commission*, 322 Mich 691.

Article V, Section 29 is not the only provision of the Constitution which will have an effect on any proposed ordinance adopted by the City of Detroit in the field of civil rights. Consideration must also be given to Article I, Section 2 of the Revised Constitution, which provides as follows:

"No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation."

I have ruled in my Opinion No. 4161, dated July 22, 1963, supra, that equal opportunity to housing, both public and private, is a civil right protected by the Revised Constitution and that the investigation of alleged discrimination of this civil right has been vested by the people in the Civil Rights Commission under Article V, Section 29 of the Revised Constitution.

All of the foregoing is a clear expression of the public policy of this State.

In *Attorney General, ex rel Lenane,* v. *City of Detroit,* 225 Mich 631, the Court considered a minimum wage ordinance of the City of Detroit. *There was no State statute on the subject.* But the Court held that the State had the *power* to regulate in this area. The Court said:

"The police power rests in the State. * * * [No provision] of the home-rule act delegates to municipalities the general exercise of all of such police power. Nor do the constitutional provisions above quoted work such result. While the municipality in the performance of certain of its functions acts as agent of the State *it may not as such agent fix for the State its public policy* * * *." (Emphasis supplied.) At p. 638:

"In the provisions under consideration the city has undertaken to exercise the police power * * * over matters of State concern; it has undertaken not only to fix a public policy for its activities which are purely local but also for its activities as an arm of the State. * * * If * * * the city possesses such of the police power of the State as may be necessary to permit it to legislate upon matters of municipal concern, *it does not follow that it possesses all of the police power of the sovereign so as to enable it to legislate generally in fixing a public policy in matters of State concern.* This power has not been given it either by the Constitution or the home-rule act. * * *." (Emphasis supplied) At pp 640-641.

The Court, in *City of Grand Haven* v. *Grocer's Cooperative Dairy Company*, 330 Mich 694, considered a municipal ordinance relating to the pasteurization of milk. It was asserted by plaintiff that the ordinance was invalid on the ground that the State had enacted statutory provisions which covered the field of pasteurization. The Court found that "by enactment of the pertinent statutory provisions, the legislature intended to and did take over *plenary* control of pasteurization of dairy products." (Emphasis supplied)

The Court went on to say that:

"* * * There is no provision in the State law granting to cities the power to impose additional restrictions or requirements. It follows that section 7(b) of the city ordinance, which seeks to impose an important limitation and requirement in addition to those provided in the State statute is invalid." (p 702)

In Article VII, Section 22 of the new Constitution, the people have provided in part:

"* * * Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law * * *."

The people of the State by their adoption of Section 29 of Article V and Section 2 of Article I of the new Constitution clearly established the policy of the State regarding the protection of civil rights against discrimination in their exercise or enjoyment because of religion, race, color or national origin. At no place in the new Constitution is there any delegation to municipalities of authority to regulate or jurisdiction to enforce civil rights against the prohibited discrimination.

The impact of Article I, Section 2 and Article V, Section 29 of the new Constitution demands the conclusion that the declaration and protection of civil rights is a matter of State concern. There is no inherent or delegated power in a city, such as the City of Detroit, to enact ordinances relating thereto. *Nance* v. *Mayflower Tavern, Inc.* (Utah, 1944), 150 P 2d 773.

Applying these principles to the proposed ordinances in question, it is clear that the "Open Occupancy Ordinance" which would seek to bar discriminatory housing practices, and the "Property Owners' Rights Ordinance" which would seek to declare certain civil rights of persons to make disposition of their property as they see fit, will be beyond the powers of the City of Detroit after January 1, 1964, the effective date of the new Constitution.

Ordinances such as those creating a human relations commission which has as its primary purpose education, counseling, conciliation, mediation, etc., are within the authority of a city since they do not seek to create or enforce these rights. Indeed, it would seem that agencies engaging in such techniques should be encouraged.

Therefore, it is my opinion that if either the "Open Occupancy Ordinance" or the "Property Owners' Rights Ordinance" of the City of Detroit is adopted, it will be superseded by the Constitution on January 1, 1964, the effective date of the Revised Constitution.

FRANK J. KELLEY,
Attorney General.

STATE OF MICHIGAN—FRANK J. KELLEY, ATTORNEY GENERAL

Cities: Ordinances Creating a Human Relations Committee.

Ordinances creating a Human Relations Committee which has as its primary purpose education, counseling, conciliation, mediation, etc., are within the authority of a city since they do not seek to create or enforce these rights.

Constitutional Law:

Such municipal ordinances conferring authority upon a human relations committee to conduct investigations is not in violation of the Michigan Constitution of 1963.

NOVEMBER 18, 1963.

Opinion No. 4211

Honorable PAUL C. YOUNGER,
State Senator,
609 Prudden Building,
Lansing, Mich.:

In your letter of August 16, 1963, you have requested an opinion of this office in regards to certain questions which have been rephased in the following manner:

1. Does the Ordinance establishing the Human Relations Committee adopted by the City of Lansing violate the provisions of the Revised Constitution of 1963?

2. If the Ordinance gave the Human Relations Committee the power to initiate investigations and make investigations on their own volitions, would such powers violate the provisions of the Revised Constitution of 1963?

There is contained within the Ordinance on Human Relations the following sections:

"17B. 2. The Human Relations Committee shall:

"(a) Foster mutual understanding and respect among all racial, and nationality groups in the City of Lansing. It shall discourage discriminatory practices among any such groups, or any of its members. It shall cooperate with City, State, and Federal agencies as well as with nongovernmental organizations; it shall examine and make such studies in any field of human relations as in the judgment of the Human Relations Committee will aid in effectuating its general purpose.

"(b) It shall advise and recommend methods for furnishing equal service to all residents of this City; it shall develop pamphlets for city employees to study which prescribe methods of dealing with inter-group relations which develop respect for equal rights and which result in equal treatment without regard to race, color, creed, national origin or ancestry; assuring fair and equal treatment under law to all citizens; it shall give counsel and advice on how to protect the rights of all persons to enjoy public accommodations and facilities, and to receive equal treatment from all holders of contracts or privileges from the City, and advice the best methods of maintaining equality of opportunity for employment and advancement in the City government.

"(c) It shall study and examine problems arising between groups in the City of Lansing which may result in tensions, discrimination or prejudice on account of race, color, creed, national origin or ancestry.

"(d) It shall formulate and carry out programs of community education and information with the object of discouraging and eliminating any such tensions, prejudice or discrimination.

"(e) It shall examine, and if it deems advisable, make public report on any complaints of discrimination, tensions or prejudice filed with or referred to it.

"(f) It shall further issue such publications and reports of examinations and research as in its judgment will tend to minimize or eliminate prejudice, intolerance, race or area tensions and discrimination or which will promote or tend to promote good will.

"(g) It shall strive to secure the cooperation of various racial, religious, nationality and ethnic groups, formal or informal groupings in the community, veterans' organizations, fraternal, benevolent and service groups, in educational campaigns devoted to the need for eliminating group prejudice, racial or area tensions, intolerance, and discrimination.

"(h) It shall cooperate with other public, governmental or private agencies in developing courses of instruction for presentation in public and/or private schools, in public libraries, or any other suitable place, showing and illustrating the contributions of various religions, nationality and ethnic groups to the culture, tradition and progress of our City, State and Nation, and further showing the deplorable effects and menace of prejudice, intolerance, discrimination, racial, and area tensions.

"(i) It shall cooperate with Federal, State and City agencies and departments which request advice in carrying out projects within their respective authorities to eliminate inter-group tensions, and to promote inter-group harmony. It shall recommend to the Mayor and to the City Council measures, including legislation, aimed at improving the ability of the various city departments and agencies to insure protection of any and all persons and groups from discrimination because of race, color, creed, national origin and ancestry. It shall advise any official of competent authority on any matters involving civil rights or the violation thereof that may come to its attention.

"(j) It shall prepare and submit reports to the Mayor and City Council of its activities. At least one report shall be made annually.

"Section 17B.3. * * *

"Section 17B.4. The Human Relations Committee shall receive and examine complaints of tensions, practices of discrimination and acts of prejudice against any person or group because of race, color, creed, national origin or ancestry, and may conduct private or public hearings with regard thereto; carry on studies to obtain factual data to ascertain the status and treatment of racial, religious, and ethnic groups in the city, and the best means of progressively improving human relations in the city.

"Section 17B.5. The gathering of factual information is vital to the Human Relations Committee in the performance of its duties. In the event any person or persons find it impractical to supply such information to the Human Relations Committee, the Committee may in its dissretion make its report to the City Council."

This office, on October 3, 1963, issued its Opinion No. 4195 in which was stated the following:

"Ordinances such as those creating a human relations commission which has as its primary purpose education, counseling, conciliation, mediation, etc., are within the authority of a city since they do not seek to create or enforce these rights. Indeed, it would seem that agencies engaging in such techniques should be encouraged."

In answer to Question No. 1, the Ordinance adopted by the City of Lansing in establishing a Human Relations Committee does not violate the provision of the Revised Constitution of 1963. The duties and functions of the Human Relations Committee as set forth herein could serve as a guide for other cities throughout the state.

This office, in its Opinion No. 4161 dated July 22, 1963, outlined the powers of the Civil Rights Commission as created by Art. V, Sec. 29 of the Revised Constitution, and I quote:

"From a plain reading of Article V, Section 29, it is clear that the people have conferred plenary power upon the Civil Rights Commission in its sphere of authority as a constitutional commission to investigate and to secure the enjoyment of civil rights without discrimination."

A human relations committee created by ordinance in order to fulfill its function of education, conciliation, mediation, etc. must be able to ascertain the facts. This necessitates inclusion of the power to conduct investigations. Such power to investigate can be conferred. It must be stressed however that such power does not relate to the *enforcement* of civil rights. Therefore, in answer to your Question No. 2, ordinances providing for human relations committees may confer power upon the committee to conduct investigations and such conferred power would not conflict with the Michigan Constitution of 1963.

FRANK J. KELLEY,
Attorney General.

Senator HART. Incidentally, 2 days ago the city of Flint adopted an open-housing ordinance—the city of Flint, Mich.

Senator ERVIN. The city council adopted it?

Senator HART. Yes.

Senator ERVIN. Without a vote of the people?

Senator HART. Yes. Mr. Chairman, this raises the most basic question as to your and my responsibilities. Do we vote the way we think the majority of the people would like us to, or do we vote consistent with what we feel is right and wrong?

Senator ERVIN. Well, I think that we are supposed to be representatives of the people, and I don't believe Congress ought to rob 190 million people of their rights, especially when a large segment of those people have had an opportunity to express an opinion and have said that they don't want to be robbed of their rights in this field.

Senator HART. Let's assume that 190 million people elected that they would deny me my right to go to church where I wanted to. That is a pretty clear voice. But what is our responsibility?

Senator ERVIN. Well, fortunately, that is one part of the Constitution that thus far is left intact, and so that law would be unconstitutional.

Senator HART. But I think it points up the dilemma that confronts a public official when there seems to be an attitude reflected at the polls which he feels is not right. Under those conditions I think his constituency is entitled to his best judgment. They can yank him out at the end of his term. But that is the way I look at it.

Senator ERVIN. Apart from all the legal questions, doesn't this housing title embody the policy that the people of the United States shall not be at liberty to create their own residential housing patterns, and on the contrary, the Federal Government itself will undertake to create those housing patterns by the coercive power of Federal law?

Senator HART. I think it is one more in a series of actions which do restrict persons with respect to the use and disposition of their property. I may like pink shingles on my house, but the code says you shan't have pink shingles. Or I may be very comfortable throwing my rubbish out the back door, but I am not allowed to. I am not even allowed to dispose of my own property on my death, without some restrictions. That doesn't affect anybody but my own family. So we are not talking about something new, really, in that sense.

Senator ERVIN. I don't know of any restriction that prevents a man from disposing of his property as he sees fit, with the exception of the fact that under the laws of some States he is required to leave a certain amount to his wife.

Senator HART. No, the law in restraint on alienation is on our books. I don't know about North Carolina's.

Senator ERVIN. This law places restraints on alienation.

Senator HART. Sure.

Senator ERVIN. It places a drastic one.

Senator HART. Yes, but it is just another one.

Senator ERVIN. You cannot prefer a man of your race or of your religion over a man of another race or of another religion, and, if you do, you subject yourself to unlimited damages, in a suit that can be brought by an attorney appointed by the court for the plaintiff. But no attorney is appointed by the court for the defendant. It seems to me that does violence to the concept of equal protection of the laws—to have one kind of a law for one side of the case and an entirely different kind of law for the other side of the case.

Senator HART. I think the circumstances explain why that differing treatment is suggested.

Senator ERVIN. Yes, the circumstances do. All residential patterns throughout the country up to the present date are dictated more or less by the operation of the free enterprise system; are they not?

Senator HART. Yes.

Senator ERVIN. For example, let us assume a residential community that is inhabited exclusively by people of the Jewish religion, and one of the residents must sell his home.

Senator HART. You mean this is a resident who wants to sell his home?

Senator ERVIN. Wants to sell his home, yes, and in making the sale of his house he preferred a person of the Jewish religion over a person of the Catholic religion or the Protestant religion. He would be subject to a suit, in which he would be immersed in an unlimited amount of damages for any mental suffering or humiliation, plus punitive damages not to exceed $500. Wouldn't he?

Senator HART. If he violated this act; yes.

Senator ERVIN. Now what is inherently wrong in a person of the Jewish faith, residing in a Jewish community, preferring to sell his home to another person of the Jewish faith? What is there wrong in that?

Senator HART. Mr. Chairman, I am a Roman Catholic. Let's assume I wanted to sell my home; but I put up a sign "only Catholics need apply," or conversely take the sign that confronted my grandfather, "Catholics don't need to apply." I hope I would be as offended by that practice today as my grandfather was when he tried to get a job in the late 1890's. It is just wrong. We want to be judged as individuals who are good or bad, not while we are 50 feet away because we have a different skin color or not by the church from which we are seen to leave. Now it is as simple as that.

Senator ERVIN. It is very simple, because this bill would say to a person of the Jewish faith residing in a Jewish community that if he sells his property to a person of the Jewish faith in preference to some person of another faith who offers equal terms, he subjects himself to a lawsuit in which conceivably a jury could award $1 million, or above $1 million for humiliation and mental anguish. Now, isn't that so?

Senator HART. It depends on what kind of scars you leave on society if you tolerate the continuance of the limitation of what we talk about as the "American dream."

Senator ERVIN. Well, what is it?

Senator HART. One part of that dream is that everybody can dream that the day will come when he will be able to buy a home, where his means permit, and not limit the dream to white areas.

Senator ERVIN. Well, the American dream is that the American people should have freedom; is it not?

Senator HART. Freedom, but not freedom to be cruel to your neighbor.

Senator ERVIN. This bill would take away from 190 million Americans the right to be free in the sale of their property or in the rental of their property.

Senator HART. Provided only that they shall not discriminate.

Senator ERVIN. Where is there any invidious discrimination for a person of the Jewish faith, residing in a Jewish community, to say, "I would prefer to sell my property in this Jewish community to a person of my faith rather than to a person of another faith." What evil is there in that?

Senator HART. Perhaps an understanding of that depends on the degree to which one has been a member of a minority group.

Senator ERVIN. What is there essentially evil in that?

Senator HART. I think, Mr. Chairman, that I could turn it around and say what reason is there for us to hesitate to insure that that colored soldier can get decent housing?

Senator ERVIN. You are going off the subject.

Senator HART. No; I am not going off the subject.

Senator ERVIN. Yes, sir.

Senator HART. I am staying right in the target. You are going to the periphery of it. I am talking about the great core of the problem, the American Negro. We encourage him to be responsible. We encourage him to go to school to advance himself economically. We encourage him to have a stable family, "but don't come near me." Now this is just wrong and it invites great trouble down the road.

Senator ERVIN. Senator, that would be perfectly responsive to my question if the bill had been restricted to preventing discrimination in the rental of housing to servicemen, but that is not the main purpose of this bill.

Senator HART. Because the serviceman dramatizes it, the harm, the cruelty is the same whether he is in or out of uniform.

Senator ERVIN. This bill covers all residential property in the United States. It would require a man who wanted to stay out of the toils of the law and be free from vexatious lawsuits, to discriminate against people of his race and in favor of people of other races, and require him to discriminate against people of his religion and in favor of people of other religions. Now, isn't that so?

Senator HART. I know what you would say when I say that the law does not require that. You would say, "Yes; but to be safe from a lawsuit you have got to do it that way."

Senator ERVIN. Yes.

Senator HART. Well, that depends on the prudence of enforcement, and that is separate and distinct and apart from our discussion of the provisions of the bill.

Senator ERVIN. Doesn't the word "discriminate" mean that a man is making a choice between alternative courses of conduct?

Senator HART. I propose an easy definition—but I doubt if it is precise enough for use in the dictionary—to say that we shall treat people on the same terms in comparable situations, and not inject the question of how do you spell your name, what is your color, where do you go to church. And that is a pretty good method on which to base a society, and where we fail to do it, we ought to take corrective action.

Senator ERVIN. Don't you discriminate—I am not speaking racially—but don't you discriminate scores of times every day between one course of conduct or another?

Senator HART. Yes, surely.

Senator ERVIN. And so the only way a man would be safe if this bill were enacted into law, would be for him to decide against people of his own race and his own religion in favor of people of another race and another religion. Otherwise he could be embroiled in a lawsuit, couldn't he?

Senator HART. I think, Mr. Chairman, you are suggesting that the bill is impossible of enactment because either way you play it under those conditions——

Senator ERVIN. No.

Senator HART (continuing). You violate the law, because you are rejecting your fellow because he is of your faith, and it would be a colored judgment.

Senator ERVIN. The difference is that the bill is passed for one segment of society and not for the other segments of society.

Senator HART. This bill is going to be passed for the benefit of our society.

Senator ERVIN. It is proposed for the purpose of making people discriminate against the people of their race and their religion in favor of people of other races and other religions when they sell or rent their property. That is the practical effect of the bill and that is what the bill is intended for, isn't it?

Senator HART. I think the bill is intended, Mr. Chairman, as I indicated at the outset, to insure against discrimination based on race, religion, or color, and that is a very desirable objective in my book.

Senator ERVIN. In other words, if a man in making a sale or rental of his property, in any way allows any consideration of race or religion

to enter his mind and then reaches the conclusion that it would be more appropriate to sell or rent his property to a person of his own race or his own religion he would be violating this statute, wouldn't he?

Senator HART. Mr. Chairman, the language isn't all that complex.

Senator ERVIN. It is as simple as that.

Senator HART. But what is good, what is desirable about the continuation of ghettos? Unless you have a law like this, how are you ever going to break them? How are they ever going to escape? And isn't our society better for their escape and the elimination of the ghetto?

Senator ERVIN. Well, why rob everybody of their rights, to accomplish that purpose?

Senator HART. I would not support the purpose if it is to sustain a ghetto.

Senator ERVIN. Well, that is what this bill does. It robs 190 million people of their right to sell and rent their property to whom they choose.

Senator HART. Senator, not to extend the argument, I don't interpret it that way but I know you do.

Senator ERVIN. Well, I think it is indisputable that this bill is designed to deter white people from selling or renting their homes to members of their own race when members of other races desire to purchase or rent them, and it is, therefore, designed to make them discriminate in favor of other races and other religions.

Senator HART. I remember, Mr. Chairman, somewhat the same line of discussion with respect to the public accommodations section. I know there is a distinction which you can draw.

Senator ERVIN. Yes.

Senator HART. But the same argument is made.

Senator ERVIN. Yes, and I was opposed to the public accommodations provision because I am opposed to the destruction of liberty. I believe if people don't have the liberty to do what the Government thinks is unwise as well as to do what the Government thinks is wise, they have no liberty whatever.

Senator HART. I can't count on you for a very good auto safety bill then, can I?

Senator ERVIN. Yes, you can.

Senator HART. That certainly deserves going through——

Senator ERVIN. That is different. No man has the right to get on a highway and run over other people.

Senator HART. Why? Because it hurts people.

Senator ERVIN. But a person ought to have a right to sell his property to anyone he may select, but we could pursue this at great length and I am satisfied that I wouldn't be able to convert you to my sound views on this subject.

I just want to ask you one more question. I have placed in the record at your request a report prepared by Vincent A. Doyle. Mr. Doyle is Legislative Attorney for the Legislative Reference Service of the Library of Congress. He says——

Senator HART. This is his statement you are reading?

Senator ERVIN. I am reading his statement:

There is not much doubt that Title IV lays a heavy federal hand on areas of rights which had heretofore been considered private. It admits no exceptions to its restrictions. The private religious home which rents accommodations to the elderly of its faith would no longer be able to exclude members of other faiths. The Swedish Old Folks Home would be required to open its doors to the elderly of other ancestry. The owner of a home that has fallen on hard times and decides to rent a few rooms to tide him over would have his choice of tenants circumscribed.

There is no doubt that his statement is correct, is there?

Senator HART. That what, sir?

Senator ERVIN. That statement in your opinion is undoubtedly correct, isn't it?

Senator HART. I believe it is.

Senator ERVIN. Thank you.

Senator HART. But you know that "heavy hand" has been laid a number of other times, and when it was laid, there were many who were shocked by its imposition. But in the passage of time, we generally concluded that the extension of the power was right, and we can begin with the prohibition against hiring kids 7 years old to dig coal, and go all down the line, and I think in the long run we are the better for having done each of those things.

Senator ERVIN. Yes, and you and I have reached a point of agreement. I will agree with you the history of the world shows that the thirst of government for more power over the lives of people is insatiable, and that it cannot be stayed short of tyranny, unless it is restrained by a Constitution which it is required to observe. It was for that very reason that the founders put in the Constitution the due process of law clause providing that people should not be deprived of their property without due process of law.

Senator HART. Yes, but, Mr. Chairman——

Senator ERVIN. A multitude of decisions down to this date, which may be reversed any minute, have said that among the rights of property, secured by the due process clause, is the right to sell or rent your property to whom you please.

Senator HART. Mr. Chairman, in that review of history, where you suggest that all that has happened is extension of Government with consequent denial or reduction of freedom, I think in most of those cases you can identify a new and perhaps a more desirable element of freedom as a result of restraint.

I was prohibited from minting my own money centuries ago, but the flow of commerce was accelerated because of this security with respect to the exchange.

When I was prohibited from marketing milk unless it had certain treatment, my freedom was denied, but the community's freedom was protected in that it got a more secure milk supply. Conceivably, restraining one from discriminating in the sale of property will make all of us a little stronger because we will have a better conscience.

Senator ERVIN. Yes, make the Government stronger and us weaker. Of course, you can adopt the theory that people should have no freedom to make any choices and the Government should make all choices for them. Since the Government is all-wise and the people all-foolish, the decisions of the people would be unwise and the decisions of the Government wise. Of course, all of the people would be slaves. Thank you.

Senator HART. Thank you very much.

Senator ERVIN. I am sorry to have detained you so long.

Mr. AUTRY. Mr. Chairman, the next witness is the Honorable John Sparkman, Senator from Alabama, and chairman of the Subcommittee on Housing of the Senate Labor and Public Welfare Committee.

Senator ERVIN. Senator, we are delighted to have you with us.

STATEMENT OF HON. JOHN SPARKMAN, U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SPARKMAN. Thank you, Mr. Chairman. Mr. Chairman, for 30 years I have worked to provide safe, decent, and sanitary housing for America's citizens.

Senator ERVIN. If I may interject myself at this point, I would say that there is no human being in the United States who has done as much to accomplish that purpose as you have.

Senator SPARKMAN. Thank you, Mr. Chairman. Legislation which I have sponsored and legislation which I have supported has made it possible for millions of Americans to own their own homes.

I think I may say that I know something about housing and some of the problems connected with it. And that is why I am dismayed by the housing provisions of the legislation you are considering today.

As a lawyer, I am disheartened by the provisions of the proposals which would limit State power of law enforcement and which would further erode the principle of federalism.

And as an American, I am hopeful that this bill will not become law.

My first objection to the housing provision is that it clearly violates the right to the free use and disposal of property.

Throughout the history of Anglo-American law, the distinguishing feature between types of ownership has been in the degree to which an individual could use and dispose of his property.

Mr. Chairman, this bill, if adopted, would irrevocably destroy that right. The private owner would no longer have a free choice in selecting his buyer. He would no longer have a free choice of sales price or conditions of sale. The landlord could not exercise his own free will in selecting the tenants who will share his home with him.

Let me emphasize that this bill applies to every room for rent in every home in America, every apartment and every house. There are no exceptions.

The legal significance of the property right was recognized by the eminent jurist, Blackstone, when he observed:

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole * * * dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

Now, Mr. Chairman, things have changed since Blackstone. The property right is no longer an absolute right. But in those areas where it has been limited, there has been a tangible real harm from which the society had to be protected. And there has been a strong legal basis for the protective action.

Where is the legal base for this action that is proposed?

This invasion of rights applies equally to homes which in no legal or logical manner are connected with interstate commerce.

This invasion of rights applies equally to property transactions which create no threat to the peace, security, health or safety of a community and hence provide no legal basis for the proper exercise of State police power.

This invasion of rights cannot be said to rest upon the "due process" clause of the 14th amendment. Interpretation of that right has uniformly been that it applies only to action by State agencies, and not to those of individuals.

Where is the legal basis for such repugnant Federal action?

The answer, Mr. Chairman, is that there is none.

It is an arrogation of power, unprecedented, unjustified, and unwise.

But strong voices have been raised in support of this bill.

We are told that this bill is the ultimate action to solve all social problems. We are told that this bill is a panacea, a cureall for our Nation's social ills.

But, Mr. Chairman, we have heard that argument before. With the introduction of every so-called civil rights bill in the past, advocates of each bill have told us in effect, "This is the last one. This is the answer."

What has been the result? There have been street demonstrations, and disorders with the passage of each new bill.

There has developed a malignant theory that if a group has a gripe in our society, it takes to the streets to solve it.

The results of each and every piece of so-called civil rights legislation in the past should be proof enough that the Congress cannot legislate solutions to problems of human relations. Social engineering by legislative edict has been proved grossly ineffective.

We are also told that this bill is addressed to the controversy between property rights and so-called human rights. And we are asked to believe that somehow the former are unworthy and the latter are an ultimate good.

The first answer to that argument is that the ownership of property is a human right.

The second answer is given by no less a liberal spokesman for human rights than Walter Lippmann when he said:

> It has been the fashion to speak of the conflict between human rights and property rights, and from this it has come to be widely believed that the cause of private property is tainted with evil and should not be espoused by rational and civilized men. In so far as these ideas refer to . . . great impersonal corporate properties, they make sense. . . . But the issue between the giant corporation and the public should not be allowed to obscure the truth that the only dependable foundation of personal liberty is the personal economic security of private property.

Mr. Lippmann went on to draw the conclusion "Private property was the original source of freedom. It is still its main bulwark."

Now, Mr. Chairman, those of us who support this point of view are always the subject of attack. We are pictured as supporting the greedy landlord who stands in the doorway turning away the poor, but deserving applicants. We are labeled "bigots," and we are told that we are biased, reactionary, ignorant, and prejudiced.

These labels are but semantic substitutions for thinking, which cannot obscure the fact that this proposal simply means a Federal official can tell me to whom and under what circumstances I can sell my home.

This proposal simply means that my freedom of choice and freedom of association must be sacrificed for no legal reason and for no rational basis.

I think also, Mr. Chairman, that this bill, if passed, will have results not anticipated by its supporters. Consider the following hypothetical example: A church group which had purchased property for construction of a home for its elderly could not legally build such a home for the exclusive use of members of its faith. This example is but one of many that show the danger of such sweeping delegation of power.

I may say, Mr. Chairman, I take a great deal of pride in legislation that I sponsored that made it possible for the building of homes specially designed for elderly people, and as might well be expected, the various church groups throughout the country have been leaders in taking advantage of that program that is provided for under the law, of providing a place where their elderly retired people may live, and this bill, if enacted into law, would destroy that very helpful program that has been designed and has been accomplishing so much good. Many more could be given, but I think this is a good example.

That leads me to the final objection I have to this part of the bill.

The whole process of democracy is one designed to draw legal, rational limits between the rights of various citizens. No right is an absolute right.

We all know that the right to free speech does not extend to shouting "fire" in a crowded theater. It has been said that my right to swing my fist ends at my neighbor's jaw.

In like manner, this bill is an attempt to choose between two national policies. The right of the property owner to sell, rent, or lease his property is a right supported by many centuries of Anglo-American law.

The right of a buyer to buy any house anywhere is a right never before established.

I believe that it is at this point that we must support the established right. The fundamental difference between our free enterprise system and totalitarianism is the right of free property.

This bill infringes on that right.

But the weaknesses of this bill are not confined to any one section. Other sections of the bill attack the traditional Federal-State relationships in State law enforcement matters and the selection of State juries.

Congress has no legal right to destroy the division that has always existed between the Federal and State legal systems, and it was established under the Constitution itself. This action is nothing but a naked encroachment on the valid legal power of the State.

You know, Mr. Chairman, the erosion of the principle of federalism is a phenomenon so often occurring that I fear it is beginning to lose its impact. No greater indictment could be made of our performance as national legislators than that we failed to understand the significance of that erosion.

During my 30 years in Congress, I have witnessed more and more attempts by various groups to resolve all their problems at the Federal level without even considering that there might be a workable solution found at the local level. I for one, am a firm believer in the

abilities and aptitudes of the many fine people responsible for our local governments.

Many problems call for a special solution which can best be determined by local initiative. I submit that the Federal Government does not always have the last word in problem solving. True, situations arise in our complex society which call for assistance from the Federal Government and this cannot be ignored.

But as legislators, we should allow the States and the local communities to meet the challenge of resolving their own difficulties before running to Washington to seek a solution.

Mr. Chairman, I have confidence in the people at the grassroots level.

No greater attack could be made on any bill than that it furthers the destruction of federalism.

The ignominious proposal to put the Federal Government in the business of selecting state juries deals a lethal blow to our dual system of government.

The right to trial by jury is one of the oldest and most cherished rights of man. It was Thomas Jefferson who, in his first inaugural address said that:

> Trial by juries form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation . . . should we wander from them in moments of error or alarm, let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty, and safety.

For centuries the right to trial to jury has been one of the bulwarks against tyranny. The jury trial is one of a citizen's oldest protections against the power of the sovereign.

This bill destroys that protection because the sovereign is now involved in choosing the jury.

The jury system is worth protecting. It is the best trial system ever devised by freemen. It should not be tampered with.

Federal jury packing is not the answer to any problems of our society.

In summary, Mr. Chairman, this bill is an ill advised attempt to subvert the rights of States and the rights of peoples to the arbitrary commands of the Federal Government.

This bill rests on no legal basis and its passage would be a serious blow to basic American philosophy and American law.

It must be rejected.

Senator ERVIN. Senator, I would like to call your attention to a magnificent statement by Justice Harlan in his concurring opinion in *Peterson* v. *Greenville* 373 U.S. 244. He says in effect that in controversies of this kind we have a clash between liberty and equality. I wanted to direct your attention to this:

> Freedom of the individual to dispose of his property as he sees fit, to be arbitrary, capricious, even unjust in his public relations are things entitled to a large measure of protection from governmental interference. This liberty would be over-ridden in the name of equality if the strictures of the 14th Amendment were applied to governmental and private action without distinction.

Don't you agree that if a man has to conduct himself according to the dictates of the Government, he has no liberty? And isn't one of the fundamental purposes of this bill to deprive him of liberty in respect to his private property?

Senator SPARKMAN. I think the statement of Justice Harlan is incontrovertible, and I certainly agree with the conclusions stated by the distinguished chairman.

Senator ERVIN. And he adds to this opinion, also, something that you called attention to very eloquently:

> Also inherent in the concept of state action are values of Federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should more properly be left to the more precise instruments of local authority.

Now do you know of any decision ever handed down which holds that the Federal Government has power to legislate in respect to the title to real estate or the use of real estate within the borders of the State, in the hand of private owners?

Senator SPARKMAN. None whatsoever.

Senator ERVIN. Hasn't it always been considered that under the Constitution, the sole power to regulate the disposition and the use of privately owned property belongs to the States and that the Federal Government has no authority whatever in this field?

Senator SPARKMAN. I certainly agree with that statement.

Senator ERVIN. And isn't the housing provision of this bill totally incompatible with that principle?

Senator SPARKMAN. It certainly is, in my opinion.

Senator ERVIN. I want to call your attention to something in the report from the Library of Congress by Vincent A. Doyle, which I am making a part of the record at the request of the distinguished Senator from Michigan. Mr. Doyle says this:

> There is not much doubt that Title IV lays a heavy federal hand on areas of rights which have heretofore been considered private. It admits of no exceptions to its restrictions. The private religious home which rents accommodations to the elderly of its faith would no longer be able to exclude members of other faiths. The Swedish Old Folks Home would be required to open its doors to the elderly of other ancestries. The owner of a home who has fallen upon hard times and decides to rent a few rooms to tide him over would have his choice of tenants circumscribed.

As I construe that statement, it is in complete harmony with the points which you have made in your statement.

Senator SPARKMAN. I think it coincides.

Senator ERVIN. Now in Forsyth County, N.C., at the present moment members of the Jewish faith are erecting a home for elderly members of their faith.

I will ask you if this bill should become law and be upheld as valid, could not members of other faiths go there and compel the manager to receive them as renters notwithstanding the fact that the home was built by Jews solely for the benefit of the elderly of the Jewish faith.

Senator SPARKMAN. That would be true. That would be the case.

Senator ERVIN. Is there not a principle known as freedom of association which is sanctioned by the first amendment as interpreted by the Supreme Court of the United States in a number of cases, and does not this principle guarantee to all Americans the right to associate together to accomplish legitimate purposes?

Senator SPARKMAN. It certainly does.

Senator ERVIN. And while no law is valid which bars a man's power to sell or rent his property to any individual of any race or religion, didn't the Supreme Court declare in *Shelley* v. *Kraemer* that

if the people of a community by voluntary action maintained a residential neighborhood for members of their race, that there is nothing in the 14th amendment to invalidate such action?

Senator SPARKMAN. I believe the chairman is correct.

Senator ERVIN. And do you not think that freedom of association guaranteed by the first amendment gives members of any race a right, which cannot be abrogated by Federal law, to maintain their community for people of their own race?

Senator SPARKMAN. I agree with the chairman in his conclusion.

Senator ERVIN. Title II undertakes to establish, does it not, a rule of procedure for State courts. It passes upon the question whether or not people have been excluded from juries on account of their race or their religion or their sex or their national origin or their economic status?

Senator SPARKMAN. That is title II.

Senator ERVIN. Are you familiar with any act of Congress that has been passed since George Washington took his first oath of office as President of the United States whereby the Congress undertook to prescribe rules of procedure to govern State courts?

Senator SPARKMAN. Not at all, and in fact, some very strong statements have been made against any such action.

Senator ERVIN. Now Chief Justice Samuel P. Chase stated in the celebrated case of *Texas* v. *White* that the Constitution in all of its provisions looks to an indestructible union composed of indestructible States. Can such a union exist if Congress has the right to supplant the State's power to prescribe rules of procedure for the operation of its own courts? Wouldn't that negative the federal system as a vital part of our constitutional Government?

Senator SPARKMAN. Yes it would be contrary to the intent of the Constitution and to our system of government.

Senator ERVIN. Doesn't title II provide in effect that an attorney in a case can assert that the provisions with reference to the composition of juries have been violated, and without offering any basis for his assertions, require all of the jury officials in the jurisdiction involved to come in and make a disclosure of all details about how they select the jurors?

Senator SPARKMAN. That is the import of the language.

Senator ERVIN. And he can do that without making any proof that there is any basis for his assertions; can he not?

Senator SPARKMAN. It could be done on a simple charge.

Senator ERVIN. And even after he receives the sworn statement of the jury officials, and that sworn statement shows that there has been no violation of the statute, he can then cross-examine those jury commissioners and any other person concerning any matter relevant to the question whether there has been any person denied the right to serve on the jury on account of his race or his national origin or his sex or his economic status; can't he?

Senator SPARKMAN. That is right. It brings the Federal Government right into the jury box.

Senator ERVIN. I will ask you as a matter of fact if any lawyer could not virtually prevent any case from ever coming to trial, under the provisions of this bill, owing to the fact that it would be relevant for him to inquire into the race, the national origin, the sex, the religion,

and the economic status of every adult whose name either appeared in the jury box or whose name was excluded from the jury box?

Senator SPARKMAN. There could be almost interminable delay.

Senator ERVIN. And is it not true that in most of the rural counties of the United States with which you are familiar the courts of general jurisdiction meet only for limited periods of time at stated intervals throughout the year, and under this title would this not provide a method by which a lawyer could prevent the average case from ever coming to trial?

Senator SPARKMAN. The Senator is correct.

Senator ERVIN. And he could do all of that without showing there is any basis for his action whatever; can't he?

Senator SPARKMAN. That is correct.

Senator ERVIN. Now, just one question with reference to title III. Under existing law, the Attorney General can bring suits to desegregate school districts only if he has a complaint that discrimination has existed in those school districts, and only if the persons making the complaint are unable financially to maintain the cost of the litigation themselves. Isn't that your understanding of existing law?

Senator SPARKMAN. That is correct.

Senator ERVIN. Now, does not title III vest in the Attorney General the absolute authority to bring desegregation suits without any complaint being made, and without making any inquiry into the financial ability of any body to bring suits?

Senator SPARKMAN. That is right.

Senator ERVIN. Individually.

Senator SPARKMAN. He can start an action any time he personally wishes to do so.

Senator ERVIN. Is it not one of the fundamental principles of our Constitution that constitutional rights are individual rights, and whether they are to be exercised or not is a matter solely for the determination of the individual possessing the right?

Senator SPARKMAN. That is correct.

Senator ERVIN. Does not title III vest in the Attorney General power to do violence to that constitutional principle, and to make the determination himself whether or not rights which belong to individuals shall be exercised even in cases where those individuals may not wish to exercise those rights?

Senator SPARKMAN. That is right.

Senator ERVIN. After the decision in the *Brown* case, on remand, did not the Federal courts in South Carolina and Kansas declare that the *Brown* case did not require integration—that it merely prohibited discrimination consisting of the exclusion of a child from a particular school on account of his race?

Senator SPARKMAN. That is right.

Senator ERVIN. And did not those courts declare and have not other Federal courts since declared that the Constitution does not require integration? It merely prohibits exclusion from schools on the basis of race, and if all the schools of a community are open to all children regardless of race there is no violation of the Constitution involved.

Senator SPARKMAN. That is my understanding.

Senator ERVIN. And wouldn't title III in practical operation give the Attorney General the power to nullify the interpretation made

of the Constitution in the *Brown* case, regardless of the wishes of the people of the communities?

Senator SPARKMAN. It certainly would give the Attorney General that power.

Senator ERVIN. Now, with reference to title V, which purports to be based in part on the 14th amendment, does not the 1st section of the 14th amendment merely provide that no State shall deprive any person of the privileges and impunities of Federal citizenship or of due process of law or of the equal protection of the laws? Isn't that its substance?

Senator SPARKMAN. That is the provision.

Senator ERVIN. No power whatever is given to Congress under those words to regulate or to deal with anything except the prohibitions on certain kinds of State action; is that not true?

Senator SPARKMAN. That is my interpretation.

Senator ERVIN. And does not section 5 of the 14th amendment merely provide that Congress shall have the power to pass legislation which is appropriate to enforce those prohibitions against the forbidden State action?

Senator SPARKMAN. The Senator is correct.

Senator ERVIN. And hasn't every authoritative decision of the Supreme Court of the United States and of all of the lower Federal courts from the time the 14th amendment was ratified stated that section 5 does not reach individual action at all, unless that individual action is concurred in by State action of some kind?

Senator SPARKMAN. That is my understanding.

Senator ERVIN. And would it not be impossible to uphold these provisions relating to the action of individuals in title V, unless there is a total repudiation of both the language and the interpretations of the 14th amendment?

Senator SPARKMAN. I feel that that is the effect that title V would have.

Senator ERVIN. You can make a very good case for the proposition that if you want to engage in logic as to the powers of Government to do what is best for the people, the Government should have power to prescribe what the people will eat or what their diet should be in the interest of keeping them from overeating.

Senator SPARKMAN. Well, that conclusion could be drawn. I may say, Mr. Chairman, I am a strong believer in our system of government, which does provide for what I consider a strong Federal Government, a strong National Government, but at the same time the protection of the States and the individuals in the rights that were there before there was a Federal Government. I believe in that dual system of government and I think we ought to respect it.

Senator ERVIN. I share your conviction in that regard. I think we have the most marvelous system of government ever created by the mind of man, and that is so because it was created out of the entire experience of the English-speaking people in their fight for self-Government and dignity and freedom of the individual. The Constitution divides the powers of the Government between the Federal Government on the one hand and local government in the form of the States and subdivisions of States on the other, and I think that when-

ever you let the Federal Government invade the fields that are reserved to the States, you are destroying the best system of government ever devised by the mind of man.

This bill to a large extent, where it doesn't offend the letter of the Constitution, offends, in my judgment, sanity and sound action under the Constitution.

Thank you very much.

Senator SPARKMAN. Thank you, Mr. Chairman.

Mr. AUTRY. Mr. Chairman, the next witness is the Honorable Frankie Freeman, Commissioner of the U.S. Commission on Civil Rights. She is also the associate general counsel of the St. Louis Housing and Land Clearance Authority.

Mrs. Freeman, if you would for the record, please identify the two gentlemen accompanying you.

STATEMENT OF FRANKIE FREEMAN, COMMISSIONER, ASSOCIATE GENERAL COUNSEL, ST. LOUIS HOUSING AND LAND CLEARANCE AUTHORITIES, U.S. COMMISSION ON CIVIL RIGHTS, ACCOMPANIED BY WILLIAM L. TAYLOR, STAFF DIRECTOR, AND HOWARD A. GLICKSTEIN, GENERAL COUNSEL

Mrs. FREEMAN. Honorable chairman and distinguished members of this subcommittee, I am Frankie M. Freeman, a member of the U.S. Commission on Civil Rights. Accompanying me are Mr. William L. Taylor, staff director, and Mr. Howard Glickstein, General Counsel of the Commission on Civil Rights.

I appreciate this opportunity to appear before you in support of legislation which, I believe will afford urgently needed protection to all Americans.

The Commission supports the objectives of S. 3296—to provide more effective and impartial means of selecting juries, to make more secure the right to equal educational opportunity and to equal access to public facilities, to remove racial discrimination as a barrier to obtaining housing, and to strengthen and supplement existing criminal sanctions against officials and private citizens who intimidate Negroes and civil rights workers in connection with the exercise of their rights. We have suggestions for what we believe will be improvements—but they are offered as changes tending to strengthen the bill and make more certain our Nation's approach to its objectives.

TITLES I AND II

It was one of the central purposes of the 14th amendment to do away with a dual standard in the administration of justice for whites and Negroes. One hundred years have elapsed but we have failed to achieve that purpose in some areas of this country. In parts of the South the instrumentalities of justice have been used, in the words of my fellow Commissioner, Erwin N. Griswold, "to perpetuate a system of social control." Exclusion of Negroes from juries is one of the ways in which this social control is exercised. Crimes or civil wrongs of certain types, committed against Negroes or whites believed to sympathize with Negroes, cease to be crimes or wrongs at all. Disproportionately large penalties are imposed on Negroes believed to

have flouted prevailing social mores. And it is not difficult to appreciate the effect that knowledge by Negroes of racial discrimination in the selection of juries may have in deterring them from seeking civil remedies in just causes.

Titles I and II of the bill are designed to deal more effectively with discrimination in the selection of juries and thereby make inroads upon the dual standard. These titles also could help to end racial violence by increasing the likelihood that the offenders will be made to answer for their crimes.

Several proposed amendments of a technical nature to title I and other titles of the bill are incorporated in a staff memorandum, which, with the permission of the subcommittee, I will submit for the record.

(The memorandum referred to follows:)

UNITED STATES COMMISSION ON CIVIL RIGHTS, WASHINGTON, D.C.

STAFF MEMORANDUM

Subject: Recommendations on Technical Amendments to S. 3296 and Supplementary Comment on Title V.

TITLE I—FEDERAL JURIES

There are two areas in Title I where technical improvements should be made:

Summoning of Jurors—The Administration's Bill amends and renumbers the sections of the present law which would not be changed, but omits the provision now numbered as Title 28 U.S.C. §1867, without adding a substitute provision. Present section 1867 provides for the summoning of prospective jurors at the time they are required to serve.

Testing of Jurors—The Administration's Bill requires prospective jurors to appear personally before the clerk to fill out a juror qualification form. This would require prospective jurors to make a special trip to the Federal district court, often some distance from their homes, without any compensation. We recommend that the Bill be amended to permit the juror qualification form to be returned by mail and, if necessary, completed on his behalf by someone other than the juror. Only if a person did not respond to a mail request would the person be asked to appear in person. This would mean that the literacy test portion of the form would have to be administered by the clerk after the prospective juror had been summoned to the court for actual jury duty, and that all persons summoned would be compensated whether or not they were accepted for jury service.

TITLE V—INTERFERENCE WITH RIGHTS

Interference with Persons Using Interstate Highways—Section 501(a) should include an additional subsection making criminal any interference with a person using any road or highway in interstate commerce. Section 501(a)(7) is limited to travel by common carrier. While 18 U.S.C. §241 has been interpreted to make criminal any interference with interstate travel, that section requires the Government in a prosecution to establish the existence of a conspiracy. By covering interstate travel in this legislation, the Government would be protecting against interference with persons using the highways even where there is not a conspiracy.

Repeal of Criminal Sanctions Against Intimidation Contained in Voting Rights Act of 1965—As Mrs. Freeman's statement notes, Title V as presently written applies only to acts involving "force or threat of force." It does not extend to economic intimidation. Her statement also notes that Section 502(c) repeals the criminal sanctions against economic intimidation now contained in the Voting Rights Act.

The Commission has repeatedly drawn attention to the problem of economic intimidation directed at Negro exercise of voting rights. In its 1961 report, *Voting* at pp. 91–97, it examined difficulties in the enforcement of 42 U.S.C. §1971(b). In its 1965 report, *Voting in Mississippi* at pp. 31–40, the Commission explored the effects of fear of economic reprisal and published the results of a four-county poll of public school teachers showing the direct relationship between fear of economic reprisal and failure to attempt to register.

It is impossible to measure at this time the effect which the threat of possible criminal prosecution has had on persons who might otherwise have attempted

economic coercion against Negro voter registrants. We do know that the Attorney General, testifying before a subcommittee of the House Judiciary Committee on the proposed Voting Rights Act of 1965, stressed the need for new tools to combat existing economic intimidation and urged adoption of a criminal sanction prohibiting intimidation (including economic intimidation) of persons voting or attempting to vote as a "substantial deterrent to intimidation." Hearings before Subcommittee No. 5 of the House Judiciary Committee on H.R. 6400, March 18, 1965, at p. 11. It is certainly clear that large numbers of Negro citizens have been encouraged to register by the 1965 Act. Without convincing proof that the present criminal sanction has been without effect in deterring economic reprisal, elementary caution would dictate that the sanction be retained.

Repeal of the criminal sanctions of the Voting Rights Act applicable to intimidation involves still other problems.

"Voting" is defined in the Voting Rights Act as including the right to have one's ballot counted and included in the appropriate totals. It is also defined in that Act as extending to elections to party office. It is not clear that a court would read these terms into Section 501(a) or 501(b), which are criminal provisions to be strictly construed. Accordingly, threats of violence aimed at persons participating in precinct meetings, circulating petitions for nominations or challenging failures to tabulate may not be reached under Title V of the proposed 1966 Act.

In a prosecution under the Voting Rights Act for violating Section 11(b), it is not necessary to establish a racial motive. Under Section 501(a)(1) of the proposed 1966 Act, however, it is apparently necessary to prove that the injury, intimidation or interference, or attempted injury, intimidation, or interference was "because of * * * [the victim's] race, color, religion, or national origin * * *" Something akin to a racial motive also would have to be proven under Sections 501(b)(1) and 501(b)(2). Under Section 501(b)(1), the Government would have to establish an intent to discourage the person interfered with from participating in voting or other protected activity *without discrimination on account of race, color, religion or national origin.* Section 501(b)(2) requires an intent to intimidate a person because he has "*so* participated" in the protected activity, i.e., participated "without discrimination on account of race, color, religion or national origin."

In his testimony before Congress in 1965, the Attorney General urged the adoption of the criminal sanction against intimidation now contained in the Voting Rights Act on the ground that proof of purpose in civil litigation under 42 U.S.C. §1971(b) had "rendered the statute largely ineffective." Title V of the proposed 1965 Act would appear to reestablish a "purpose" requirement similar to that which the Department of Justice has found difficult to establish in the past—only this time the Department would have to prove purpose beyond a reasonable doubt.

We see no justification for withdrawing criminal sanctions which presently exist, substituting other criminal sanctions which are not as comprehensive or effective, and thereby increasing needlessly the likelihood of economic intimidation and physical violence now restrained by the threat of Federal prosecution.

With respect to State jury selection, dealt with under title II, the Commission found in 1961 that:

> The practice of excluding Negroes from juries or account of their race still persists in a few States. The burden of combating such racial exclusion from juries now rests entirely on private persons—almost invariably defendants in criminal trials.

Accordingly, the Commission recommended—

> that Congress consider the advisability of empowering the Attorney General to bring civil proceedings to prevent the exclusion of persons from jury service on account of race, color, or national origin.

S. 3296 would do that, and in addition would cover discrimination based on religion, sex, and economic status. The Commission endorses these additions.

Although the enforcement provisions of title II are appropriate, I believe they could be strengthened.

Section 201 creates a right which it vests in potential jurors. Under section 204 the Attorney General and private litigants may bring

injunctive proceedings to enforce the right. Criminal defendants are empowered to enforce the provisions of the law. We recommend that plaintiffs and defendants in civil litigation in State courts also be permitted to enforce the nondiscrimination right, as they can under section, 1867(b) of title I in Federal cases.

Sections 204 and 205 provide suitable discovery proceedings and impose the requirement of preserving jury records. A further provision should be added requiring the recording of racial data.

Establishing the race of each name upon relevant jury records would be an impossible requirement for most private litigants. The Attorney General outlined to the House Committee on the Judiciary the extreme conditions of jury exclusion in Lowndes County, Ala., found by the district court on February 7. In preparing that case the Department of Justice expended extraordinary effort to sift through the thousands of names of persons appearing on jury records and to establish the race of each person on those records. In Mississippi, where State law prohibits recording the race of registered voters, the Justice Department has spent thousands of man-hours establishing the racial identity of persons on voting rolls in litigation to enforce voting rights. Voter rolls serve as a basis for jury selection in Mississippi.

We recommend that whenever a prospective juror is called to demonstrate his qualifications for jury service, the State should be required to record his race, color, religion, sex, and national origin. The relevant provisions of title I, section 1865(a), impose this requirement with respect to Federal juries. It is equally necessary in title II in order to make the discovery procedures and recordkeeping requirements of sections 204 and 205 meaningful.

Lastly, I believe title II would be improved by further facilitating proof of jury discrimination. Consideration should be given to provisions such as those contained in the pending Douglas-Case bill (S. 2923) creating a rebuttable presumption of jury discrimination where there is a recent court decree finding such discrimination or disproportionately low participation of any protective class over a period of time.

TITLE III

Experience over the last 2 years demonstrates the need for refinement and extension of present civil remedies for the protection of Federal rights.

The Commission supports the proposal in title III to authorize the Attorney General to bring civil actions against public officials wherever such actions are necessary to desegregate public schools and other public facilities instead of limiting him to action only upon a signed complaint from a private party who is unable to bring suit. The burden should not rest upon citizens deprived of rights—whether or not they are indigent—to pit their resources against the far more formidable resources of the State or local government which is failing to comply with well-settled constitutional obligations.

We also particularly urge the enactment of section 301(b) of title III, which would authorize the Attorney General to institute civil actions against persons, whether or not they are public officials, who intimidate, threaten, coerce, or interfere with persons attending or helping others to attend public schools or any other public facility.

The Commission has found that fear, intimidation and harassment of Negro parents are still substantial deterrents to desegregation of public schools in the South. In a recent report on school desegregation in the Southern and border States, the Commission found numerous instances of intimidation, harassment and violent attacks on children and parents of children who attempted to attend formerly all-white schools. For example, in one county in Georgia, bottles, stones, toilet paper, and paint were thrown at the home of a family whose daughter was one of the first four Negro children to attend the county high school which formerly had been all white. The family of another of these four children had lived under such attacks for a year.

These families continued to send their children to the desegregated schools, but many others gave up. In another Georgia county, all of the Negro children who selected white schools under a desegregation plan approved by the Office of Education changed their choice. The father of one Negro student said that within 48 hours of submitting the choice form designating a white school, he was told by his employer, who was also his landlord, that he would lose his job and home if his child attended a white school. In a county in Mississippi, two families who had chosen white schools and had altered their choice were nevertheless evicted by their white landlords. This confirmed the belief of other Negro families in that county that they could not afford to send their children to the white schools.

Such acts of intimidation and harassment constitute an important reason why school desegregation in the Deep South continues to be restricted to token numbers of children. It was this finding that led the Commission to recommend legislation similar to that embodied in title III.

If this bill is enacted, the Attorney General will have the authority to bring civil suits for injunctive relief in the areas of voting, housing, jury selection, schools, public accommodations, and employment. But we think this sanction should be available against interference with the advocacy of racial equality. Title III should be expanded to give the Attorney General this additional authority.

We also recommend that Congress amend 42 U.S.C. 1983 to permit suits by private persons for injunctive relief against persons seeking to interfere with the exercise of rights specified in title V of the administration's bill. Section 1983 as presently written would be applicable to interference with title V rights only when such interference were under color of law. The decision of the Supreme Court in *United States* v. *Guest*, decided March 29, 1966, suggests that Congress has the power to permit suits by individuals for injunctive relief against private persons seeking to interfere with the exercise of these rights. Congress should exercise that power.

We also suggest a few additional amendments to the bill to improve existing civil remedies. Most of these proposals have been recommended previously by the U.S. Commission on Civil Rights.

1. We suggest that the administration's bill be amended to give persons who suffer physical injury or property loss as the result of exercising any of the specific rights protected by the criminal provisions of title V of the administration's bill, or as the result of urging or aiding others to exercise such rights, a right of action for money damages in Federal court against those responsible for the injury or loss. This

would provide a more effective remedy for assuring compensation to those who are injured by racial violence than is available under existing law. Sections 1938 and 1985 of title 42, United States Code, are inadequate because they are limited to actions against persons acting under color of law or pursuant to conspiracies to deprive individuals of protected rights.

2. In addition, we propose that 42 U.S.C. 1983 be amended to include a provision that any county, city or other local governmental entity which employs officers who deprive persons of rights protected by section 1983 should be jointly liable with the officers to persons who suffer injury or loss from the misconduct of such officers. This amendment—recommended by the Commission on Civil Rights in 1961 and again in 1965—would not only assure the recovery of sufficient funds to compensate for the loss, but would encourage local governmental entities to hire more responsible law enforcement officials. Several States, either by statute or judicial decision, already make local governments liable for the wrongful acts of their agents. But Federal remedies for violation of Federal rights should not be dependent on State law.

We regard these remedies as minimal steps which should not preclude a serious study of proposals to establish Federal administrative machinery to indemnify the victims of civil rights crimes.

3. The administration's bill also should be amended to allow private persons to obtain injunctive relief, notwithstanding the anti-injunction prohibitions of 28 U.S.C. 2283, wherever State prosecutions are brought against persons for properly exercising first amendment rights directed at obtaining equal treatment for all citizens regardless of race, color, religion or national origin. Such a proposal was made by the U.S. Commission on Civil Rights in its law enforcement report in 1965.

4. We also believe that equal treatment under law will become a reality sooner if law enforcement and the administration of justice become the work of all people, without regard to race. Negroes are still barred in many localities from becoming law enforcement officers and court officials. We urge that title VII of the 1964 Civil Rights Act be amended to cover discrimination in public employment in State and local governments and agencies. It is anamolous that under title VII as now written obligations are imposed upon private employers and unions that are not imposed upon government.

TITLE IV. EQUAL OPPORTUNITY IN HOUSING

Title IV would outlaw discrimination in the rental, sale, financing, use, and occupancy of housing. In doing so, it would reaffirm and implement the national policy—declared as long ago as the Housing Act of 1949—to realize "as soon as feasible * * * the goal of a decent home and a suitable living environment for every American family."

Studies by the U.S. Commission on Civil Rights over a period of years have provided ample support for its conclusion that "housing * * * seems to be the one commodity on the American market that is not freely available on equal terms to everyone who can afford to pay." This limitation on availability of housing to nonwhites is not simply the result of individual decisions by individual homeowners and tenants who wished to segregate themselves.

On the contrary, during the past 30 years we have seen the development of large new communities in metropolitan areas made possible by Federal assistance and constructed under Federal policies which encouraged the creation and maintenance of racially homogeneous areas. From 1935 until well after World War II—a period during which approximately 15 million new homes were built—the power of the National Government was employed openly to prevent integrated housing. Federal policies were premised upon the hypothesis that social and economic stability could best be achieved by keeping neighborhood populations as homogeneous as possible. For example, the 1935 and 1936 Underwriting Manuals of the FHA recommend the insertion of racial covenants in deeds and warned that "inharmonious racial groups" or "incompatible racial elements" would reduce the value of property. The 1938 FHA manual advised:

> If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes.

Even after 1950, prior to the issuance by President Kennedy of Executive Order No. 11063, none of the Federal agencies concerned with the extension of housing and mortgage credit took significant action to assure that the institutions they assisted—builders, mortgage lenders, and realtors—made their service available to all persons upon equal terms.

In large measure as a result of these policies, the increasing numbers of Negroes and members of other minority groups who have migrated to urban areas have found themselves confined largely to deteriorating areas of the central city. With little new housing available to them, they have paid exorbitant prices for housing that is overcrowded and often unsound—all contrary to the policy announced in the Housing Act of 1949 to eliminate substandard and other inadequate housing.

Other Federal policies—such as highway construction and urban renewal—have frequently aggravated rather than remedied this situation. In its recent hearing in Cleveland, Ohio, the Commission heard testimony from a Negro witness who was uprooted by highway construction from a $22,000 home he owned in a predominantly white section of the city. Unable to find a home in the same area and unaided by the government which had displaced him, he was compelled to move back to the slum area he had left 10 years earlier.

With this background the Federal Government has a clear responsibility to correct the injustice which it has done so much to create and perpetuate.

The guarantee to all citizens of free access to housing within their means is, we believe, essential to the fulfillment of other rights.

Senator ERVIN. Pardon the interruption. Didn't the event which you just described occur in the State of Missouri?

Mrs. FREEMAN. Cleveland. Cleveland, Ohio.

Senator ERVIN. Cleveland, Ohio?

Mrs. FREEMAN. Yes, sir.

Senator ERVIN. Thank you.

Mrs. FREEMAN. It has been suggested that access to housing is largely an economic matter, and there is a good measure of truth in this assertion. But jobs increasingly are being dispersed from the central city into smaller cities and suburban areas. Negroes barred

from obtaining housing in these areas often are effectively excluded from access to better paying jobs.

They are also hindred in their efforts to obtain better education and increasingly are relegated to segregated and inferior schools. In establishing a right to nondiscriminatory access to housing, S. 3296 will also open the doors to equal economic and educational opportunity.

Although we support the major provisions of title IV, we believe the bill should be amended to make the remedies more effective. As presently written title IV relies exclusively upon the initiation of lawsuits by the aggrieved party or the Attorney General. Experience in the field of civil rights has shown that exclusive reliance upon individual lawsuits is not an effacious way of remedying widespread violations of Federal law. In the field of voting, Congress provided this type of remedy in 1957, 1960, and 1964 and ultimately conceded its failure by enacting the Voting Rights Act of 1965 establishing nonjudicial remedies. The House has passed amendments to title VII of the Civil Rights Act of 1964 to strengthen the administrative enforcement machinery of the Equal Employment Opportunity Commission—suggesting that in the employment area, too, there is a recognition that judicial remedies alone are inadequate. Our already overburdened courts, moreover, provide little hope for prompt enforcement, and the Attorney General's office already has major responsibility for suits in other important areas. Thus, we propose that Congress vest in a Federal agency administrative authority to investigate and make prompt determinations of fact in cases involving violations of this title, and to issue cease-and-desist orders enforceable in the courts.

We also believe that the bill should be amended to make more effective use of another sanction, the conditioning of Federal financial assistance upon action to afford equal housing opportunity.

Several years ago, the Commission examined in some detail the role of the Federal Government in relation to housing finance. We concluded then, and we believe it is equally true today, that "the Federal Government is the Atlas of the Nation's home finance community, supporting the entire structure with its resources, its prestige, and its blessings." Through programs of FHA mortgage insurance and VA loan guarantees, the Federal Government insures private lending institutions against loss and facilitates the entire housing market. As of January 1, 1966, the total outstanding FHA mortgage insurance was estimated at $47.6 billion and the outstanding principal balance of VA guaranteed loans was estimated at $30.4 billion. The Federal Government also grants charters and insures accounts of lending institutions that are responsible for a major portion of the Nation's home financing. As of January 1, 1966, these institutions held, in the aggregate, residential mortgage loans of over $170 billion. It has been estimated that the combination of federally underwritten loans and conventional loans made by federally supervised lending institutions accounts for more than 80 percent of all home loans. Surely this massive Federal involvement in the housing market should be brought into play in making equal housing opportunity a fact of American life.

To some extent, of course, the sanction of fund withdrawal is already provided by law. Title VI of the Civil Rights Act of 1964 and Execu-

tive Order 11063 on equal opportunity in housing, issued by President Kennedy in 1962, both address themselves to preventing housing discrimination by means of the leverage of Federal assistance. Both title VI and the Executive order, however, are limited in their coverage.

Title VI excludes FHA and VA insurance and guaranty programs from its ambit. The Executive order, while it covers new housing provided through FHA or VA assistance, does not deal meaningfully with housing provided under assistance agreements executed before the date of the order. Thus, for example, hundereds of thousands of multifamily units built prior to the order, but still assisted by FHA mortgage insurance, are not subject to any Federal requirement of nondiscrimination. The order, moreover, covers only an estimated 17 percent of the new housing starts. In recent years the FHA and VA share of the new housing market has been declining. Furthermore, neither title VI nor the Executive order relates at all to Federal assistance by way of Federal chartering or insurance of accounts in federally supervised lending institutions.

The Executive order has not had a significant impact even with respect to housing which it does cover. By administrative regulation, FHA has eliminated owner-occupied one- and two-family houses from coverage. FHA and VA have relied exclusively on complaints, undertaking no affirmative action to enforce the nondiscrimination requirement. Many cases become moot either because the Negro family involved cannot wait for a house pending conclusion of the administrative proceedings or because, owing to the lack of machinery for immediate relief, the house is sold. Furthermore, sanctions against builders have proved ineffective because they have been able to turn to conventional financing free of any nondiscrimination obligation.

Title IV of this bill would correct the existing gaps in coverage by extending coverage to all housing, regardless of how it was financed. We believe this breadth of coverage should be supported by legislation requiring federally chartered or insured banks and savings and loan associations, as a condition of continued chartering or insurance, to follow nondiscrimination policies in mortgage lending and to include in loan agreements executed with builders a provision that the builder will not discriminate on the basis of race, religion, or national origin in the sale or rental of the homes for which the financing is provided. Proposed legislation along these lines might appropriately be enacted by amending title VI of the Civil Rights Act of 1964.

Finally, we think it important to recognize that even if this legislation is enacted and is effectively implemented, it will be of benefit primarily to those who have the means to afford middle income housing. Adequate housing within the reach of people with low incomes is available only in limited quantity outside the central city. The problem is compounded by the unavailability of land for low income housing outside the central city and the refusal of suburban authorities to permit within their jurisdictions the construction of federally subsidized low income housing. The Department of Housing and Urban Development, if it is to make a contribution to solving the problems of our large cities, must address itself to the preparation of policy measures designed to provide better housing opportunities for citizens of all incomes throughout our metropolitan areas.

TITLE V: CRIMINAL SANCTIONS TO PROTECT FEDERAL RIGHTS

Finally, we must develop effective legislation and executive measures to remedy the intolerable condition, found in parts of the Deep South, of violence and intimidation which goes unpunished. Assuring that juries are selected in a fair and nondiscriminatory manner is one important requisite to deterring and punishing racial violence. But Federal criminal remedies also must be strengthened if this goal is to be accomplished. In November of 1965, the Commission completed a study of discrimination in southern law enforcement. It found that in county after county, the persons responsible for bombings, arson, beatings, and murder of Negroes, and whites assisting Negroes in asserting their rights, were not being brought to justice. The perpetrators of the triple murder in Neshoba County, Miss., during the summer of 1964, the Penn killing on a Georgia highway, and the killing of Jonathan Daniels in Lowndes County, and Rev. James Reeb in Selma, Ala., are still unpunished. Based on testimony at its Mississippi hearing, the Commission found that between September 1963 and September 1964, in and near Adams and Madison Counties, Miss., there had been multiple instances of bombing and arson of Negro homes and churches, and of whipping, shooting and even killing of Negroes. No one was brought to justice by local law enforcement officials in Adams County; two men pleaded no contest and received minimal fines in Madison County.

The Commission found, in effect, that the administration of justice has broken down in parts of the South. Investigations of incidents of violence by the responsible law enforcement officials were perfunctory or nonexistent. In some cases officials treated civil rights workers as suspects rather than the victims of the violence.

Since the time of the Commission's investigation, law enforcement has improved in some parts of the South. In many places, political and community leaders have spoken out clearly against violence and have directed law-enforcement officials to provide protection for people and ideas they do not like.

But racial violence continues. On January 11, 1966, Vernon Dahmer, a Negro leader who had encouraged and assisted Negroes to pay their poll taxes and register to vote was killed during the fire bombing of his home in Hattiesburg, Miss. And this committee knows that even as these hearings began on Monday, James Meredith was struck down by a sniper as he marched in Mississippi, to urge Negroes to vote, and assure them there was nothing to fear. There have been numerous other recent acts of violence in some areas of the Deep South which have gone and continue to go unnoticed by the national news media. The Southern Regional Council, in a report issued in May of 1966, collected newspaper and other published reports listing nearly a hundred incidents of racial violence in a number of Southern States occurring between September 1965 and February 1966. It appears that in many areas the responsible State and local officials are still not completely willing or able to carry out their duties.

In this situation, there is a clear Federal responsibility for protecting the rights of citizens to be secure against violence and intimidation. Congress, in the last centry, enacted laws to fulfill this responsibility, but these laws have not proved effective.

Title V, unlike previous Federal criminal statutes to protect civil rights does not require the Federal Government to prove that the assailant specifically intended to deprive the victim of a specific constitutional right. Instead, the Government need only prove that the assailant intended illegal violence which has the effect of depriving the victim of a Federal right. The statute would cover acts of private individuals, whether or not they conspire together and regardless of whether local governmental officials also were involved. It also would provide for penalties graduated in accordance with the seriousness of the crime.

The Commission's investigations in Mississippi in 1964 and 1965 revealed that much of the violence that occurred was aimed at persons selected at random, and that such violence intimidated the Negro community as effectively as if directed at a person actually engaged in civil rights activities.

At its Jackson hearing, the Commissioners heard testimony from one Negro resident of Adams County, Miss., describing a beating he had received from eight hooded men. The witness testified that he was not registered to vote and had never been involved in civil rights activity of any kind. He said:

> . . . they pulled my clothes off . . . shoved me down on my stomach, then they started beating . . . (They said:) "we know you're the leading nigger in Natchez, the NAACP and the Masonic Lodge". . . then they got me to my knees and put a double-barrelled shotgun right at the end of my nose . . . and said, "Well, now, you're going to tell a white man the truth." Then . . . he hit me in the face until he knocked me over. And he said, "Nigger run . . ." and when I fell . . . they clamped the light out and they shot right where they seen me last . . .

This kind of attack to terrorize the Negro community would be dealt with expressly by section 501(b)(1). This section will strengthen existing laws by covering random acts of violence against persons who have not attempted to exercise any of the rights enumerated in section 501(a), when such violence is intended to discourage other persons from exercising these rights.

Title V makes other improvements in existing law. As this committee knows, the Commission's 1965 law enforcement report recommended that the FBI make on-the-scene arrests when civil rights violations are committed in their presence. One objection that has been raised against this proposal is that because of the vagueness of sections 241 and 242 of title 18, FBI agents would be required to make complicated determinations about the intent of the assailants. Title V, by making specific the conduct prohibited, should remove this obstacle to on-the-scene arrests.

We recommend, in addition, that Congress give serious consideration to amending title V in the following respects:

1. Congress should enact a companion provision to 18 U.S.C. 242 which would enumerate those specific denials of due process rights which would constitute criminal acts. Such a provision would, for example, punish any law enforcement officer who inflicted bodily injury upon a person in the course of eliciting a confession to a crime. The provision would supplement the coverage of equal protection rights provided by title V of the bill. This addition would eliminate the need for establishing the specific intent to deprive the victim of his constitutional rights which is now required to be proven in all section 242 prosecutions.

2. A section should be included which would forbid private conduct designed to preclude a fair trial. Such a statute would reach lynching by providing punishment for private individuals who, acting alone or in a group not including law enforcement officials, for example, killed a person who was in custody awaiting trial for a crime.

3. Title V should be amended to prohibit acts of economic as well as physical coercion. Title V as now written applies only to acts involving "force or threat of force." In fact, the bill would narrow existing law by repealing criminal provisions in the Voting Rights Act which make intimidation and coercion by State registration officials and private persons, by any means including threat of firing or eviction, a crime. Yet economic coercion, as Congress recognized in connection with the Voting Rights Act of 1965, remains a serious impediment to the exercise of Federal rights. Since September 1965, newspapers have reported that 100 Negroes in St. Francisville, La., and 20 in Lowndes County, Ala., have been evicted from their homes for registering to vote. The Commission found in February of this year that in some areas of the South where Negroes have elected to attend formerly all-white schools, the Negro community has been subjected to evictions and loss of jobs as well as to other forms of intimidation. I have cited some examples previously.

There are many others. For example, the mother of a Negro student who selected a white school in Sumter County, Ga., was fired from her job as a maid within 24 hours after submission of the choice form. In Webster County, Miss., two Negro families who had selected formerly all-white schools for three children scheduled to enter the first grade in September 1965 were told by their white landlords to move out of their houses. Evictions of Negro families enrolling their children in previously all-white schools have been reported in Thomas County, Ga., and Merigold, Miss. Parents of such children have been reported threatened with, or actually subjected to, job loss in Baker County and Waynesboro, Ga., Rolling Fork, Anguilla and West Point, Miss., and Demopolis, Ala.

Such practices are properly treated as criminal acts, for they are deliberate and often effective efforts to interfere with the exercise of Federal rights. Since economic coercion is by its very nature a calculated act, it may be susceptible to deterrence by criminal sanctions even more than violence, which frequently is irrational. Acts of economic intimidation directed against the exercise of any of the rights protected by title V should be covered by the bill. And surely there is no warrant for taking the retrogressive step of repealing the criminal sanction against economic intimidation presently contained in the Voting Rights Act.

CONCLUSION

Mr. Chairman, although Congress spent many long and arduous hours in enacting the landmark Civil Rights Act of 1964 and the Voting Rights Act of 1965, that legislation was in a real sense only a beginning—not an end. It did not attempt to deal with the critical problem of discrimination in housing, and it did not fully secure the rights which it was the high purpose of those statutes to vindicate. Those rights were not fully secured because, to the extent that judicial remedies were provided, the remedies afforded were not wholly adequate. More important, intimidation of persons exercising or

attempting to exercise their rights has not been effectively met, partly because the available criminal sanctions against such intimidation are inadequate and partly because juries discriminatorily selected cannot be relied upon to convict the guilty. Unless we move swiftly to secure these rights in fact as well as in theory, we risk a serious loss of faith and bitter disillusionment by those who, upon passage of the 1964 and 1965 acts, believed that the doors to equal opportunity finally had opened for them.

Senator ERVIN. Your recommendations are rather drastic. In the interests of time I am not going to cross-examine you about them but I will only make the observation that if the recommendations of the Civil Rights Commission were enacted into law, States would be substantially destroyed as effective instruments of government, State power would be supplanted in fields that have always been assigned to States, by Federal power. The rights of private contract would be most seriously curtailed, what are properly justiciable controversies would be transferred from the courts, where certain rules of law prevail, to boards, and the Federal Government would for the first time in American history embark on a program of enacting and enforcing criminal laws generally. Thank you for your appearance.

Mrs. FREEMAN. Thank you.

Senator ERVIN. Do you have any questions?

Mr. AUTRY. Just one, Mr. Chairman.

Mrs. Freeman, at the bottom of page 3 of your statement you say:

> We recommend that whenever a prospective juror is called to demonstrate his qualifications for jury service, the State should be required to report his race, color, religion, sex and national origin.

You may know that the American Civil Liberties Union and the Anti-Defamation League and the chairman of the subcommittee all objected to eliciting a prospective juror's religion on the grounds of privacy. Also, I believe the Attorney General said that he did not know of any discrimination in jury service on account of religion. Does the Commission have any evidence that jurors are being discriminated against because of their religion?

Mrs. FREEMAN. I believe, sir, that there have been charges of discrimination. The Commission supports the administration's bill, and if the form would indicate and give the person a choice, where he would not be required to state religion, the Commission would have no objection.

Mr. AUTRY. And as to national origin, if the prospective juror objected to stating national origin, would you say the same thing?

Mrs. FREEMAN. No. I think that we would not have the same feeling about race or national origin. Take the case of Mississippi, where as you know as of the last reports only 7 percent of the Negro persons qualified to vote were actually registered——

Mr. AUTRY. Excuse me, I was referring specifically to national origin. I wasn't referring to race there. The reason I bring this up is that the chairman of the subcommittee has a colloquy with the Attorney General concerning the use of the words "national origin." And I don't want to put words in the mouths of either one of them, but both the Attorney General and the chairman of the subcommittee, I recall, felt that under many circumstances they didn't know what "national origin" meant.

Mrs. FREEMAN. The position of the Commission is that where a class is discriminated against, there should be such record-keeping as would make proof of the discrimination possible. The Spanish-speaking Americans would be an example.

Mr. AUTRY. Mexican-Americans?

Mrs. FREEMAN. Mexican-Americans.

Mr. AUTRY. But this would apply to everybody, and that is the difficulty that the subcommittee has found with this. What is national origin? Of course, with Mexican-Americans you have just said what it is. Those are people who have recently come to this country perhaps, Spanish-speaking people, as you have just said. Technically, however, their national origin is—wouldn't they be for the most part American, except for those who are naturalized citizens? What I am trying to define here is whether you mean only naturalized Americans of a class or whether you mean all Americans of that class?

Mrs. FREEMAN. I am trying to understand your question. Are you suggesting that the committee does not know the meaning of national origin?

Mr. AUTRY. I am suggesting that both the subcommittee and the Attorney General had some difficulty with the definition of the term "national origin."

Mrs. FREEMAN. It is a part of the 1964 act under title 7.

Mr. AUTRY. Those references were prohibitive in nature. They did not require that the information be elicited from every American.

Mrs. FREEMAN. They required recordkeeping.

Mr. AUTRY. On the basis of national origin?

Mrs. FREEMAN. Title 7, section 709(a):

> In connection with any investigation of a charge filed under Section 706, the Commission or its designated representatives shall . . .

Then going to 709(c):

> Except as provided in Subsection (d), every employer, employment agency and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title . . .

Mr. AUTRY. And you feel that language requires that we elicit from all Americans what their national origin is?

Mrs. FREEMAN. I believe the Commission has the power to get such information as is necessary to carry out——

Mr. AUTRY. Yes, exactly, but do we want national origin included in a questionnaire required of all prospective jurors?

Mrs. FREEMAN. We want the bill to be as inclusive as possible to end the discrimination that is in existence.

Mr. AUTRY. Thank you.

Senator ERVIN. I still wonder why you put that in, because your origin and mine are both American I would say, and I have never had anybody yet cite me a single instance where anybody has ever been excluded from a jury service on account of national origin.

Mrs. FREEMAN. Are you referring to the Spanish-Americans?

Senator ERVIN. Yes, they, too. Most of them are Americans. Most of them are born in Texas. Their national origin, I would say,

is American. Of course, you go back to national origin, my ancestors came from Scotland and North Ireland and England and France. I don't think my national origin is French. I think it is American, and I think this is a wholly meaningless term that is put in for so much window dressing. And yet under title II, you could spend a week questioning whether people because of national origin have been excluded from juries, and none of us know what we mean by the term. Thank you.

Mrs. FREEMAN. Thank you.

Mr. AUTRY. Mr. Chairman, the next witness is the Honorable Jack P. Nix, State superintendent of schools, of Atlanta, Ga.

Senator ERVIN. I presume, Mr. Nix, you would rather proceed with the hearing at this time rather than adjourn and come back later in the afternoon?

STATEMENT OF HON. JACK P. NIX, STATE SUPERINTENDENT OF SCHOOLS, STATE OF GEORGIA

Mr. NIX. Yes, Mr. Chairman, because I have a plane to get back to Atlanta.

Mr. Chairman, I am a State constitutional officer elected by the people of Georgia, responsible for the administration of the Georgia program of public education, including vocational and technical education.

It is appropriate, I think, that I provide this committee with some factual situations we have experienced in Georgia with our 196 school systems in their efforts to comply with the intent of the Civil Rights Act of 1964; and, in particular, the desegregation guidelines issued by the U.S. Office of Education applicable to the 1965–66 school year which we have just concluded, and in more recent days, the revised desegregation guidelines issued by this same office which are applicable to the 1966 summer school program and the 1966–67 school year.

I feel it incumbent as State superintendent of schools of Georgia to mention to this committee some factual statements concerning the current status of public school education in our State.

During the past 4 years, in particular, the General Assembly of Georgia, the Governor of the State of Georgia, the State board of education, the State department of education, our professional education associations, civic groups, and other people interested in education have taken a serious look at our program of public education. Under the leadership of these groups every hamlet of Georgia has heard the story that public schools exist solely for the educational welfare of children, and instruction is the basic purpose of schools.

It is our contention that when lay people, together with State and national leadership, accept this philosophy of public school education, then and only then will our public schools be permitted to do that which they were established to do—instruct children.

After some years of self-evaluation and study, the 1964 General Assembly of Georgia acted on what we call the minimum foundation law. Under this law we were attempting to establish equality of educational opportunity for all Georgia's children and youth regardless of where they may live or what their stations in life might be. This program was adopted in 1964 and became law, and upon its enactment our State board of education began to assert its full

leadership in moving toward the kind of instruction asked for by the people and required by our State legislature.

Following this law we had a study made by Dr. W. D. McClurkin of George Peabody College of Teachers, on the organization of school systems in Georgia, which pointed us in the direction of larger area school systems and larger schools which would provide the necessary financial support for quality instruction.

In addition to this, we have recently adopted standards for system-wide schools in our State approved by the State board of education. We are in the process of having an 8 months' evaluation of these standards.

In addition to this, an additional study relative to education in the Southern States was carried on by Dr. Jackson of Peabody College in Tennessee, and the composite thinking in all of these studies incorporated into our foundation law point in the direction of quality instruction desired by Georgia.

Too, they identify the kind of an organizational vehicle in which we must travel to obtain quality instruction. These spectacular reports and this law are serving as a basis and foundation for building a good educational program in our State. This effort on Georgia's part to attain its educational objective and to keep before our people the basic purposes of schools—that of instructing our children—will, of necessity, require time, leadership, patience, and money.

In the 1964–65 fiscal year our financial receipts for the maintenance and operation of public schools in Georgia consisted of some $304 million plus, provided with 30 percent local money, 63.9 percent State money and 6.1 percent Federal money. For school year that is just closing and at the end of this month at the close of this fiscal year, we anticipate that the percentages will change to 26.6 percent local funds, 61.4 percent State funds, and 12 percent Federal funds.

In the employment of over 42,000 teachers in our State during the 1964-65 school year, 6.1 percent of them represented 2,568 teachers, leaving 39,536 teachers for the State and local systems to finance. I think this illustrates the meager contribution the Federal Government is making toward the maintenance and operation of public school education in Georgia. I assure you that we appreciate even this contribution; however, the noise that is being made in some places could infer that the Federal Government is underwriting the total program of instruction in the States.

School administration, to be successful in the fulfillment of the basic purpose of schools, must be kept as close to the child, the teacher, and the classroom as possible and practical where instruction and learning actually take place. The experience we sustained this year in operating a local school system from the State level, after having been named the receiver of the school system by the Federal courts, definitely proved the wisdom of this statement. Actuating a law from the national level through a multiplicity of rules and regulations that doubled in 1 year's time is rather confusing and distracts the attention of local people from the basic purpose of schools—that of instructing children. Herein, in my opinion, lies one of the difficulties in the implementation of the guidelines of the Civil Rights Act of 1964.

For purposes of simplicity and effectiveness, I would like to address my remarks to two aspects of the 1964 Civil Rights Act and Senator Ervin's amendment to the administration's 1966 Civil Rights Act:

(1) The provision for the cutoff and "deferment of funds"; and

(2) The requirement for racial balance contained in the two sets of guidelines previously referred to but not contained in the act itself as passed by Congress.

Title VI, section 602, provides that—

compliance with any requirement adopted pursuant to this section shall be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for a hearing, of a failure to comply with such a requirement. * * * (2) by any other means authorized by law; provided, however, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

I am sure the members of this committee are eminently familiar with the general "Statement of Policies Under Title VI of the Civil Rights Act of 1964," respecting desegregation of elementary and secondary schools, issued by the U.S. Office of Education, applicable to the 1965–66 school year. Under this statement of policies, local school systems were expected to file a voluntary plan of desegregation with the U.S. Office of Education if, in local application, the system had had a record of operating a dual school system and had not previously been subject to a court order.

As I have previously stated, we have 196 school systems in Georgia. All but two of these systems filed voluntary plans or submitted court orders to the U.S. Office of Education last year. It was later determined one of these plans was not acceptable to the U.S. Office of Education. As a result of the two systems' failure to file (Lincoln and Glascock Counties), Federal financial assistance was withheld from the systems, initially without any hearing.

However, it is the third system to which I would like to direct my remarks and point out the inequities existing in the cutoff provisions of the act and how those who need the funds the greatest are subject to further inequities as a result thereof. As a matter of fact, I am of the opinion the cutoff provisions of this act in this case constituted an act of discrimination against the children so affected.

Taliaferro County had submitted a plan of desegregation which was not acceptable to the U.S. Office of Education. Early in September of 1965, as a result of racial demonstrations in the county, the matter was taken into Federal district court and the State superintendent of schools was made receiver for the Taliaferro County school system. Pursuant to the instructions of the court, a plan of desegregation for the balance of the school year 1965–66 was filed and approved by the district court. This approved plan was presented to the U.S. Office of Education as a basis for compliance with the desegregation guidelines. The then State superintendent of schools, Dr. Claude Purcell, requested by letter that the U.S. Office of Education approve this plan as a means for continuing Federal assistance to Taliaferro County. This request was turned down and the county has not received any Federal assistance for this school year even though the desegregation plan, as previously stated, had been approved by the Federal court.

Later in the school year, more particularly January of this year, at which time I became State superintendent of schools, the Court itself indicated a great deal of concern as to why remedial instructional assistance had not been given to the transferees and the children remaining in the system resulting from the plan ordered by the Court.

It was pointed out that the U.S. Office of Education had not approved the Court's plan and, therefore, refused financial assistance for any of these children. In other words, the application of the guidelines by the U.S. Office of Education, which were outside the scope and intent of the act itself, in my opinion, prevented the children of this county from participating in programs to improve instruction provided with Federal funds.

The system was entitled to approximately $74,000 this year just closed which would have been used in a much-needed remedial instructional program, a Headstart program, and upgrading the quality of the instruction for more than 500 Negro children who chose to remain in the system and about 241 children who chose to transfer out of the system. It seems to me this was an act of discrimination on the part of the U.S. Office of Education against the very children who were in most need of the assistance.

At the present time, we have in Georgia eight systems—this week we had two additional systems to qualify so we have only eight—out of the 196 who have elected to not sign the compliance form 441–B. It is our understanding, and I have this understanding in the form of a telegram from the Commissioner, that these systems are immediately placed in the noncompliance category and are not eligible for further Federal assistance under new programs. In other words, the systems are deemed to be guilty of discrimination, even though no complaint of discrimination has been registered and without an investigation.

Senator ERVIN. And I might add, Mr. NIX, as I construe it, they have been not only denied Federal assistance for failure to comply with the announced guidelines and without any evidence of discrimination, but they have been denied Federal assistance in violation of the act which merely authorizes cutoff or denial of funds where there has been discrimination which the courts have defined to be merely the exclusion of a child from a particular school on account of his race.

Mr. NIX. Yes, sir, Mr. Chairman, and I think in addition to this, that the cutoff of funds is supposed according to the law to take place after a hearing and not before a hearing.

Senator ERVIN. That is correct. The law you previously quoted expressly provides that.

Mr. NIX. This is one of the reasons or the reason that we support vigorously section 606(A) of your amendment to the proposed Civil Rights Act of 1966.

It is our position that a local school system should not be prohibited from participating in Federal assistance programs until the statutory provisions required by the 1964 Civil Rights Act have been met.

I might digress here a moment, Senator, to inject that system superintendents and boards of education have a very difficult time in staffing for programs, and with the uncertainty of whether or not they receive funds, they cannot contract for people for programs that will be initiated in July or in September, unless they have some assurance that funds will be forthcoming.

With this procedure that the U.S. Office is now following, we have no assurance that funds will continue, because most any day a telephone call, or a letter, or a telegram from the Commissioner's Office could direct me, as State superintendent of schools, to cut off funds to any system in our State, and I would have no authority other than to comply with this directive.

This, then, puts the local superintendent and the system board of education in a most embarrassing situation with the people they have employed. It also interferes with the education of children, which we are trying to do in this business of public education.

Senator ERVIN. I would like to state at this point that, when title VI was before the Senate, I did the best I could to bring some sanity to its provisions, and some regard for due process of law. Although I was opposed to the bill, I tried to make the bill as workable and as fair and as just as possible. I introduced a number of amendments to accomplish that purpose. Unfortunately, when there is a bill up in the Congress that is labeled a civil rights bill, it makes no difference what its provisions are. You can reason as much as you will, but the majority—I hate to say it about the body I belong to—the majority of the Members come over there and vote for the bill just like it is, without even hearing your argument, without even giving it consideration.

I introduced an amendment to this provision. I have never believed in letting executive agencies exercise what are in effect judicial powers, so I offered an amendment to eliminate the power of Federal agencies to cut off funds, and to substitute due process of law in the Federal courts for agency action. My amendment provided that no funds should be cut off by the Federal agencies, but whenever the Federal agencies had reasonable cause to believe that discrimination was being practiced, then they would report their evidence to the Attorney General, and the Attorney General could then investigate the case, and if he found out there was probable cause for so doing could bring a suit to enjoin further discrimination.

I expressly provided that, instead of having to go to the drastic course of cutting off food and milk programs for helpless little children, the court could make a decree which would prevent further discrimination. That would have accorded with the ancient American concept of a hearing which even the statute requires, before one is condemned, and would have afforded an opportunity to adjust the controversy without denying the schools adequate funds insofar as there were any funds given by the Federal Government, or denying lunch programs or milk programs. But unfortunately that amendment was voted down, by men who were making large protestations about their great love for due process of law.

Mr. NIX. Mr. Chairman, I would like to point out here that this is getting to be more difficult as time goes along rather than getting better for us to administer programs. I would like to point out a specific example.

Under the new Elementary and Secondary Act, title 3 section, we were to submit new ideas and innovative projects for educational purposes, improving the education of children. We started last October with a project covering our Ninth Congressional District to cross county lines with instructional services, in order that the children in small systems, as well as large systems, would have the benefit of the same quality of education, regardless of the size of the system, the children, race or anything else.

The U.S. Office of Education officials liked the idea. We have refined this, and on May 12 of this year I sent two members of the staff and one of the system superintendents to converse with them. They, in all fairness, indicated the project was approved and that we could start on June 1.

On Monday of this week we received notice from one of the officials of the U.S. Office of Education that it was held up in the civil rights unit of the U.S. Office of Education, the equal educational opportunities unit, even though it is an approvable project.

Now, in my opinion, as I told the Commissioner by telephone, he did not have the right to disapprove that project, because it was approvable. He did have the right to hold off the money if we were not following the civil rights law. We had written in the project that any system in the Ninth Congressional District that did not comply with the Civil Rights Act or the guidelines would not be a participant. Yet they are still holding this project, even though there has been no hearing, there has been no complaint filed or anything else. The fiscal year is almost gone, and people we would like to employ are no longer available. We had interviews set up for the first of June. So it is really getting worse rather than better, Senator.

It has been our experience in Georgia that system superintendents and boards of education, are willing to comply with section 601 of title VI of the Civil Rights Act of 1964 which provides—

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, being denied the benefits of, or being subjected to discrimination of any program or activity receiving federal financial assistance—

but the same superintendents and boards of education are reluctant and are finding it almost impossible to comply with the racial transfer percentage requirements required by paragraph 181.54 of the "Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964," issued by the U.S. Department of Health, Education, and Welfare, in March of this year.

They are even more convinced and concerned that the requirements of paragraph 181.13, with reference to faculty and staff desegregation, are completely outside the scope and intent of section 601 of title VI of the Civil Rights Act. Attitudes and feelings are more intense in our State, and I believe I can say, Senator, that those responsible individuals with whom I have talked throughout the country feel as I do, that the encroachment of the Federal Government into State governments is greater at this particular time than at any time during my lifetime. I think many people, responsible people, are now looking at State officials, governments, and constitutional officers, as being not much more than clerical workers of the Federal Government. This is a real danger to our form of government if we are going to maintain a strong Federal Government and a strong State government.

Attitudes and feelings are more intense when school officials read section 604, which states—

> Nothing contained in this Title shall be construed to authorize action under this Title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization, except where a primary objective of the federal financial assistance is to provide employment.

Our people feel the intent of the act is the same as was stated by the assistant majority leader at the time the act was passed. To quote the words of Vice President Humphrey:

> While the Constitution prohibits segregation, it does not require integration. The busing of children to achieve racial balance would be an act to effect the integration of schools. In fact, if the bill were to compel it, it would be a violation, because it would be handling the matter on the basis of race.

I believe the opinion of the majority of system superintendents and boards of education in Georgia is that the desegregation guidelines recently issued by the U.S. Office of Education are outside the scope and intent of the 1964 Civil Rights Act. In fact, the requirement for racial balance mandatory transfer provisions are in flagrant violation of the act itself.

To follow these provisions to the logical conclusions in everyday application would require, in effect, that a public utility company would be discriminating unless it insisted that a certain percentage of the minority race sit in the front of its buses or, likewise, a certain percentage of the minority race would be required to use the public golf courses and swimming pools. By the same token, they would be saying past acts of discrimination could not be effectively removed until a certain percentage of the minority groups are voting in each election.

I am sure it is obvious to this committee that acts of discrimination have existed in certain areas of our public life, but I also believe human decency and commonsense dictate that this discrimination has been removed in practical application in the above examples.

The Civil Rights Act of 1964 is now a fact. Our people are gradually moving into an acceptance of its intent. Eventually, if patience is manifested, its intent and Georgia's philosophy of public school education, which is the instruction of children, can be reconciled and effectuated.

It does seem to me, though, if the Federal Government is actually interested in the instruction of children, it could more wisely spend the available money for the instruction of children rather than Federal policemen to badger boards of education with a multiplicity of ambiguous guidelines. Using a 6.1 percentage contribution to dictate the spending of the other 93.9 percent is rather presumptuous and absurd.

Congress never intended or implied when it used the words "by any other means authorized by law" to give birth or pedigree to any Federal agency to incubate its own rules and regulations and let them travel unrestricted under this cover of authority.

It has been our experience in Georgia that the Department of Health, Education, and Welfare is using the words "cutoff of funds" under section 602, paragraph 1, and the words "deferral of funds" under paragraph 2, to extend regulations beyond the law. To the recipient of the funds, this is bureaucracy at its worst and a play on words, in addition to circumventing the intent of Congress.

It does not make any difference to the receiving system under what provisions the funds are withheld as long as the funds are not forthcoming, and the system has not had the full benefit of the protection intended by Congress.

Mr. Chairman, I respectfully request, on behalf of the 1,140,000 schoolchildren in Georgia, your careful consideration and evaluation of Federal programs involving the expenditure of funds for educational purposes. We must have your help to give back to the States authority to operate public education programs for the benefit of children. Thank you.

I would like personally to thank you as chairman of this committee, and as a Senator of this great Nation for your personal efforts to help us with this particular problem.

Senator ERVIN. Thank you, Mr. Nix. Isn't it fair to state that the people of States like Georgia and North Carolina have spent a greater portion of their earthly substance for the education of Negro children than the people of many other States in the Union, simply because they have more of such children, and have had through the years?

Mr. NIX. Not only that, Senator, but in our State we are spending over 59 percent of all State revenue for education.

Senator ERVIN. And isn't it true that States like North Carolina and Georgia embarked upon programs to give adequate education to all of their children of all races long before any such civil rights concoctions that are now presented were ever suggested?

Mr. NIX. Senator, in the early 1950's when Senator Talmadge was our Governor, we started a school building program, a $200 million program at that time, and I am firmly convinced that during the 1950's and early 1960's our Negro students were the best housed Negro students in this entire country. Their building facilities were in the poorest condition in the early 1950's, and we started at that time to develop facilities that would be good in terms of sound educational programs regardless of what color the children's skins might be.

Senator ERVIN. Isn't it a fair statement to say that in States like yours and mine, the people who actually control the State governments and establish its policies are dedicated to the proposition that every child of every race should have an opportunity so far as it lies within the physical resources of those States, "to burgeon out" as the great educational Governor, Charles Aycock, said, "everything within him."

Mr. NIX. Mr. Chairman, in my own personal opinion the greatest thing that any State of this Nation has is the minds of its youth. It doesn't particularly make any difference what color the child's skin might be. Our purpose in Georgia, and I am sure it is the same in North Carolina, and I would hope that it would be the same throughout the Nation (but I don't think it is in the minds of all individuals at this time) is that this is the greatest responsibility we have to develop the minds of children to be effective citizens in terms of productivity and successful living, to build a truly great democracy. I fear this is endangered with some of the edicts that are now being issued on the part of some of the Federal officials, and in my own carefully considered opinion, the Congress didn't intend for them to issue some of these edicts they are sending out now.

Senator ERVIN. I think that your statement and the words of title VI itself show the absolute soundness of that observation. Title VI said, as you point out in your statement, that funds would not be cut off without an opportunity to be heard.

It said that desegregation of schools should not be construed to require racial balance.

It stated in express words that there would be no authority to require the busing or the transportation of children from one point to another in order to integrate schools.

It stated that the Federal Government would have no authority over the employment of State officials, State employees, except in those rare cases where the only purpose of the program was to promote employment. In my judgment the guidelines laid down by the Office of Education of the Department of Health, Education, and Welfare

violate all of those provisions of the act. And they also go beyond the terms of the Constitution even as construed in the *Brown* case, because the Constitution thus far has been construed merely to prohibit discrimination, that is the exclusion of a child from a particular school solely upon the basis of his race, and not to require integration of the races. And yet these guidelines are based virtually entirely upon the theory that they must either browbeat or bribe school districts into establishing racial balances in the schools.

I am a man who believes in speaking plainly, so I can't be misunderstood, and some people don't like me for so doing, but I am convinced, from a consideration of the guidelines established by the Department of Health, Education, and Welfare, that the Department is more concerned with integration than it is with education, insofar as southern schools are concerned.

Mr. NIX. Senator, I think speaking one's mind is one of my weaknesses, also, but I am so concerned about the education of our children that I think it is unreasonable for anyone, either on a State or National level, to place local system superintendents and boards of education in the position of trying to staff and operate public schools when they don't know, from the beginning of one fiscal year to the end of that fiscal year, what additional rules and regulations are going to be issued that would cut off their funds, their source of funds, or cut off a particular program that had been built into a total educational effort. This is my plea to the Federal officials: Tell us what you can do for the entire year, and then leave us alone and let us run the programs within your rules and regulations, but don't cut the money off during the middle of the year.

Senator ERVIN. I have been concerned with the same problem, as a result of being requested by school districts in North Carolina to intercede with the Department of Health, Education, and Welfare and ascertain what they were requiring.

I am frank to state that in some instances it has taken me 6 weeks to get a reply to a letter addressed to the Department. Any department that can't answer a letter in 6 weeks has got no business undertaking to manage the schools of the entire country or of an entire section of the country.

Now, when title VI was before the Senate I predicted what has come to pass. I requested the Senate to write into the bill what the exact requirements were, to spell out the meaning of "discrimination," and not leave the definition to 40 or 50 different Federal agencies administering 40, 50, 60, or 100 different Federal programs. I wasn't heeded on that point. Referring to Caligula, the Roman emperor who wrote his laws in small letters high on the walls so the people couldn't read them, I pointed out that compared with title VI, Caligula was a far more just legislator than the Senate if it passed that bill in its present form, because the Senate would be saying the meaning of law is going to be determined by what may hereafter be devised by Federal administrators. In that way the Senate was far more unjust than Caligula because if somebody had a long enough ladder and a magnifying glass he could have climbed up and read Caligula's laws.

But we passed title VI and left the laws undisclosed in what are, as far as the thoughts on this proposition were concerned, the then

empty craniums of Federal administrators. We have one department making one interpretation of the law and another department making another interpretation of the law and one agency making one interpretation one day and another on another day. I predicted then we were going to have chaos in the educational field and in other fields, because these funds would be used to bribe local officials into an acceptance of whatever notions these different and varied agencies administering these acts might entertain.

I think you point out very effectively that there are people sitting on the banks of the Potomac, representing the Federal Government, which contributes only 6.1 percent of the total expenditures for schools in your State, who want to assume virtually complete domination of those schools.

It is also to be remembered that a substantial part of that 6.1 percent which comes from the Federal Government was undoubtedly paid into the Federal Treasury by the people who made the contribution of the other 93.9 percent. I do not see how our Federal system of government can endure, if the determination of how schools are to be operated is to be transferred from the school districts to the banks of the Potomac, and there vested in a department which, with all due respect for it, I have observed closely for 12 years, if you give it an inch of authority, it always takes a mile.

Mr. NIX. Mr. Chairman, I would like to inject one thought here. You know, history records that nations last for about 200 years. Our Nation is 190 years of age. If this trend continues at the rapid rate that it has in the last few years, I have a fear for the type of a government that we will have by the year 2000.

Whenever you remove the control of public education away from the parents and the people in the individual communities and States, and centralize it all into one body on a national level, I think you are on the road to destroying this great democracy that we have.

Senator ERVIN. I find myself in 100 percent agreement with that observation, and that is one reason I still fight, sometimes against great odds, to try to preserve the Federal system of government. I am a great believer in the principle of the Founding Fathers, which was expressed by Thomas Hobbes, the English philosopher, when he said that liberty is government divided into small fragments. That is the reason the Constitution divides the powers of government between the Federal Government on the national level and the States on the local level, and assigns legislative powers to one department of government and executive powers to another, and judicial powers to another. But we pass laws which ignore these distinctions, which attempt to concentrate all the powers of government into one central government, and give the judicial powers of that government to executive agencies, and also give the legislative powers of that government to executive agencies.

I think that we are in a serious condition when so many men are willing to destroy fundamentals for the sake of accomplishing, in a hurry, objects that they deem to be desirable.

I appreciate your appearance here, and the amendment which I offer is merely to bring a little due process and a little justice into these programs. In my mind it is abhorrent for the Federal Government to cut off lunch programs and educational programs that are designed for the education and welfare of little children, just because the Fed-

eral Government doesn't agree in some instance with some of the actions of the men who have control of the schools.

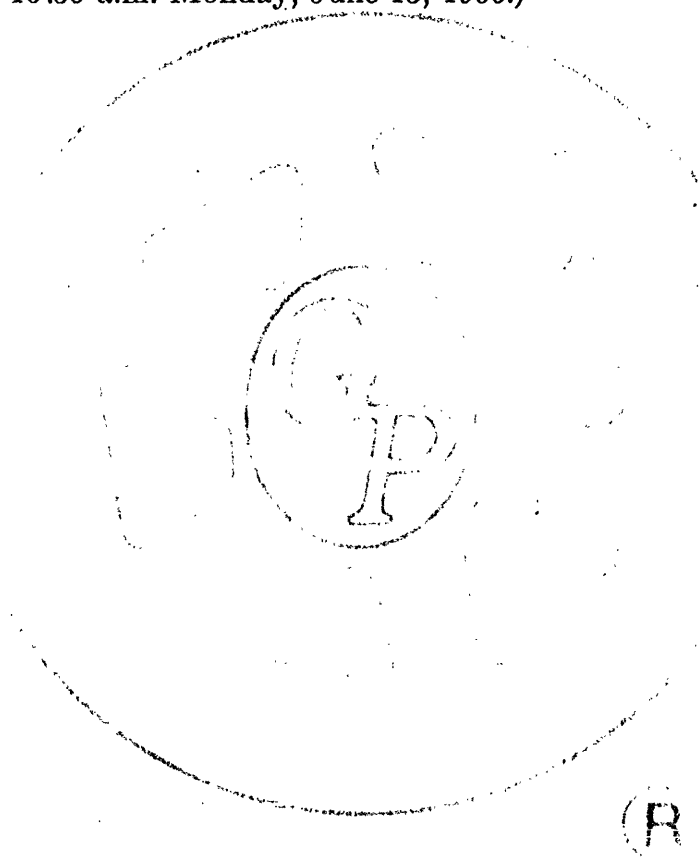
Certainly, the children have no control of the schools. As you pointed out very well in your statement, the people who are injured are not only people that don't make the policies but they are the people who stand in the greatest need of this assistance.

Mr. NIX. Thank you, Mr. Chairman, for this privilege.

Senator ERVIN. Thank you very much, Mr. Nix.

The subcommittee will stand in recess until 10:30 Monday morning.

(Whereupon, at 1:25 p.m., the subcommittee was recessed, to reconvene at 10:30 a.m. Monday, June 13, 1966.)



CIVIL RIGHTS

MONDAY, JUNE 13, 1966

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:33 a.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin, Jr. (chairman), presiding.

Present: Senators Ervin and Scott.

Also present: George Autry, chief counsel; Houston Groome, Jr., Lawrence M. Baskir, and Lewis W. Evans, counsel; and John Baker, minority counsel.

Senator ERVIN. The subcommittee will come to order. Counsel will call the first witness.

Mr. AUTRY. The first witness is Mr. Alan Emlen, chairman of the Realtors' Washington Committee of the National Association of Real Estate Boards, Washington, D.C. Mr. Emlen is accompanied by Mr. John C. Williamson, counsel for the Realtors' Washington Committee.

Senator ERVIN. Gentlemen, we are delighted to have you with us. The Chair wishes to recognize the distinguished Senator from Pennsylvania at this time.

Senator SCOTT. Mr. Chairman, your witness, Mr. Alan L. Emlen, is a neighbor and friend of mine in the community of Chestnut Hill in Philadelphia, a real estate broker who has been engaged in that business, as his statement indicates, for 21 years, and he is appearing on behalf of the Realtors' Washington Committee.

He has held high office in the Pennsylvania Real Estate Commission, and he is a very well known Philadelphian.

While he and I may always with our constituents not agree entirely in all matters of law, I have indicated disagreements with title IV which are postulated on different reasons from those which I think Mr. Emlen will propose.

I would like to add, however, that in our community a number of residents, representing many people who are quite well known, including both U.S. Senators, I think we are fairly well known up in our neighborhood anyway, joined in a public advertisement not long ago in which we said that we would welcome the entry into that neighborhood and the purchase and occupancy of real estate by any person who in good faith became the owner of that real estate, that we would welcome neighbors without any discrimination of race, creed, or color, and it represented a community and local action which I regard as of high importance, because this community does contain and has contained many of the holders of public office, a greater per-

centage than any other community in the city of Philadelphia, and I think that statement ought to be made to show the good will of the residents of the community. We do welcome Mr. Emlen here and his counsel.

Senator ERVIN. We certainly appreciate your appearance and your introduction of Mr. Emlen. I will make a confession at this point similar to the one you have just made, and that is I also have a few constituents that don't share the same views I maintain on all subjects.

Senator SCOTT. Judging from the returns every 6 years, you seem to have a substantial majority in agreement with you.

Senator ERVIN. Thank you. You may proceed. We are delighted to have both of you gentlemen with us.

STATEMENT OF ALAN L. EMLEN, CHAIRMAN, REALTORS' WASHINGTON COMMITTEE, NATIONAL ASSOCIATION OF REAL ESTATE BOARDS; ACCOMPANIED BY JOHN C. WILLIAMSON, COUNSEL FOR THE REALTORS' WASHINGTON COMMITTEE, WASHINGTON, D.C.

Mr. EMLEN. Mr. Chairman, any questions that the committee would have to ask me in connection with law, points of law and the Constitution, I would like the privilege of referring them to my counsel, Mr. Williamson.

Mr. Chairman and members of the subcommittee, my name is Alan L. Emlen and I am a real estate broker with offices in Philadelphia. I have been engaged in the residential real estate brokerage business in the Philadelphia metropolitan area for 21 years. My firm maintains five offices in Philadelphia and contiguous suburbs. I am also a former member of the Pennsylvania Real Estate Commission. I appear today as chairman of the Realtors' Washington Committee of the National Association of Real Estate Boards to present the views of the association in opposition to title IV of the pending Civil Rights Act, S. 3296.

Our association consists of more than 83,000 realtors who are members of more than 1,500 local boards of realtors in every State of the Union.

I am attaching for the record a copy of the policy statement adopted by our last convention which serves as the basis for this appearance in opposition to title IV. The key to this policy statement is in the first sentence which I shall quote:

> We reassert our support of the principle of equal opportunity in the acquisition and enjoyment of real property and the right of individuals to determine the disposition of that property.

We are here to raise our voice against the injection of the element of legal compulsion—of the police expedient—in the relations of a homeowner or any other residential property owner and the one who seeks to buy or rent his property.

We concern ourselves only with the private action of an individual property owner in an area where the State is in no way involved. We deplore the attempt in title IV to proscribe private action in private dealings between private individuals in the disposition of privately owned property.

The Attorney General in his testimony of June 6, said that he had no doubts whatsoever as to the constitutionality of title IV. He relies almost wholly on the dictum in a concurring opinion in the case of *United States* v. *Guest*, decided by the U.S. Supreme Court on March 28, 1966, a few weeks before the introduction of S. 3296 and more than 2 months after the President advised the Congress that this legislation would be sought. Perhaps if this dictum, which Justice Harlan in a concurring opinion to the Court's opinion described as "extraordinary," had not been forthcoming, we would not be here today.

Nevertheless, this dictum suggested that the 14th amendment of the Constitution could be extended to the acts of individuals, without the necessity for determining any level of State action. Thus a century of Supreme Court decisions on this point including the intent of the Congress as expressed in the language of the 14th amendment were swept aside as though they had never existed. A quotation from Supreme Court Justice Benjamin N. Cardozo on this extraordinary reliance of the Attorney General on the dictum in the *Guest* case is most appropriate:

> We do not pick our rules of law full-blossomed from the trees.[1]

For a century there was neither obscurity nor opportunity for diverse judgment in interpreting the 14th amendment. Supreme Court Justices throughout the century have written an eloquent chapter in the law as to the meaning of the 14th amendment and its limitation to the actions of the State in abridging the privileges or immunities of citizens, depriving one of life, liberty, or property without due process of law, or denying one the equal protection of the laws.

Justice Douglas, concurring in the fairly recent opinion in *Lombard* v. *Louisiana*,[2] said:

> If this were an intrusion of a man's home or yard or farm or garden, the property owner could seek and obtain the aid of the State against the intruder. For the Bill of Rights, as applied to the States through the Due Process clause of the 14th Amendment, casts its weight on the side of the privacy of homes. The 3rd Amendment with its ban on the quartering of soldiers in private homes radiates that philosophy. The 4th Amendment, while concerned with official invasions of privacy through searches and seizures, is eloquent testimony of the sanctity of private premises. For even when the police enter a private precinct they must, with rare exceptions, come armed with a warrant issued by a magistrate. A private person has no standing to obtain even limited access. The principle that a man's home is his castle is basic to our system of jurisprudence.

Yet in title IV the Congress would authorize the omnipotent arm of the Attorney General to reach into a private home, unlatch the door, and direct the owner to rent a room or sell the home to a person with whom he does not choose to execute a rental or sales agreement. The very breadth of the implications of the Attorney General's position casts doubt upon its validity.

Justice Harlan, in his concurring opinion in *Peterson* v. *Greenville*,[3] underscored the suppression of individual freedom which would inevitably ensue were the Congress to enact title IV as an implementation of the 14th amendment. In the opinion he stated:

> * * * Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of

[1] "The Nature of the Judicial Process"—Cardozo.
[2] 373 U.S. 267 (1963).
[3] 373 U.S. 244 (1963)

protection from governmental interference. This liberty would be overridden, in the name of equality, if the strictures of the Amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority.

We insist that nothing in the Federal Constitution gives to one citizen the right to acquire property from another citizen who does not wish to sell it to him regardless of the reason. In legal usage a right involves a legal relationship between people. The capacity to create enforcible legal relations by one's voluntary act such as contract rights, property rights, the marriage relation, and so on, is an essential ingredient of citizenship. Federal constitutional guarantees, implemented by the Congress, prevent any State from denying these rights on racial grounds; but these rights are enforcible only against State officers and not against private persons. A may desire to buy B's home, but A does not have a right to buy B's home unless there is a valid contract—that is to say, a legal relationship. The Congress, in title IV, is being asked to assert the coercive power of the State to give A this right, and this cannot be done without depriving B of a right that is deeply rooted in our traditions as well as in the common law.

Compelling the homeowner or rental owner of real estate to enter into a contract with one not of his choice is an affront to the American tradition of freedom of contract, the very underpinnings of which rest on the proposition that no American, without his consent, need become an unwilling contractor with any other person.

The Attorney General in his testimony referred to the *Shelley* v. *Kraemer* case[4] which held that racially restricted covenants were not enforceable in either State or Federal courts. A statement from the majority opinion in that case is most pertinent to consideration of title IV. The opinion says:

> * * * the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the 14th Amendment is only such action as may fairly be said to be that of the State. That amendment erects no shield against merely private conduct, however discriminatory or wrongful.

The Attorney General also cites the commerce clause as a constitutional basis for forcing homeowners and rental property owners to contract with persons other than those of their choice. The Attorney General is, of course, predicting the attitude of the U.S. Supreme Court toward this new role for the commerce clause, and we regret that his view is nurtured by ample precedents that the power of the Congress to regulate commerce among the States is almost without limitation.

I say "almost without limitation" because we cannot concede that the Constitution, whose underlying thesis is one of limitation and enumeration of powers, would give the Congress the power to bring every intrastate sale within the scope of the commerce clause.

A home is part of the land; its constituent parts, although once having flowed in commerce, have come to rest. To contend that the rental of a room in one's home, or the sale of a home, is interstate commerce is to state a concept of law which realism cannot accept.

We have studied the precedents cited by the Attorney General in reliance on the commerce clause and respectfully suggest that he may

[4] 334 U.S. 1 (1948).

be on a judicial shopping spree to find appropriate constitutional "hooks" upon which to peg his conclusion. One of the cases cited, *Wickard* v. *Filburn*,[5] arose out of a violation of a Federal acreage allotment and the Court held that growing wheat in excess of the Federal allotment would have a substantial economic effect on interstate commerce. The constitutional question had already been resolved that the Congress had the power to regulate the production of wheat in order to stimulate trade in wheat at increased prices. The Attorney General found an analogy to the home in the fact that all of the wheat was consumed on the farm. However, the analogy does not stand up even under cursory analysis.

Senator ERVIN. If I may interrupt you, I would like to ask you a question here at this point. The case of *Wickard* v. *Filburn* involved an interpretation of the power of the Secretary of Agriculture under the Agricultural Adjustment Act, and the Agricultural Adjustment Act was an act whose primary purpose was to regulate interstate and foreign commerce in farm commodities. Did they not make the strange ruling in *Wickard* v. *Filburn* on the basis that Congress has the power to regulate intrastate activities to the extent and only to the extent that the regulation of such activities is necessary or appropriate to the effective regulation of interstate or foreign commerce itself?

Mr. WILLIAMSON. That is correct. The Court had to find that the production of the wheat had a substantial effect on the power of the Congress to regulate the production of wheat, and its marketing in interstate commerce.

Senator ERVIN. You may not concur with my language, but don't you concur in the substance of my thought, that *Wickard* v. *Filburn* is just a "fool" application of a sound principle of law?

Mr. WILLIAMSON. That is right.

Mr. EMLEN. The Attorney General also relies on *Katzenbach* v. *McClung*,[6] a case arising out of the public accommodations title of the 1964 Civil Rights Act, to rebut the assertion that building materials having been put to rest as part of the land, the element of interstate commerce no longer obtains.

However, the *McClung* case is readily distinguishable. Here in the case involving Ollie's Barbecue, the meat having traveled in interstate commerce did not in fact come to rest. It was sold in a matter of hours to persons traveling intrastate as well as interstate. However, lumber and roofing materials not only come to rest, but lose their separate identity to become part of the land.

If the Congress enacts title IV and thereby fails to exercise some restraint on the U.S. Supreme Court, then I doubt that there is any element of private human endeavor—social, political, or economic—that can escape the commerce clause. Even the 1954 school cases could have been decided under the commerce clause. Private schools, private clubs—yes, even housekeeping—would fall within the all-encompassing grasp of the commerce clause—everything and everyone that makes use of an article that possessed an element which at one time flowed in commerce. We hope that the Congress by rejecting title IV will thereby sound a note of caution that there are reasonable limits beyond which the Congress will not tempt the Court to so "rewrite" the commerce clause.

[5] 317 U.S. 111 (1942).
[6] 379 U.S. 294, 302 (1964).

The moral end advanced by title IV cannot justify the means through which it is sought to be attained. The obliteration of the distinction between public and private affairs, a necessary consequence of title IV, represents a sharp erosion of individual liberty. If individual freedom is worthy of preservation, it behooves all Americans to mark well the distinction between public and private affairs and to employ most sparingly the force of law to coerce human conduct in the area of private affairs.

For the remainder of my testimony I would like to discuss some rather serious obstacles to the enforcement provisions of title IV. As an association of licensed real estate brokers we are of course concerned with the effect of title IV on the sale of homes. We have studied title IV and we are convinced that the language is not only destructive of the rights of property ownership, but attempts at its enforcement are certain to adversely affect the sale and transfer of homes.

Under section 406 of the bill, a plaintiff has within 6 months after an alleged discriminatory housing practice or violation has occurred to file suit in a Federal, State, or local court.

Assume that a contract for the sale of a home was executed on January 20 and final title search preliminary to recording of the deed occurred on April 20. On April 19 a complaint was filed against the seller alleging an act of discrimination in the sale of the house the previous November or December. Because the suit is quasi in rem, that is, it relates to the house which is the object of the title search, the title attorney will not certify title, thereby preventing disbursement of the mortgage proceeds and bringing the sale of the home to a grinding halt. I can comprehend of no legislative proposal more destructive of the growth of homeownership than title IV, because the mere allegation of discrimination would shift the burden of proof to the defendant homeowner. His would be the almost impossible burden of establishing that he made a subjective judgment for good and sufficient reason other than those proscribed by title IV.

Let me cite another example of the mischief that this legislation may generate. A suit for preliminary injunction is filed and on the basis of pleadings, and without the taking of testimony, the injunction is issued. The seller would have to wait from 1 to 3 years in many jurisdictions for an opportunity to prove that this refusal to contract with the complainant was based on grounds other than racial or religious discrimination. During the interim the house must remain off the market.

Under the common law, a contract does not come into existence until a legally binding offer has been "accepted." The offeror may withdraw an offer at any time prior to such acceptance. Unless specifically worded so as to constitute an offer, an advertisement for sale of a piece of property is merely an invitation to receive offers. The seller in this case retains the right to reject any and all offers or to withdraw the property from sale for any reason whatsoever.

Title IV would seriously impair this freedom of action of the seller of a home. It would, in effect, convert an advertisement into a legally binding offer with respect to any person who alleges violation of section 403. The action by such person, however, would not be for breach of contract, but for violation of an entirely new right—that of the right to buy real property advertised for sale. Thus the placing

of an ad incurs legal consequences hitherto unknown to the common law. It not only restricts the seller's freedom to bargain and negotiate with a number of offerors, but it also restricts his right to withdraw the property from sale.

We note, also, that the damages for "humiliation and mental pain and suffering" are without limit, and no standard or criterion for gaging such damages is even suggested by this bill. Section 406(d) allows only the prevailing plaintiff a reasonable attorney's fee as part of the costs. The entire bill, including the authority of the Attorney General to intervene on behalf of the plaintiff, is heavily weighted against the homeowner. The most frivolous harassing complaint could wipe out an owner's equity in his home even were he to prevail ultimately.

Section 403(d) would even prohibit reference in an advertisement to the proximity of a parochial school for even this would, under the terms of the bill, be held to indicate a preference for a purchaser of a particular religious faith.

We are not here in the interests of the segregationist but in the interests of the homeowner and the owners of rental property. We are convinced that the cause of improved race relations will be retarded, not enhanced, by the enactment of this measure. In every case where a similar law has been submitted to a referendum of the people, it has been overwhelmingly rejected.

The hopeful assumption that open occupancy will solve all the problems inherent in any biracial society is surrounded with gravely challenging difficulties even under noncoercive policies. To raise this assumption to the level of law, thereby overthrowing deeply rooted constitutional guarantees of private property, is a manifest distortion of any rational aim.

We urge the subcommittee to reject title IV of S. 3296.

That concludes my testimony, Mr. Chairman.

(The statement of policy referred to follows:)

STATEMENT OF POLICY ADOPTED BY THE DELEGATE BODY OF THE NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, CHICAGO, ILL., NOVEMBER 18, 1965

PROPERTY OWNERSHIP

We reassert our support of the principle of equal opportunity in the acquisition and enjoyment of real property and the right of individuals to determine the disposition of that property. This principle does not and should not establish special privilege for any particular group.

Government should not deny, limit, or abridge, directly or indirectly, the fundamental right of every person to sell, lease, or rent any part or all of his real property, or to decline to sell, lease, or rent such real property.

We deplore the trend toward abandonment of responsible citizenship in allowing property destruction to occur. Riotous and irresponsible disrespect for law and authority results in additional costs to society in law enforcement and compensation for property loss or damage.

We urge all citizens to communicate to their duly elected public officials their alarm and concern with such acts, to the end that the human right to own property is maintained and strengthened; for with every right there is a duty and with every privilege there is a corresponding responsibility.

Senator ERVIN. Does counsel have a question?

Mr. AUTRY. Yes, Mr. Chairman.

Mr. Emlen, on page 7 you testified, I believe, that title IV would have the effect of not improving interstate commerce, but rather retarding interstate commerce; is that correct?

Mr. EMLEN. Yes.

Mr. AUTRY. Is that assumption correct? That is in the first paragraph. The Attorney General has testified that because of discrimination in various States, this bill would improve the sale and rental of homes and would increase the flow of commerce. I believe you arrive at a different conclusion here; is that correct?

Mr. EMLEN. We think it would retard the sale of homes.

Mr. AUTRY. You would feel it would have exactly the opposite effect on commerce that the Attorney General would; is that correct?

Mr. EMLEN. Yes, sir.

Mr. AUTRY. The Attorney General also testified in his statement to the effect that title IV would be welcomed by property owners, realtors, builders, and lenders, and would operate as an "economic shield," I believe he said, and protect them from what would otherwise be economic retaliation in the absence of a law prohibiting racial discrimination by anyone.

Would you care to comment on that?

Mr. EMLEN. Yes, I would. If the economic shield were the only thing that concerned this association, I don't think we would be here. I would like to explain that the National Association of Real Estate Boards, by and large, is made up of small real estate offices. They are not, the preponderance of our members are not big operators, and the preponderance of our members deal almost entirely in the sale of used housing, owner-occupied largely. These are one-, two-, and three-man offices, and these people have an entirely different stake than a great big operational builder with 5,000, 6,000, or 7,000 houses involved, like Levittown, or something like that.

The real reason that the national association is stirred up is because these homeowners, that these member brokers of ours represent are the ones that are stirred up, and it is not the realtors who are stirring up the owners, it is the owners stirring up the realtors. It is the other way around.

Mr. WILLIAMSON. Mr. Autry, I think the Attorney General's comments were based largely on the testimony of Mr. Levitt.

Mr. EMLEN. And Mr. Rouse.

Mr. WILLIAMSON. And Mr. Rouse. Both of these gentlemen are substantial developers, and their activities are geared to Federal programs, and, of course, their activities are subject to the Executive order. That is really a horse of a different color. If somebody wants to deal with a Government program, then I think they ought to conform to reasonable rules laid down by such a Government agency.

Senator ERVIN. Not only that, but as a practical matter he had better curry favor with the Government by saying "amen" to whatever pronouncements it makes.

Mr. WILLIAMSON. That is right.

Mr. EMLEN. He has got to.

Mr. WILLIAMSON. I think all of Mr. Levitt's activities were subject to FHA and VA and I think the only reason why Belair in Maryland was not subject to the Executive order was that he was able to get a master commitment on the entire subdivision prior to the issuance of the Executive order.

Mr. AUTRY. Thank you. For the record, I understand that yours is not a segregated or restricted organization; is that true?

Mr. EMLEN. That is right. I can't give you an accurate count of the number of Negro members. We don't keep our membership records that way anyway. But in answer to the allegation that has been made that we exclude Negroes from the national association, I would like to comment that when I was the president of the Philadelphia Real Estate Board in 1958 and 1959, I made a very conscientious effort to create an atmosphere conducive to the application of Negro members by appointing a Negro as member of the admissions committee of that board, a man in very good standing in that community, both socially and businesswise, so that I know we have several Negroes in the Philadelphia board and I know several dozen boards throughout the country that do have them and where they are welcome.

Mr. AUTRY. Both the Attorney General in his opening statement and you have characterized this as a "forced housing" law, but for different reasons. Would either you or Mr. Williamson like to elaborate on the differences of your interpretation of that phrase?

Mr. EMLEN. It is forced housing in our opinion because of the element of legal force that is injected into this proposed legislation. At the State level we have 15 or 16 States with fair housing laws or forced housing laws, whatever you want to call them. The 10th amendment reserves to the States the police power for a matter of this kind. Even at the State level we object to this as an unwarranted use of the police power.

Mr. AUTRY. And how did your organization arrive at its decision to oppose title IV?

Mr. EMLEN. Well, if I could just take one second, like other trade associations of a similar nature, when this legislation was introduced in May, we had a meeting of the board of directors of the association, consisting of about 200-some directors, in Chicago, and the proposition was put to the board of directors for a vote as to what their position was going to be on it, and it was virtually unanimous. There were perhaps one or two dissents but there were no reported dissents in the board of directors. That then became the national association's policy, and I suppose that among our 83,000 members there are a few objectors, but they haven't been vocal. Realtors are overwhelmingly in favor of the position we are taking, probably 95 percent.

Mr. WILLIAMSON. I might add that the basic policy statement was adopted by our national convention in Chicago and in the year prior in Los Angeles. The policy statement that was quoted here, and that was ratified by the delegate body of approximately 6,000.

Mr. AUTRY. Thank you, Mr. Emlen.

Mr. EMLEN. Thank you.

Mr. AUTRY. Thank you, Mr. Chairman.

Senator ERVIN. Do you wish to ask questions, Senator?

Senator SCOTT. Mr. Emlen, as I think you know, and as I said in the beginning, we postulate a concern as to title IV for different reasons. I have already said here that I think that the incumbent President of the United States and his immediate predecessor have vailed to keep their promise to issue an Executive order, a "stroke of the pen" so-called, which by Federal direction involving the obligation of the Executive to administer and implement our national housing policy, an estimated 80 percent of the privately owned property in the country could be affected with the Federal interest through

VA- and FHA-insured housing, federally insued mortgages, and so forth.

Since that has not been done, I would like to ask a couple of questions that concern me as to the operation of the proposed Civil Rights Act itself. For example, interfamily relationship. Do you find in title IV any provision which would protect the right of a man to sell to his own brother, if they had been, let's say, in business together for 20 years? Is there any provision that you know of that would protect the man's right to sell to his own brother, if he so desired, for example, to continue the harmonious operation of the business, of the very property from which they are operating their business?

Mr. EMLEN. There is nothing, in the number of times that I have read the bill, that I can see there, Senator.

Senator SCOTT. I can't find anything that protects.

Mr. WILLIAMSON. I think, Senator, if it were a private sale, I don't think that there would be anything in title IV to prohibit it. But if the house, let's say, were held out to the public for sale or advertised for sale, I think that an act of discrimination could lie even though——

Senator SCOTT. You think the danger is in holding out? If it were a private sale nothing in this act would prohibit such an action?

Mr. WILLIAMSON. That is my opinion. I might be reserved.

Senator SCOTT. Would that be true also—I am just trying to clarify sections of the bill, because I am not sure—would that be true also if a person had said, an employer had said to an employee 10 years previously, "In about 10 years or sometime in the future I intend to turn over my home to you. You have served me all these years. I intend to turn it over to you at a fixed price," which is understood by both of them to be well below the market. Is there anything in title IV that would prohibit that, assuming there is no offering to the public?

Mr. EMLEN. There is nothing that would prohibit it; no, sir.

Senator SCOTT. But once there is an offering to the public, and a bid, then there would be a prohibition in selling to one's employee in spite of an earlier indication.

Mr. EMLEN. Unless you could prove that you were doing it for reasons other than race.

Senator SCOTT. Yes. I mean assuming the absence of an actual contract but an oral promise which we know is not enforcible here, but an understanding that in 10 years you will be able to buy the property at $10,000, meanwhile the property has gone up to $30,000, if it is offered for sale and someone bids $20,000 for it, then what happens to the desire of the employer to convey to the employee at $10,000?

Mr. EMLEN. I suppose he would have to convince the judge, when the complaint was made, that he had made this oral agreement with this man for a future date, and see whether the judge believed him.

Senator SCOTT. Now with every understanding that real estate transactions are not normally accompanied by evasion, would it not be possible to evade title IV by offering a property at $75,000 whose real value was $30,000, and then rejecting bids at $31,000 once offered for sale? In other words, couldn't the owner offer it at any price he wants, and offer it at a given price only, say $75,000, and refuse to sell until the purchaser he preferred came along at a bid, even though the bid is far above the offered price?

Mr. EMLEN. He could do that. Of course, if it was a modest home and subject to FHA financing, that would be a pretty difficult thing to do because it would have to come in at the FHA appraised value or close to it.

Senator SCOTT. If it is not coupled with a Federal interest other than——

Mr. EMLEN. You could manipulate it any way you wanted to if it wasn't covered by any——

Senator SCOTT. The Attorney General testified——

Senator ERVIN. You had better read subsection (b) of section 403 on page 26.

Senator SCOTT. Before we do that, the Attorney General testified that such a case could, not necessarily would, raise the question of a conspiracy. If a conspiracy could be proved it would be violative of the act.

Mr. WILLIAMSON. I think any claimant who offered a price that was in excess of the price at which the house was sold could, if he were a member of a minority group, file a complaint alleging discrimination, because there would be a presumption that there was some element such as discrimination that may have influenced the seller to sell the home at a price below the complainant's offer.

Senator SCOTT. That is all I have.

Senator ERVIN. Is there any provision whatever in title IV that makes any reference to an offer to sell to the public?

Mr. WILLIAMSON. No, sir.

Senator ERVIN. The whole tenor of section IV is that the house is available for sale, isn't it?

Mr. WILLIAMSON. Yes, that is right.

Senator ERVIN. And can it be said that virtually every house is available for sale at a price?

Mr. WILLIAMSON. Yes, sir.

Senator ERVIN. And this bill covers every residence.

Senator SCOTT. That is not true if you have to deal with some of the maiden ladies that he has to deal with in our community.

Senator ERVIN. Yes, but they are a rare exception. Now with reference to sale of a man's property to his brother, I will ask you if under this bill that if a man wants to sell his house to his brother, and some other man of another race or religion wants to buy it, on the same terms, and the owner prefers to sell it to his brother rather than to the man of the other race or religion, he is committing an illegal act under this bill, isn't he?

Mr. WILLIAMSON. It is possible, let's say if the house was vacant or there was evidence to show that the house was for sale. Earlier when I discussed this, I was referring to a private sale where the person just decided to buy another home and sell his home to his brother. Now as I say, that is my own opinion, but it is a debatable—my answer is a debatable one.

Senator ERVIN. Now as a matter of fact, if the owner of the house is desirous of selling, even to his brother, and that fact becomes known to a man of another race or religion, and the man of the other race or religion comes and offers to buy it on exactly the same terms that the man is willing to sell to his brother, and the owner goes ahead and sells to his brother, because he prefers to sell to his brother rather than to a

man of another race or religion, then he is violating the act, isn't he, the plain wording of the act?

Mr. WILLIAMSON. I think that the prima facie case of discrimination would prevail if the member of the minority group offered slightly more than what the brother was paying for it.

Senator ERVIN. Yes, because in that case he would be hit right square by subsection (b) of section 403, because he would be discriminating in respect to the terms and conditions of sale.

Now I wish you would follow this act very carefully.

Mr. EMLEN. Senator, I would like to make another comment in this vein about the capriciousness of homeowners, and this is a thing that really isn't accounted for. It happens in the business that I am in, which is entirely residential all the time. Now, this is one example which would be very greatly affected by an act like this.

A man in the community where Senator Scott and I lived several years ago gave us a house for sale for $20,000, and we got him a buyer within 24 hours for this house at the asking price and I went to the seller of this house and I told him and he said, "I wouldn't sell this house to that man if he were the last man on earth. I really hate him." He belonged to his same church and club and everything else. I said, "What do you want me to do?" He said, "I have got a friend who said he will pay me $18,000 for this house and he bought it."

This is human capriciousness and prejudice and everything. Of course, there is no element of race here, but suppose under this act he had turned the Negro down at $20,000 for a reason other than race. This is a very capricious gentleman. The burden would be on him and he would never get out from under that allegation that he was discriminating for reasons of race.

Senator ERVIN. And although the house might not be worth more than $20,000 or $25,000, he could have $1 million damages awarded against him as far as the terms of this bill.

Mr. EMLEN. That is right; yes sir.

Senator SCOTT. May I ask, Mr. Emlen, whatever happened to the *Moi* case, when someone of oriental origin either bought or subdivided property in your community. I don't know whether you had any connection with it. What happened to that?

Mr. EMLEN. Senator, the *Moi* case involved a man of Korean extraction, who made an offering simultaneously within 20 minutes with that of a Caucasian, I guess you would say. They made identical offers within a half hour of each other on a property in Chestnut Hill where Senator Scott and I live. Mr. Moi went to the Human Relations Commission in Philadelphia and filed a complaint. They have jurisdiction over the fair housing ordinance in Philadelphia. He complained that he was discriminated against because of his race.

Well, there were various aspects of this case among which was that his deposit check was returned for insufficient funds. But he nevertheless stuck to the racial issue and it went to the Court of Common Pleas in Philadelphia, I believe, Senator, just in the last week or two it was dropped. I don't know why it was dropped, but the case was dismissed, and there was no charge of discrimination finally that stuck against the owner. The other man got it. But I think that it was colored with a lot of issues other than race, which complicated it.

Senator SCOTT. I had forgotten what happened. I want to make it clear I am in favor of this bill, Mr. Emlen, but I have doubts for different reasons than you on title IV.

Mr. EMLEN. That tied that property up, you see, for over 2 years. The owner couldn't sell it for over 2 years.

Senator ERVIN. I call attention to section 406, which is enforcement by private persons. Anybody of another race or religion can be a plaintiff under section 406, even though he hasn't been refused the sale or the rental of a house; isn't that true?

Mr. WILLIAMSON. I didn't get the question.

Mr. EMLEN. Even if he hasn't been refused, he may do it.

Senator ERVIN. Yes. For example subsection 3 of section 403 says that it is unlawful—

to print or publish or cause to be printed or published any notice, statement or advertisement with respect to the sale, rental or lease of a dwelling that indicates any preference, limitation or discrimination based on race, color or national origin or an intention to make any such preference, limitation or discrimination.

Now that is a violation of the act, just to place an advertisement.

Now I invite your attention to section 406, subsection (a):

The rights granted by sections 403, 404 and 405 may be enforced by civil actions in appropriate United States District Courts without regard to the amount in controversy and in appropriate state or local courts of jurisdiction a civil action shall be commenced within six months after the alleged discriminatory housing practice or violation of section 405 occurred.

Sub-section (b). Upon application by the plaintiff and in such circumstances as the Court may deem just, a Court of the United States, in which a civil action under this section has been brought, may appoint an attorney for the plaintiff and may authorize the commencement of a civil action without the payment of fees, cost or security. A Court of a State or subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision.

Sub-section (c). The Court may grant such relief as it deems appropriate, including a permanent or temporary injunction, restraining order or other order, and may award damages to the plaintiff including damages for humiliation and mental pain and suffering and up to $500 punitive damages.

Sub-section (d). The Court may allow a prevailing plaintiff a reasonable attorney's fee as part of the cost.

Now that is the only section of this title which deals with who is going to be the plaintiff and about relief, isn't it?

Mr. WILLIAMSON. That is right.

Senator ERVIN. It doesn't even have a requirement that the plaintiff shall have been refused the rental or purchase of real estate, does it?

Mr. EMLEN. That is right.

Senator ERVIN. This title applies to all corporations. Under section 403, the word "person," includes—

individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers and fiduciaries.

Now that would include a church, would it not?

Mr. WILLIAMSON. That is right.

Senator ERVIN. Either as a corporation or a voluntary organization or association?

Mr. EMLEN. Yes, sir.

Senator ERVIN. Now, in my State the Presbyterian Church, the Methodist Church, and the Lutheran Church already have residential

homes for the elderly members of their congregations, and the people of the Jewish faith are now engaged in building such a residential home for the elderly people of the Jewish faith. I will ask you if under subsection (b) of section 406 if it wouldn't be an unlawful act for any of those religious denominations to place an advertisement in print of any kind saying that they were operating these homes for the benefit of the elderly people of their respective faiths?

Mr. EMLEN. Yes, sir.

Senator ERVIN. And if they should put such an advertisement in print, they could be sued by any person of any other religion, for damages, and it would be possible for a person who hasn't even applied for admission to that home, if he is of another religion, to recover unlimited damages, wouldn't it?

Mr. WILLIAMSON. That is right, Senator, and even if the complainant in this case purchased the home and obtained title, he could still maintain a cause of action that he had to pay a larger down-payment than somebody else who may have tried to buy the house.

Senator ERVIN. I am not a Lutheran, I am not a Methodist, and I am not of the Jewish faith. If I applied to any one of those homes to receive me, and if they refused to receive me, I could sue those churches for unlimited damages, could I not?

Mr. WILLIAMSON. That is right.

Senator ERVIN. I don't know why it took the Department of Justice from January until May to draw this bill. Senator Scott just called my attention to subsection (b) of section 406. You will notice the plaintiff can get a court-appointed attorney, can't he?

Mr. WILLIAMSON. Yes, sir.

Senator ERVIN. There is no provision for the defendant to get a court-appointed attorney.

Mr. EMLEN. No, sir.

Senator ERVIN. And so if a widow who was forced by economic circumstances to rent one room in her dwelling house, and she preferred to rent that room to a person of her race in preference to a person of another race, and even though she had no money, and she claimed that she wasn't guilty of any illegal preference, the court would not have the power to appoint an attorney to represent her, but would have the power to appoint an attorney to represent the plaintiff, wouldn't it?

Mr. EMLEN. Yes, sir.

Senator ERVIN. And then you get down to subsection (d) of section 406, if the widow lost the case the court could make her pay the attorney's fee for the plaintiff, could it not?

Mr. EMLEN. Yes, sir.

Senator ERVIN. But if she won the case she couldn't recover a penny in attorney's fees?

Mr. WILLIAMSON. That is right.

Senator ERVIN. Don't you think it is a pretty sorry statute for Congress to pass, which would load all the legal "dice" in favor of one side and against the other?

Mr. EMLEN. Yes, sir.

Senator ERVIN. Don't you think that Congress would be guilty of as gross a discrimination as what this title undertakes to prevent, if it should enact a remedial statute of that nature?

Mr. EMLEN. Yes, sir.

Senator ERVIN. Why should Congress put itself on one side of a lawsuit rather than another? Can you think of any reason that justice requires it?

Mr. EMLEN. No, sir.

Senator SCOTT. Mr. Chairman, it seems to me that equity would be done—I know we in this committee have debated this in a number of cases, in a number of other bills, the business of allowing attorney's fees to one side only—equity could be done if you were to allow attorney fees at all, by changing the word "plaintiff" to "party," that "the Court may allow prevailing party reasonable attorney's fees as part of the cost," because if a harassing suit were brought by a rich person against a poor person, and the poor person wins, and is allowed to keep his or her house, the poor person has to pay his or her attorney's fee and the rich person has it paid by the poor person.

This just strikes me as a highly inequitable provision and I have argued against it in other matters which have no relation to civil rights at all.

Mr. WILLIAMSON. It would still be heavily weighted against the defendant, primarily because of the nature of the suit. The mere allegation of discrimination would shift the burden to the defendant in all of these cases.

I was recently co-counsel on a case before the Federal Housing Administration involving discrimination, where sanctions were imposed against a realtor, and the allegation of discrimination, the mere fact that the Negro family was turned down, shifted the burden, even though the realtor submitted evidence that he sold homes in the development to two Negro families, and the third Negro family he rejected because he did not believe that they had enough income to carry the mortgage. This was economic discrimination that he admitted. But, nevertheless, the mere fact that the Negro family was turned down shifted the burden to the realtor to prove that the discrimination was economic and not racial, but he couldn't prevail.

Mr. EMLEN. Also, Senator, almost all residential real estate transaction, as you know, up until the last minute, is oral, and it is almost always a salesperson talking to a purchaser or to a seller. You very seldom have very much in writing to "hang your hat on" for proof to back anything up, whether it involved race or anything else. It would just put the defendant in an impossible position.

Senator ERVIN. I will ask you if on account of that very thing—well, let's go back a little bit. I will direct this question to Mr. Williamson. Hasn't it always been one of the recognized principles of American jurisprudence and American constitutional law that the right to regulate the title to real estate and the right to regulate contracts relating to real estate belongs to the States?

Mr. WILLIAMSON. Yes, sir.

Senator ERVIN. Do you know any decision, from the time George Washington took his first oath of office as President of the United States down to this moment which holds that Congress has the power to regulate either the title to real estate or the nature and terms of contracts relating to real estate?

Mr. WILLIAMSON. Sir, the law students refer to that as "hornbook law."

Senator ERVIN. Yes.

Mr. WILLIAMSON. That is elementary.

Senator ERVIN. Yes. Title IV of this bill if enacted into law would undertake to change that which has been accepted hornbook law and accepted constitutional law since the foundation of this Republic, wouldn't it?

Mr. WILLIAMSON. Yes, sir.

Senator ERVIN. Now really, when you get down to it in the ultimate analysis, isn't this an attempt on the part of the Federal Government to regulate the thoughts of people and to punish them because of the thoughts they think?

Mr. WILLIAMSON. Yes, sir.

Senator ERVIN. In other words, the thrust of this bill is to say to every homeowner in the United States, "When you sell your home, you must totally eliminate from your mind any thought or any impression concerning the race or religion of anybody you deal with in respect to real estate."

Mr. WILLIAMSON. That is right.

Senator ERVIN. If the owner of real property wants to sell it, and two people of different races or of different religions apply to him to purchase it, unless he sells to the person not of his race or the person not of his religion, he has made out a prima facie case against himself; hasn't he?

Mr. WILLIAMSON. That is right, sir.

Mr. EMLEN. Yes.

Senator ERVIN. And so isn't the real objective of this statute to try to coerce a homeowner to sell his property to a person of some other race or some other religion, rather than a person of his race or his religion?

Mr. WILLIAMSON. That is correct.

Senator ERVIN. And to borrow Shakespeare's expression, if he wants to stay on "the windy side of the law," he is going to discriminate against the man of his race or the man of his religion in favor of the man of another race or another religion, in order to avoid the possibility that he may be immersed in damages.

Mr. WILLIAMSON. That is correct.

Senator ERVIN. So, the truth of it is the ultimate objective of this bill is to deprive all Americans who own residential property or property which is susceptible of development as residential property of their right to control either its sale or its rental. Isn't that the objective of the bill?

Mr. WILLIAMSON. That certainly is the case.

Senator SCOTT. Mr. Chairman, before you proceed, because I have to leave for another appointment, may I indicate that in committee, if necessary, I may offer an amendment, because the members of the Judiciary Committee are certainly not against lawyers, I think that is hornbook law, too, and I think we ought to provide that "the prevailing party" whoever it is "be entitled to reasonable attorney's fees as part of the cost" if any provision is in the bill. And while some people say "Hang all lawyers," I would say at least hang them equally or elevate them equally, as the case may be.

Senator ERVIN. Senator, I would like to announce at this time that I will oppose your amendment as well as oppose the present provision of the bill.

Senator SCOTT. I am glad to find you on the opposite side again.

Senator ERVIN. The Scriptures tell us that the Devil travels to

and fro, seeking whom he may devour. Therefore, I am opposed to legislation which allows lawyer's fees. I am a lawyer and I have high respect for them, but I don't want to offer an inducement for lawyers to follow the example of the Devil to go abroad seeking lawsuits in order to get a fee allowed by the court. I believe each client ought to compensate his own lawyer.

I want you to follow me closely on how this bill is drafted. I start with section 403, and I am going to leave out unnecessary words, in order to read the complete obligation this section would put on homeowners.

"It shall be unlawful for the owner to refuse to sell, rent, or lease a dwelling to any person because of race, color, religion, or national origin.

Now isn't that a complete statement?

Mr. WILLIAMSON. Yes, sir.

Senator ERVIN. That is not leaving out any essential part of the obligation imposed upon the owner.

Mr. WILLIAMSON. That is right.

Senator ERVIN. In other words, there is no requirement that the owner even be willing to sell; is there?

Mr. WILLIAMSON. No, that is just implied, but I could see where a court might rule otherwise.

Senator ERVIN. Yes. Well, I can't see how it is implied. It just says it shall be unlawful for the owner "to refuse to sell, rent, or lease a dwelling to any person because of race, color, religion, or national origin." In other words, if I am an owner of property and a man comes and wants to buy it, and I am not offering it for sale, and I say, "No, I am not going to sell it to you. I am not going to sell it to anybody and particularly I am not going to sell it to you because of your religion," I would be under the act; wouldn't I, according to its phraseology?

Mr. WILLIAMSON. I would say that taking a literal interpretation of the words that the authors of the bill use, that could happen.

Senator ERVIN. Yes.

Mr. WILLIAMSON. I don't think it is their intent.

Senator ERVIN. They intend many things that they don't spell out in it.

Mr. WILLIAMSON. If we just judge the intent by the language they use, that could happen

Senator ERVIN. Yes, it certainly could, and I know the Attorney General talks about offering to sell to the public, but those words are not in here. Don't you think that laws ought to be written with more certain language than that?

Mr. WILLIAMSON. Yes, sir.

Mr. EMLEN. Senator, I would like to say, referring back in this connection and in my testimony, that I think the most dangerous area here is going to be in the advertising of residential real estate for sale. I think that is the biggest "boobytrap" in the thing, because you actually have put that house on the market then, and you know that there are many, many reasons why people may withdraw their houses from the market. They may be assigned to move to St. Paul, Minn., on Sunday and they have had their orders canceled on Wednesday, and so he doesn't want to sell his house after all.

I can see a wide area for abuse in this regard, where the complainant would say, "Well, he took it off the market to prevent me from owning it."

Senator ERVIN. The more I read this title, the more I marvel at why it took the Department of Justice from January to May to draw it. I want to read another section of this.

Mr. WILLIAMSON. I think they were waiting for the dicta in the *Guest* case.

Senator ERVIN. Well, I don't see why they didn't put in the phraseology and say what they meant. There is not a single thing in here that says this only applies if a man is offering to sell his property.

Now I want to read you another portion to see if this is not so:

Section 403. It shall be unlawful for the owner to deny a dwelling to any person because of his race, color, religion, or national origin.

If a man came to me and asked for my dwelling and I denied it to him on account of his race or religion, I would be guilty of an illegal act under the terms of that phraseology; would I not?

Mr. WILLIAMSON (reading):

It shall be unlawful for the owner to deny * * *

Senator ERVIN. To deny.

Mr. WILLIAMSON (continuing):

* * * a dwelling to any person.

Senator ERVIN. Because all of that is in the conjunctive.

Mr. WILLIAMSON. Obviously, "deny" must mean something other than sell, rent, or lease.

Senator ERVIN. It must mean something other than what it says; mustn't it?

Mr. WILLIAMSON. Yes, sir.

Senator ERVIN. Yes. But that is what it says. It says it is unlawful for an owner to deny a dwelling to any person because of his race, color, religion, or national origin, and if you denied a dwelling to any person under the exact phraseology of this law, taking the words to mean exactly what they say, he could be sued, couldn't he?

Mr. WILLIAMSON. Yes, sir. In other words, a complainant could make out a cause of action because an owner was withholding his property from public sale on the grounds of race, religion, or national origin.

Senator ERVIN. That is right. Now listen to this in section 403:

It shall be unlawful for the owner to refuse to negotiate for the sale, rental or lease of a dwelling to any person because of his race, color, religion or national origin.

I ask you if, according to the phraseology of this bill, that is not a complete separate offense in itself, refusal to negotiate?

Mr. WILLIAMSON. Yes, sir; and we could even go a step further. I think it would be a violation of section 403 if a homeowner refused to admit some person to his house who wanted to take a look at it preparatory to making an offer.

Senator ERVIN. In other words, a man could be sued and immersed in an unlimited amount of damages if he refuses to negotiate for the sale of his property which he doesn't desire to sell. In other words, he has got to negotiate a contract that he doesn't intend to make.

Now go back just 1 minute to the fact that it is hornbook law that the State has the power to regulate title to land and contracts relating to land. I will ask you if every State in the Union, to avoid uncertainty and vexatious litigation in this field, has not enacted a statute of frauds, which requires all contracts relating to the sale of land to be in writing.

Mr. WILLIAMSON. Yes, sir.

Senator ERVIN. And be signed by the party against whom it is to be enforced or by his authorized agent.

Mr. WILLIAMSON. That is right.

Senator ERVIN. And yet under title IV of this bill, everything could be dependent upon oral conversations, couldn't it?

Mr. WILLIAMSON. That is right. In the testimony here, Mr. Emlen made one statement that is a very, very important one, and that is that under the provisions of this bill, somebody who wants to buy property would be vested with a right that is unknown in the common law, a right to buy property in violation of all of the statutes of frauds and a violation of everything that we know in the common law related to the transfer of real estate.

Senator ERVIN. And this title, among other things, would nullify every statute of frauds enacted by the 50 States of the Union, wouldn't it?

Mr. WILLIAMSON. Yes, sir.

Senator ERVIN. Now this would substitute for written contracts required by statutes of fraud, oral testimony plus reading the minds of people, wouldn't it?

Mr. WILLIAMSON. Yes, sir.

Senator ERVIN. I think that there is something in the Scriptures which we might well ponder before we enact a law of this kind and that is that God judgeth not as man judgeth; that man looks upon the external appearances and God looketh upon the heart.

This title is calculated to require the courts to exercise the same power that God has and to look into man's mind and into his heart and ascertain what is there. But man doesn't have the ability to do that.

In other words, the legality of every transaction under title IV will depend on what a man has in his mind and his heart rather than upon his external action, won't it?

Mr. WILLIAMSON. That is right. Senator, there is one other provision that the Attorney General—of course, he hasn't testified with respect to title IV, but under 406(c), "The court may grant such relief as it deems appropriate including permanent or temporary injunction, restraining order or other orders." And I think the Attorney General ought to be interrogated on this, but from my reading of the plain language of the subsection, a court could issue an order setting aside a sale, where an innocent purchaser had already taken possession of a home.

Senator ERVIN. Yes.

Mr. WILLIAMSON. The court could set aside the sale and order the property transferred to the complainant.

Senator ERVIN. That is right, whatever relief the court deems appropriate. In other words, instead of Congress defining the relief, the court is given blanket authority to do anything it pleases.

Mr. WILLIAMSON. That is right.

Senator ERVIN. Or anything that it deems appropriate.

Mr. WILLIAMSON. And even assessing damages for humiliation and mental pain and suffering, without any standard as we normally have for damages for mental pain and suffering in the courts on negligence cases. They generally, I think, in all States must be related to some physical injury.

Senator ERVIN. And since the word "court" usually refers to the judge, unless the context requires otherwise, it looks like the judge is the one that is going to pass on the damages rather than the jury.

Mr. WILLIAMSON. Oh; yes, sir.

Senator ERVIN. We are so anxious to regiment people that we destroy the spirit, if not the letter of the constitutional provisions about jury trials.

Mr. WILLIAMSON. Yes, sir.

Senator ERVIN. People usually pick out a scapegoat when they argue for the passage of legislation which robs people of their rights and in this case they pick out the real estate brokers as the scapegoat.

Mr. EMLEN. That is right.

Senator ERVIN. We have had witnesses testify that real estate brokers determine who shall be the purchasers of homes; I would like to ask you in your experience as a real estate broker, whether, in the great majority of cases, the ultimate decision as to the identity of the person to whom the property is to be sold is made by the real estate broker or by the owner of the home?

Mr. EMLEN. Senator, I am glad you asked me that, because I feel pretty strongly about this position. My business is in the Philadelphia suburbs where we are beginning to have open occupancy and there are Negro buyers looking, and it is pretty hard to take, to constantly be told that this responsibility is the real estate broker's and the brokers are the ones stirring up the communities. I know in my own office, where my practice and knowledge is restricted to, that we never ask a seller of a property one way or the other whom he wants to sell to. If we get it, we get it gratuitously from the seller. He will say, "I don't want any Negroes here," "I don't want any Catholics here," "I don't want any Jews here" or whatever he says.

Now we have been asked by some of these groups to refuse to take this listing if this seller wishes to discriminate, with which I can't agree at all. But it is a fallacy to say that the brokers go to sellers of properties and say, "Now I don't want you to ever sell this place to a Negro; we don't want to break this block up," and so forth. It just isn't so in the circle of reputable brokers that I know.

We do carry out the wishes of the sellers. Now we have sellers who say, "I do not care who gets this house, and I don't care whether it is a Negro or a Jew or whatever," and then we act accordingly, and the records of my office will show that we have acted that way.

Mr. WILLIAMSON. I will say this, Senator. That more and more real estate brokers throughout the country, some of our most prominent, and I am referring to some of our past presidents, have now changed their policy and are not taking listings that have any restriction. The California Real Estate Association, I think, in all of their multiple listings of all of their boards in California that less than one-half of 1 percent had any kind of restriction. One other note. It is a

violation of our code of ethics for a realtor not to take every bonafide offer to the seller, to let the seller make the determination.

Mr. EMLEN. Senator, I think this is very pertinent to your question. This is a proposal adopted at the Los Angeles convention. This is our national association policy, not a policy statement but a procedure we follow in this regard:

> Being agents realtors individually and collectively in performing their agency functions, have no right to determine the racial, creedal or ethnic composition of any area or any part thereof. No realtor should assume to determine the suitability or eligibility on racial, creedal or ethnic groups of any prospective mortgagor, tenant or purchaser, and the realtor should submit to the client all written offers made by any prospect in connection with the transaction at hand. Upon acceptance of the realtor's client of any offer, the realtor should exert his best efforts to conclude the transaction, irrespective of the race, creed or nationality of the offerer. Each realtor should feel completely free to enter into a broker-client relationship with persons of any race, creed or nationality. Realtors should continue to condemn any attempts by persons licensed or unlicensed within or without the real estate business to solicit or procure the sale or other disposition of real estate in residential areas by conduct intended to implant fear in property owners based upon the actual or anticipated introduction of any racial, religious or ethnic group into such area.

That is our national position now.

Senator ERVIN. With reference to "blockbusting," isn't this bill designed to put the Federal Government into the "blockbusting business," putting it in plain and simple English, which I unfortunately have the habit of doing sometimes.

Can it not be truly said that virtually all the residential patterns in the United States are set by the homeowners within those sections?

Mr. EMLEN. Yes, I think so.

Senator ERVIN. And is it not true, as far as your observations go, that the overwhelming majority of people prefer to live in a residential section inhabited by people of their race?

Mr. EMLEN. Yes, sir.

Mr. WILLIAMSON. I think Senator Douglas was very eloquent on that point in his testimony.

Senator ERVIN. Yes, I thought so. He and I agreed very much on it. My own opinion is that people segregate themselves in their residences on the basis of race in obedience to a natural law, which is that like prefers to live among like. That is the reason the provisions of title IV are sort of artificial.

I notice the Wall Street Journal says, speaking of some of the difficulties of integrating residential neghborhoods:

"Many Negroes, don't want to invade all-white, developments. Lots of Negroes, just like whites, prefer not to live with members of the other race. Some estimate it at 85 percent," and that part of the statement, "Lots of Negroes, just like whites, prefer not to live with members of the other race, some estimate it at 85 percent" is in quotations, and it is attributed to Robert A. Sauer, an equal opportunity officer for the Department of Housing and Urban Development.

Now, you agree with me on the proposition that if people are going to have any freedom at all, they must have the right to do things according to their own notions rather than in obedience to governmental edicts?

Mr. EMLEN. Certainly.

Senator ERVIN. And I am a person who believes that the supreme value of civilization is freedom, and I am perfectly willing to let

people keep whatever their notions are, and to let them keep their allergies if they want to. I think that that is one of the prerequisites of freedom.

Apart from all of the loose phraseology of the bill and all of its purposes and objectives, isn't the fundamental objection to title IV of this bill is that it undertakes to rob all of the people of America of the right and the freedom to own and use and sell and rent their property as they please?

Mr. EMLEN. Yes, sir.

Senator ERVIN. The Attorney General bases his claim of constitutionality for title IV on the commerce clause, and while the commerce clause has been dealt with in 1,700 or 1,800 cases by the Supreme Court of the United States, and it has been somewhat distorted, doesn't interstate commerce essentially have reference to the movement of people and goods and communications from one State to another?

Mr. WILLIAMSON. That is the essence of it.

Senator ERVIN. It gives Congress the power to regulate the movement of goods and communications.

Mr. WILLIAMSON. That is right.

Senator ERVIN. From one State to another.

Mr. WILLIAMSON. That is the gist of what the Supreme Court had to say on it.

Senator ERVIN. And isn't it in the very nature of things impossible for real estate—that is land—to move from one State to another, across State lines?

Mr. EMLEN. Yes, sir.

Mr. WILLIAMSON. It can't be; only in the event of a tornado.

Senator ERVIN. Yes. Sometimes they blow some dust over, but that is a regulation of the Lord's rather than of Congress.

Now, I think it was well pointed out here the distinction between this and the public accommodations provision. The public accommodations provision was upheld on the ground that it dealt with interstate travelers and with goods which were moving or which had moved in interstate commerce.

Now many of the houses in the United States are built of timber, aren't they?

Mr. WILLIAMSON. Yes, sir.

Senator ERVIN. Which is cut within the borders of the State and the houses are built within the borders of the State, and nothing in it moves in interstate commerce, except perhaps a few nails, and they have come to rest and become integrated in the structure.

Mr. WILLIAMSON. It becomes part of the land.

Senator ERVIN. Don't you have difficulty in reconciling the theory that title IV is valid under the interstate commerce clause with the meaning of some very simple English words? I couldn't reach that conclusion myself without doing violence to the integrity of my intelligence. I don't say that of anybody else's. They may have a more elastic intelligence than I have.

Mr. WILLIAMSON. If this can be justified under the commerce clause, then I think any element of human endeavor could also. The Congress could enact a uniform divorce law under the theory that lack of uniformity puts a burden on the interstate travel of divorced people.

Senator ERVIN. That is right.

Mr. WILLIAMSON. There would be no limit, and that is why we hope that the Congress won't tempt the Court to so rewrite the commerce clause.

Senator ERVIN. Woodrow Wilson stated, and he was a great constitutional scholar, whenever you abolish the distinction between intrastate and interstate commerce, you abolish the system set up by our Constitution.

Mr. WILLIAMSON. That is right.

Senator ERVIN. I hate to see it abolished. It has already been manhandled to a considerable extent. But I can reconcile those decisions which manhandle it with the theory that Congress does have the power to regulate intrastate activities where such regulation is essential or appropriate to the effective regulation of interstate commerce.

But the final issue here is whether the American people are going to be permitted to exercise the free enterprise system, and the rights of private property with respect to the sale and rental of their homes, is that not the fundamental question?

Mr. WILLIAMSON. That is the issue.

Senator ERVIN. And the question is whether they are to be robbed of that right and whether the Federal Government is going to manage exactly where the people of the United States live and who their neighbors are to be.

Mr. WILLIAMSON. That is right.

Senator ERVIN. And when the Federal Government regiments people to that extent, they have mighty little freedom left, in my judgment.

Mr. WILLIAMSON. Well, if title IV is enacted, I think you will find that theme in the Civil Rights Act of 1967 or 1968.

Senator ERVIN. Yes.

Mr. AUTRY. Mr. Emlen, one more question. Isn't it true that integrated neighborhoods have voluntarily been maintained by those who wish to maintain them around the country, by setting up a sort of an unofficial quota system, which is voluntarily enforced within the neighborhood, so that an integrated neighborhood does not become either all white or all Negro?

Mr. EMLEN. The benign quota is well known. There is one developer who has been working on open occupancy housing that I know, Morris Milgram, who has done quite a lot of work. He was in Philadelphia once and now is in Chicago doing it. I know at one time at least Morris Milgram believed in the benign quota to try to establish a 60–40 ratio or something like that, which I imagine would be a pretty hard thing to do.

Mr. AUTRY. Wouldn't this bill prohibit that?

Mr. EMLEN. Yes, sir. There couldn't be any benign quota or anything like it in title IV.

Mr. WILLIAMSON. I think the witness for the Illinois Association of Real Estate Boards will have some testimony on that point as it operates in the Chicago area.

Mr. EMLEN. Certainly you are right. It couldn't possibly operate that way under this title.

Mr. AUTRY. It could destroy those neighborhoods that have voluntarily integrated.

Mr. EMLEN. Certainly.

Mr. AUTRY. Thank you.

Senator ERVIN. If a bill of this kind could be sustained under an interpretation of the interstate commerce clause, the only limitation whatever on the power of Congress under that clause would be whatever limitation the due process clause of the fifth amendment imposed, wouldn't it?

Mr. WILLIAMSON. That is correct, that would be the only limitation.

Senator ERVIN. And has it not been the general trend in the past that the due process clause of the fifth amendment as against the Federal Government and the due process clause of the 14th amendment as against the State government has been construed to protect the right of private property and it has been held in a multitude of decisions that property consists not only of the physical things, the property, the land or the house, but it also consists of the attributes of the property, and that among those attributes are the right to sell freely and the right to determine the lawful use of the property freely, and the right to lease the property freely.

Mr. WILLIAMSON. That is right.

Senator ERVIN. On behalf of the subcommittee, I want to thank Mr. Emlen and Mr. Williamson for making their appearance here.

Mr. EMLEN. Thank you, Senator.

Mr. AUTRY. Mr. Chairman, the next scheduled witness was to be Mr. Roy Wilkins, the chairman of the Leadership Conference on Civil Rights. However, Mr. Wilkins called from New York this morning at 10 o'clock to say that his flight was fogged in at the New York airport and he would be unable to be here. Therefore, we will reschedule his appearance at a mutually convenient time a little later.

Senator ERVIN. The subcommittee will stand in recess until 10:30 tomorrow.

(Whereupon at 12 p.m., the subcommittee recessed until 10:30 a.m., Tuesday, June 14, 1966.)

CIVIL RIGHTS

TUESDAY, JUNE 14, 1966

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:37 a.m., in room 2228, New Senate Office Building, Senator Roman L. Hruska presiding.

Present: Senators Hruska, Kennedy of Massachusetts, and Javits.

Also present: George Autry, chief counsel; H. Houston Groome, Lawrence M. Baskir and Lewis W. Evans, counsel; and John Baker, minority counsel.

Senator HRUSKA. The subcommittee will come to order. We will continue the hearings on the several civil rights bills now before the subcommittee.

Our first witness this morning is one of our distinguished colleagues, the senior Senator from the State of Florida. We always welcome him in any committee, and particularly in the Judiciary Committee.

Senator Holland, you have filed a statement. It will be printed in the record in its entirety. You may either read it or summarize it, as you choose.

STATEMENT OF HON. SPESSARD L. HOLLAND, U.S. SENATOR FROM THE STATE OF FLORIDA

Senator HOLLAND. Thank you, Mr. Chairman. I appreciate the chance to appear before this distinguished subcommittee. My prepared statement was drawn in contemplation of the fact that the chairman of the subcommittee would be presiding, and I refer to him several times in the statement. That will be without derogation upon the present presiding officer at all, but because of the facts that I thought would prevail at the time of the appearance. I am sorry that the death in Senator Ervin's family made it impossible for him to be here.

I wish to thank the chairman and the members of the Constitutional Rights Subcommittee for the opportunity to express my views on the serious implications of S. 3296, the legislation they are presently considering. I will not impose upon much of the subcommittee's time, and I do not wish to duplicate the fine testimony already heard with respect to these proposals. I will, if the Chair permits, confine myself to a few brief comments on certain aspects of the

administration's bill, S. 3296. Of course, I shall be pleased to answer questions on the other portions of the bill if that is desired.

The provisions I primarily direct myself to are titles II and IV. I believe these provisions deserve especial comment because with respect to each title, they are novel, dangerous, and arrogant assumptions. The assumptions are novel because they presume to overrule 100 years of uniform, consistent, and reasonable interpretation, both legal and political, concerning the grant of power to the Federal Government under the 14th amendment. The assumptions are dangerous because in their logical extensions they presume the existence of unlimited Federal power over the other two repositories of sovereignty in this country—the States and the people. Finally, the assumptions are arrogant, because they presume a godlike and omnipotent fount of wisdom in representatives of the Federal Government, and no wisdom at all in the representatives of the States, nor, indeed, any wisdom in the people themselves.

As to title I, it is clear that Congress has authority to legislate as to Federal juries. I trust this subcommittee to do so wisely. Let me say only that there are certain details of the proposal which disturb me greatly. These are the parts of the title which require citizens to disclose to the Federal Government matters of their own conscience, details of their national orgin (which, except for foreign-born citizens would certainly be "American"), and matters of their financial circumstances. I do not believe that government has any business delving into these areas. Who can guarantee that these unwarranted and unnecessary intrusions into individual privacy—here claimed for a worthy end—will always be used worthily?

I am pleased to note that the Attorney General has consented to the principle that these inquiries into private matters will be entirely voluntary. I am hopeful that this will be made explicitly clear in any legislation which may be reported to the Senate, and that if it becomes law it will be made clear to every citizen when the form is presented to him. Of course, when the Federal Government, in all its majesty, presents a citizen a form to fill out, "voluntary" generally becomes an empty word.

I would add as to title I, that as a lawyer, I have great respect for the jury system—a system which is older than this country. I hope that the belatedly found need for these important and drastic changes in the Federal jury system will not tempt the Congress into ill-advised and impetuous legislation. They clearly deserve careful and dispassionate study and expert technical testimony.

Now as to title II. This title attempts to eliminate discrimination in State jury selection. I do not object, and I know the chairman does not object, to laws preventing racial discrimination in jury selection. Nor do I—and I know of no Senator who feels differently—object to Federal laws against racial discrimination in choosing State juries. There are now such laws; they have been used with success and they could be more vigorously applied.

However, discrimination—and I hesitate to use the word—has been a basic policy of jury selection in all States and, indeed, is presently the policy of the Federal system, as well. This is discrimination based upon intelligence, moral standing, and a number of other grounds.

Some discrimination is built into jury selection by vesting in the jury official a certain degree of controlled discretion. Their function is to choose—not randomly but carefully—so that a fair and intelligent cross section of the community is available for duty. Jury duty in these States is not like voting—it is not open to all—illiterate, unintelligent, senile, immature, mentally or physically unfit.

Title II, however, is philosophically antagonistic to discretion in jury selection. It is inevitable that challenges will be made to State juries under the proposed procedures. Even if these challenges are successfully defeated—since the discretion we are talking about does not necessarily result in imbalance—practical necessity will force the States to protect against disruption of their criminal processes. They will inevitably have to abandon any semblance of discretion and turn to completely random systems such as that proposed in title I.

Now, I do not think that the random selection approach is inherently evil. But it is not the one chosen by many of the States, most notably those who allow special juries for certain kinds of cases, and those which have blue-ribbon grand or petit juries. Who is to say which approach is preferable? I, for one, will not presume to set up one or the other as the only one to be used. Why should the Attorney General—or this Congress—make such a hasty, imperious decision?

Now, this is not the only kind of "discrimination" in State jury systems. There is even discrimination in some States based upon economic status. Many States exempt—and exemption is tantamount to self-exclusion in practical effect—certain occupational groups. Second, the length of jury duty, even if for a short time, is a tremendous burden to some economic groups. Fees for jury duty are low, and even where high enough to compare with the wages of a low-paying job, that job is likely to be unskilled, unsecured, and easily filled by many others. Consequently, if a man were forced to serve on a jury, even with assurance that he would suffer no great financial loss, he might be endangering his job. As a consequence, most States allow considerable flexibility in their exemptions, and judges and jury officials are quick to relieve such persons from duty. In fact, I might mention that Florida has sought to avoid built-in economic discrimination on its juries by prescribing a 1-week tour of jury duty for petit jurors unless the circumstances, in the opinion of the judge, require such jurors to serve for a longer time, as would be the case where the trial of a certain case being tried by a petit jury lasts over 1 week. We also, in Florida, allow to each party in a jury case a substantial number of "arbitrary" or peremptory challenges which may or may not be used in any given case and may be wholly based on discrimination of many kinds. In that connection, Mr. Chairman, I think it might be interesting to insert at this time that provision of the Florida statute which allows for arbitrary or peremptory challenges.

Senator HRUSKA. It will be so ordered.

Senator HOLLAND. It is found in section 913.08 of the Florida Statutes, Annotated, and to quote it just briefly, it allows 10 peremptory challenges to both the State and the defendant if it is a capital case, or where a life sentence is involved; and second, six if the

offense charged is a felony; and three if the offense charged is a misdemeanor, that is three to each case; and fourth, that if two or more defendants are jointly tried, each defendant shall have his full number of peremptory challenges.

I haven't tried cases in many States, Mr. Chairman, but in the two or three States that I have tried cases in, all had some provision upon this point, so that a defendant can be protected against a juror whom he inherently feels will not be fair to him and he doesn't have to state any reason for the position.

(The provision of the Florida statute referred to follows:)

FLORIDA STATUTES, ANNOTATED

Sec. 913.08. Number of peremptory challenges.

The State and the defendant shall each be allowed the following number of peremptory challenges:

(1) Ten, if the offense charged is punishable by death or imprisonment for life;

(2) Six, if the offense charged is a felony not punishable by death or imprisonment for life;

(3) Three, if the offense charged is a misdemeanor;

(4) If two or more defendants are jointly tried each defendant shall be allowed the number of peremptory challenges specified above and in such case the state shall be allowed as many challenges as are allowed to all of the defendants.

I know the Attorney General has said that title II would not affect such "invidious compassion," as he called it, which results in economic discrimination. But how is one to prove a challenge of such discrimination under this bill. Quite simply—and this is explicit in some of the "quick on the trigger" devices in other proposals before the subcommittee—one merely compares the percentages. And in States with such "invidious compassion" the percentages will quickly show that lower economic groups are not being represented as they should. How is the State to defeat this showing—to present testimony from every official on every hardship exemption—and then have the individual testify to confirm the facts? I fear that the diversity, the "discrimination," hitherto thought valid in State jury selection, will fall before the grim reaper of this Federal law.

But there is a greater objection to title II. The enforcement provisions of this title interpret the 14th amendment as a grant of power to the Federal Government to prescribe affirmative rules of procedure for State judicial proceedings. I must say that it is most extraordinary to translate "no State shall"—and those are the words of the 14th amendment—into "States shall * * *." The Attorney General's arguments are most ingenious and he is certainly a better logic splitter than Lincoln was a rail splitter. However, there is a real difference between forbidding an act and requiring one. Now, of course, one can always forbid not doing an act, and then say that this is the same in practical effect as requiring that act. But the basic difference between forbidding an act and prescribing a course of condut is precisely the amount of freedom allowed the individual actor.

Totalitarian states, which deny the essential freedom of man, prescribe a course of conduct for all citizens. All acts not permitted are forbidden. If no authority is found for the act, it is outlawed.

A free society adopts the opposite principle. All acts not destructive of public order, safety, or stability are permitted.

The example is clear. There is a real difference between the power to forbid and the power to require. To say that the 14th amendment "due process" requires allowing an attorney a reasonable time to present his case is not the same as saying that due process allows the Federal Government to establish a State law that all attorneys are allowed 1 hour only to argue and, facetiously, perhaps 2 hours in civil rights cases only.

I think it is important to note that the assumption of power which is the foundation of title II is not limited to discovery rules, burdens of proof, and the like. It has no natural limits. It encompasses to the fullest extent the affirmative legislative power of the States. It includes rules of police operation, appeal procedure, and all the ramifications of the administration of justice. And since the 14th amendment is not limited to "due process," this assumption of power covers the entire gamut of "equal protection" and "privileges and immunities," both of those terminologies being taken also out of the 14th amendment. Consider the length and breadth of the laws considered by Congress. How many of them will be justified as laws applying to the States if we merely say they are necessarily to prevent the States from offending 14th amendment rights? One glance at the history of the commerce clause reminds us how far imaginative legislators and ultraliberal judges can stretch a grant of power.

I wish to make one comment more about title II by referring to title V. This title, "The Criminal Title," also applies a novel interpretation to the 14th amendment. In his justification, the Attorney General chopped some more logic and bedeviled commonsense. He saw "No State * * *" and read "No persons * * *." With the amendment now used to support legislation directly imposing Federal power upon private action, the administration arrogates another source of unlimited power. What laws are not justified to prevent private persons from denying due process, or denying equal protection, or adversely affecting the privileges and immunities of citizenship? This power claimed by the Federal Government cannot be limited to racial matters—equal protection is not so limited, nor is due process, nor are privileges and immunities. It is all-encompassing. The Attorney General in his appearance last week as much as said so. I, for one, cannot see that by passing the 14th amendment the drafters or the ratifiers contemplated an amendment which would swallow up all the other limitations in the Constitution. I cannot believe that the Attorney General honestly thinks so either. I wonder whether the civil rights bill of 1967—that is the one which we may consider next year, Mr. Chairman—will find us with a 14th amendment which reads, "Private persons shall * * *" instead of "No State shall * * *." I fear that the combination of the assumptions behind title II and title V amount to just that danger.

The chairman knows that no one deplores more than I such violence as recently occurred in the Meredith case, but he also knows that we should not attempt to combat racial violence by destroying the rights of all Americans. When Federal action appears necessary in situations in which it is not authorized by the Constitution, of

the United States, we should act to amend the Constitution. It was with this in mind that I proposed and sought ratification of the 24th amendment abolishing poll taxes in Federal elections.

I commend the Senator from North Carolina for approaching this problem in the right manner in proposing his amendment to prohibit crimes of violence against an individual because of his race or color, and I will join him in supporting such an amendment. In this way, we can do what needs to be done in the way that the Founding Fathers prescribed that we do it.

Regarding title III, and the Attorney General's request for authority to institute his own actions unsupported by a formal complaint, I only suggest that the Department of Justice should stay out of serious situations when it would appear everyone is satisfied.

Additionally, I would like to refer briefly to the chairman's amendment to the 1964 Civil Rights Act and to lend my support to its provision. Although the chairman and I unsuccessfully fought this act because it granted too much power, the Department of Health, Education, and Welfare has gone far beyond even what was granted.

The legislative history of the 1964 act seems clear, at least up to the day the Department of Health, Education, and Welfare began to implement its provisions. The subcommittee has been reminded by witnesses, and indeed by the chairman himself, of Vice President Humphrey's explanation (when he was participating in the debate as a Senator) of the meaning of the 1964 act and of the constitutional prohibitions concerning segregation. Additionally, the Federal judiciary is in full agreement with this history as it has consistently declared that while public racial segregation may be outlawed, racial integration cannot be enforced by law.

Despite these facts, the Department of Health, Education, and Welfare, through its administrators, is presently enforcing regulations designed to achieve racial balance in schools and hospitals. For what they call the national interest, they are jeopardizing the health and education of millions of Americans of all races and of all ages.

The U.S. Commission on Civil Rights has reported that the legislative history of title VI of the 1964 Civil Rights Act does not "make clear the relationships, if any," and I underscore "if any," "of the Supreme Court decisions to the Office of Education standards." To even suggest that an agency of the Federal Government should not be responsive in its activities to the rulings of the Supreme Court is astounding, at least to me.

I am deeply troubled by the absence of vitality in the separation of powers which have historically been so beneficial to this great Republic. And more specifically, I am troubled by the lack of due process of law exhibited by the National Government in its civil rights program. For this reason, I am confident that this amendment sponsored by Senators Ervin and Fulbright, will restore the elements of due process so long enjoyed by the American people.

This brings me now to title IV, the most controversial section of S. 3296, and deservingly so. For this title pretends to do exactly what I predicted a moment ago in the hypothetical "1967 Civil Rights Act." "Private persons shall * * * sell their homes and

rent their rooms to minority groups in preference to majority groups."

This reaches the ultimate in usurpation of control by the Federal Government. This legislation is proposed in the name of liberty and freedom. The Attorney General has stated it is necessary to free minorities from "compulsory residential segregation." That is indeed a strange use of language. The fact is that the patterns of residential housing which exist in the United States today are the result of the free and voluntary decisions of homeowners. Nowhere in the country today does "compulsory residential segregation" exist. Its very last vestige was removed in 1948 when the Supreme Court held that racially restrictive covenants were unenforceable (*Shelley* v. *Kraemer*, 334 U.S. 1). Nowhere in the United States is any person prevented from selling or renting his home to whomever he wishes. The Attorney General perverts the meaning of the English language to contend otherwise.

The truth of the matter is that title IV would destroy the freedom of all for Government control of all. It would replace the judgment of freemen with the judgment of the state. This control of individual action is the hallmark of totalitarian governments.

Thus, the provisions of title IV, controlling the use or disposition of real property, constitutes a deprivation of liberty and of property "without due process of law."

The proponents of this legislation have said that Congress has the power to enact it under the authority granted by article I, section 8 of the Constitution to regulate interstate commerce. It is perfectly clear and beyond doubt, as has been pointed out by the chairman, by the minority leader, Senator Dirksen, and by others, that real property does not move across State lines. This is so because the attribute which is distinctive of real property is its immovability. It does not move at all. I, therefore, fail to see how legislation which attempts to regulate the sale or rental of immovable property can be enacted by Congress under a grant of power to regulate interstate commerce.

Furthermore, the indications are that title IV, if enacted, would not be effective to accomplish that which its proponents wish to accomplish. They wish to provide adequate and integrated housing for minority groups. Although most of the areas where the largest slums and racial ghettos exist are covered by State or local fair housing laws, the passage of such laws has had no impact on such problems. For birds of a feather still insist on flocking together. Human nature remains unchanged. As was pointed out by the chairman when he opened these hearings, the National Committee Against Discrimination in Housing called title IV "totally inadequate to meet today's critical national problem of the explosive racial ghetto * * * even if it could be strengthened * * * such a proposal at this strategic moment may raise false hope among the Negro masses which cannot possibly be fulfilled by this proposal." Mr. Chairman, it was exactly the raising of such false hope by the passage of the 1964 Civil Rights Act which has brought on or encouraged the disorders which have occurred in so many places since that time. We must not encourage fase hope and illusory expectations at this time by the passage of an act which simply cannot provide what it is proposed to provide.

The enforcement provisions, because they are so unusual and so based on intimidation, require serious examination apart from considerations of the constitutionality or the desirability of title IV. The subcommittee has already heard from witnesses who have discussed these problems in detail and will hear others, so I shall not catalog all of them. I should like, however, to point out two things which I believe are particularly dangerous and unjust. First, the provision for appointment of an attorney for the plaintiff and allowing a prevailing plaintiff to recover as part of the costs reasonable attorney's fee, is unique in tort law in the United States. It seems to me that equal protection of the laws requires at least that the same provisions be made for the defendant. Second, by giving the Attorney General authority to institute suits on his own and to intervene in private suits the bill allows the Federal Government to intrude itself directly into all private real estate dealings in the country. Of course, the Attorney General cannot intervene in every suit, but he must make a selection. His selection in title IV cases will no doubt be based, at least in part, on purely political considerations. Thus, the homeowner who happens to be at the wrong place at the wrong time will have the full force of the Federal Government against him, where he may well be financing his private opponent as well.

In the final analysis, title IV, is an attempt to create a new so-called right to "open occupancy" at the expense of liberty and property rights specifically protected by the 5th and 14th amendments and without due process of law.

In conclusion, viewing this legislation in its entirety, Mr. Chairman, it is an extraordinary piece of work. Title I reverses the entire history of Federal jury selection. It chooses one theory—equal and uniform and random jury selection—over the predominant approach—careful and personal selection of jurors of quality. There is no consensus on either approach. Congress should not be stampeded into requiring one or the other before careful thought.

Title II is even more revolutionary because it imposes procedural rules of criminal justice upon the States and plainly claims the power to subject all State justice to the National Legislature.

Title III deserves little comment. Already clothed with the largest latitude of power in the history of our Nation the Attorney General seeks still more power, though one would think he could do all he wishes with the present authority.

Title IV eliminates all sense of restraint in the commerce clause. It binds land and personal freedom to the desires of the minority, and beyond its arrogant assumption of power, it recommends the most impractical, unjust, and fantastic implementing provisions.

Lastly, title V wreaks havoc upon tradition, restraint, commonsense, and legal conscience by torturing the plain meaning of words into a dangerous and disingenuous theory which admits of no limits whatever upon Federal power. In its implications, it presumes a grant of power far wider than any ever considered by any legislative grant in the Constitution—greater even than the commerce clause at its most imaginative scope.

This bill, Mr. Chairman, deserves the most careful and searching analysis. One would have hoped, in more rational times, that such

legislation would never have left the hopper. But in the emotions of the perennial civil rights crusade, all things are possible, as we sadly know so well. I compliment the chairman, and also the present presiding officer, on their efforts to search out the meaning and the implications of the provisions of the bill. An objective reading of the record of these proceedings clearly shows that they have reduced the proponents to platitudes. As the Chair has said, bereft of law and facts, they can only "give 'em hell." I hope that this will not be enough this time to prevail over reason and constitutional law.

Thank you.

Senator HRUSKA. Thank you, Senator Holland, on behalf of the chairman of this subcommittee, who unfortunately is absent this morning, and also on behalf of the subcommittee, for your very fine, clearly thought out statement. I have only a few questions.

With reference to title II, which constitutes an incursion, the first one of its kind, by Federal authority into the State judiciary system, it will be recalled that some States have what they call blue ribbon juries, and they have served well in selected cases. Perhaps the classic example were the blue ribbon juries in the 1930's I believe, when Dewey, then district attorney in New York City, was able to prosecute successfully the racketeering elements in the produce, food, and meat business in the State of New York. What will this law, in your judgment, do to such States as have seen fit, in their own judgment and based on their own experience, to resort to blue ribbon juries?

Senator HOLLAND. It would eliminate that prospect or possibility entirely, and there are other States which have special requirements for juries in special cases. For instance, some provide that freeholders only can sit on the jury when ejectment is the issue, ejectment and the question of title, and there are others that provide similar restrictions upon jury service to fitting classes of cases. All those would be discarded, and the combined wisdom and judgment of all the people in all the States which have moved in their several ways to set up their jury systems would be discarded.

For instance, in my State I have already made it clear that we have to protect for any defendant the peremptory challenge right, which goes way beyond any question of having to assign a reason, and it is a very generous peremptory challenge right which is given. All of these things that tend to get away from discrimination, and are based upon experience in the various States and in their courts, would be discarded by the adoption of this law.

Senator HRUSKA. Now another question relating to title II affecting the State jury system. In your testimony you have indicated that the enforcement provisions of this title are a grant of power to the Federal Government "to prescribe affirmative rules of procedure for State judicial proceedings."

That, of course, has been denied, and it is contended by the proponents of this plan that it is a negative rather than an affirmative grant of power. However, if you have a copy of the bill before you, I should like to refer to page 16, section 203, which provides that under certain circumstances the U.S. district court "shall enter an order effective for such period of time as may be appropriate."

Then skipping down to subsection (b), "requiring the use of objective criteria."

And subsection (c) "requiring maintenance of such records and additional records as may be necessary," and so forth.

Subsection (c) "appointing a master to perform such duties of the jury officials as may be necessary to secure that the rights secured by this title are not denied or abridged."

Would the Senator care to comment on the propositions, as to whether this comprehends the exercise of negative power, or whether it has in it some of the badges of affirmative power?

Senator HOLLAND. Of course, the question answers itself. These provisions that the Senator has quoted are all the exercise of affirmative power in the field that the Federal Government has never claimed before. It has never claimed the right to supervise and control and correct, in the judgment of the district court whatever that judgment might be, to correct the procedure in the State courts.

Senator HRUSKA. Now, one question on title IV, which has to do with housing. In your statement, Senator Holland, you stated that others besides yourself subscribe to the idea that real property does not move across State lines. So certainly in the traditional and conventional sense it cannot be conceived that the sale of it or the rental of it actually involves interstate commerce.

However, we do know that the Supreme Court has embarked upon a much broader concept of interstate commerce. They say anything which affects commerce, is interstate commerce, and in that sense a motel or a barbeque stand, which probably has very little, if any, interstate travelers among its patrons, is in interstate commerce because it affects interstate commerce.

What comment would you have on that, with reference to houses? Do the maintenance of houses, their sale and their rental affect interstate commerce?

Senator HOLLAND. I don't think so. I thought that the Court and the Congress both adopted a very strained idea of interstate commerce when they adopted the title in the 1964 act which brought in the item of entertainment of guests on the road, either by serving food or by giving them a room, but it seems to me that that is stretching the matter about as far as it could possibly be stretched and to say that a homeowner who wants to sell his home cannot use his discretion first as to whether he sells it or not, second, as to whom he sells it or not, is a completely different kind of operation from the matter of giving room and lodging to a traveling guest in a motel or hotel or in a restaurant or service station.

Senator HRUSKA. There are those who point to the Constitution which says the Congress shall have jurisdiction over commerce among the several States and of foreign commerce. If this line of decisions, and if the reasoning of advocates of this particular "affecting commerce" doctrine is pushed to its ultimate conclusion, would there, in your judgment, be any such thing as intrastate commerce except at the sufferance of the Federal Government?

Senator HOLLAND. No, I think you could find some implication upon every act and every transaction of business within a State which is

clearly intrastate which has some reference to Federal transactions, and that the Court, if it is once allowed to get that far afield, can simply do away with intrastate commerce, except where in the grace of the prosecutors and the judges, intrastate commerce may be permitted to exist, at least temporarily.

Senator HRUSKA. Of course. The Constitution provides that the Congress shall have jurisdiction over commerce among the States. This gives rise to a clear implication, an inescapable implication, that there is such a thing as intrastate commerce.

This "affecting commerce" doctrine that totally rewrites the Constitution in effect, doesn't it?

Senator HOLLAND. It does, and I am always hoping that the salvation may yet come to the Court, and that that small minority of the Court that has kept its feet on sound grounds in this particular matter may find its influence augmented and enlarged to where it becomes a majority of the Court and perhaps even a unanimous Court in behalf of the maintaining of private rights and maintaining State rights and maintaining the existence of intrastate business and intrastate transactions. The Federal Government is already too big. We all know it here in Congress. The scope of Federal activities is so great that no conscientious Member can begin to grasp all the implications of all the legislation that he is asked to consider. Nor can any executive who is handling any department or lesser branch of Government grasp all the implications of the important matters which are entrusted to him.

Now the talk about making this Federal Government the super government with control over everything that citizens do in connection with their property is, I think, so absurd and so ridiculous and so hopelessly unwise that not for a moment would I agree that this Congress should follow such a path.

Senator HRUSKA. In expressing the hope that there is a possibility of salvation and redemption both in our Federal judiciary and in our Federal Legislature, I think the Senator betrays himself as an incorrigible optimist, and a man of great and constant hope. I hope that he does realize that in the remaining years of his life, and sees some progress in that direction.

Senator HOLLAND. I thank the Senator for that wish, and I would certainly join him in it. I know how ardently he desires such a millennium to come back.

Senator HRUSKA. I have no further questions. Thank you very much for appearing here, Senator Holland.

Senator HOLLAND. Thank you, sir, for your kindness.

Mr. AUTRY. Mr. Chairman, the next witness is Mr. Dennis M. Lynch, the president of the Rhode Island Realtors Association of Pawtucket, R.I., whose appearance has been scheduled at the request of Senator Pell.

Mr. Lynch, I think you have several gentlemen accompanying you. Would you please identify them for the record?

Senator HRUSKA. Mr. Lynch, you have filed a statement pursuant to the rules and procedures of the subcommittee. It will be inserted in the record in its entirety. You may either read it or you may summarize it as you choose.

STATEMENT OF DENNIS M. LYNCH, PRESIDENT, RHODE ISLAND REALTORS ASSOCIATION, INC.; ACCOMPANIED BY RALPH GREANY, CHAIRMAN, HOMEOWNERS DIVISION; HON. OLIVER L. THOMPSON, JR., REPUBLICAN MINORITY LEADER, RHODE ISLAND HOUSE OF REPRESENTATIVES; AND HON. FRANK A. MARTIN, JR., DEMOCRAT, RHODE ISLAND HOUSE OF REPRESENTATIVES

Mr. LYNCH. I would appreciate the opportunity to go through the statement, Senator.

Senator HRUSKA. Very well, proceed.

Mr. LYNCH. I would like to introduce the gentlemen with me.

Senator HRUSKA. Will you do that please, so we will have a record of their presence here?

Mr. LYNCH. The gentlemen with me are those listed on the cover of our statement. They are Ralph F. Greany to my left, the chairman of our homeowners division in Rhode Island, Hon. Oliver L. Thompson, Jr., Republican minority leader of the Rhode Island House of Representatives, and Hon. Frank A. Martin, Jr., Democrat, Rhode Island House of Representatives.

Mr. Chairman and members of the subcommittee, we appreciate the opportunity you have given us to appear before you to state our opposition to title IV of S. 3296, the Civil Rights Act of 1966.

Due to the fact that consistent misrepresentation, intentional or otherwise, is given whenever you take a stand and speak out against particular phases of civil rights legislation, we would like to set the record straight from the outset that our only intent and purpose here today is to oppose what we must refer to the "forced housing" section of the proposed act.

We are cognizant of the fact, for instance, that the recent shooting down of James Meredith will be used by some to look with a jaundiced eye upon those of us of good will who, sincerely believing a section of the civil rights bill such as title IV to be absolutely wrong, oppose it. These people will use this deplorable event to ridicule and confuse our very reason for being here. For we are men of good will, even if we are the only ones to say so, and we are sincere when we say that we condemn such racial bigotry that leads any man to threaten or endanger the life of another. We deplore this action just as we did the action of the bigoted person who shot at the car of a State legislator of Rhode Island who opposed "forced housing" legislation in our State. We deplore this action also just as we did the action of the equally bigoted person who threatened the life of another Rhode Island legislator who also opposed, sincerely and openly, proposed "forced housing" legislation in Rhode Island. We are opposed to this prejudice on both sides of the issue that seeks to prevent men of good will on both sides who disagree only on the means of attainment of a goal from freely working toward the true object—equality of all men. We have to recognize, however, that despite the higher law of God—the Ten Commandments—that law even in these extreme and vicious incidents was not a deterrent to the act.

There are some other misconceptions and misinterpretations that we would like to help clear up since they are closely alined with our opposi-

tion to this type of legislation. We are already hearing again many of these misconstrued notions that are largely appeals to sympathy and which rest on misleading generalities and unwarranted assumptions of fact. As far as our industry is concerned we have heard time and again, in Rhode Island and across the Nation, that our opposition to "forced housing" legislation is emotional, resting on vested interests, and caused by bigotry and prejudice against Negroes. Those who make this argument are only appealing to emotionalism and prejudice. Their efforts are still aimed at presenting this issue as being exclusively concerned with the rights of some, whereas the real issue is concerned with everybody's rights in a free society.

Another misconception that is consistently flouted in our faces is the age-old line that human rights are more important than property rights. We cannot state too strongly that this is not an issue. There are no rights but human rights, and what are spoken of so derisively as property rights are only the human rights of individuals to property. This is not a controversy between people and moneyed interests, no matter what anyone thinks. This is a legitimate controversy between those who believe that questions of such intimate personal concern as are involved in the sale or rental of private housing should be left to the judgment and free choice of individuals and those people who believe that such matters should be subject to control by the Federal Government.

We believe that civil rights are those as defined by Bouvier, "which have no relation to the establishment, or management, of government. These consist in the power of acquiring, and enjoying property, of exercising the parental and marital power, and the like." They are the absolute rights of persons, the right to personal security, the rights of personal liberty, and the right to acquire and enjoy property as regulated and protected by law. They are the rights which we had thought to be inalienable according to the fundamental principle of American Government. These civil rights that we hear so much about today are either conferred upon us or are inherent in all of us and supposedly protected by Government. Our complaint, in part, is that the Government is abrogating its responsibility to protect these rights for all of us. Among the conferred rights which we believe must be protected by Government are the right to vote, the right to jury trial, the right to worship as we choose, freedom of speech, and assembly, and significantly the right of life, liberty, and property, and subject only to due process of law and the accordance of equal protection of the law. Dating way back in this American society of ours the individual has far more occasion to live out his life through exercise of rights which are so basic as to be beyond the provir e of Government to retain or control, much less create.

These rights relating to the doing of something or not doing of something as the spirit moves are reserved to the individual person without guarantee of attaining them or without impediment to accomplish them being afforded by Government. Among the civil rights of which we speak are, for example, the right to love or to hate; the right to be ambitious or lazy; the right to dispose of one's property as one sees fit; the right to acquire wealth or forsake it; the right to contract; the right to embrace one's associates while rejecting

others; the right to seek associations with mankind or withdraw from them, and many others.

Title IV of this act ignores the fact and yet helps to bring home the point that these rights are available, but in many cases their fulfillment is dependent on the attitude and reactions of other people.

If we are sincere in trying to change people's reactions and attitudes, no worse way could be found than through title IV, because this created democratic society of ours has led us to believe that a man's home is his castle, and that it meant something for a man to acknowledge and be proud of his right to life, liberty, and property. Are we now to relieve him of his right to his hard-earned property? If so, how do we claim that he still has his life and liberty?

How can we separate any of these three without destroying all of them? While no decent person will defend racial or religious hate, it does not follow that every possible action taken to eliminate them is either good or necessary.

Prohibition was termed a "noble experiment" but it did more harm than good because it abridged everyone's personal freedom without justification. The same basic error permeates title IV of this act. To condemn title IV no more makes us a proponent of bias than opposition to prohibition made one a bootlegger or drunkard.

Another widely spread argument that only adds to the confusion is the one that equates other laws on the books with "forced housing" as proposed under title IV. The argument goes that private property is already subject to the "police power" of the State, and a housing proposal such as this would simply be a proper extension of that power. Proponents also add that the same arguments are used now that were used previously to other legislation. We clearly submit that the "police power" is inherent in government and we recognize its necessity in order to protect the health, safety, and general welfare of the people, but the very necessity for its exercise must be clearly shown. Too much use of the "police power" leads to a "police state."

Property regulation by zoning, or even traffic regulations are often cited in support of this argument but this is a poor example as these things are for the mutual benefit and protection of all. If you see fit in your wisdom to report out title IV, you have taken an unwarranted step away from the mutual protection of all toward the utter destruction of the sanctity and privacy of a man's home. This is unjustifiable and is an inexcusable assault of the very rights of those you would protect. For it is our position that every man, regardless of his race or color, should have and must have the right to dispose of his hard-won property.

Utter chaos can set in in future years when it begins to become apparent that everyone has lost this precious right that has always been held sacred. We are convinced that title IV only expresses an attempt to do something by law which, by its very nature and composition, it will ultimately destroy.

We are further convinced that as bad as this section is, it is only one more step along the way that the social engineers are designing for all of us. For, if you can take away this right of free association and the right to dispose of his property within his own will, and this is what you would do, then there is no doubt that you can in the future take

away a man's right to own property. Ridiculous? We hardly think so when such proposals as title IV were labeled "ridiculous" only a short time ago.

We share the President's hopes and high expectations that this country can build cities in which people can come together to lead the good life, but the law proposed itself takes away fundamental rights which it purports to guarantee by legislation to every American entitled to these rights under our Constitution.

Wholesaling of civil rights by legislation under title IV is nothing but a phony, high-sounding effort that unfairly offers pie in the sky to people who need help and then it isn't there. This is part of the story in Rhode Island where we now have a law. By the admission of some of its stanchest proponents, after a year on the books, it is completely ineffective. Because of administration? No. Because of the law. In Rhode Island the law is a sham. It was a pitiful waste of precious time and hasn't helped solve a problem we all know exists. Disappointment has set in. People who thought there would be help, find none. Proponents who maintained this law was all they wanted, couldn't wait a year before trying further and more stringent methods. Still they miss the point in Rhode Island, just as title IV misses the point. The foundation of law should neither be the promotion of integration nor the promotion of separation in private living, but to insure that any willing buyer and any willing seller, regardless of race, religion, or color, can have the opportunity to meet in a free marketplace and deal with one another as they see fit.

If a member of a minority group needs a home, and a roof over his head, he does not need a law or a lawsuit; what he needs is living accommodations.

It seems quite clear to us from our long battle in Rhode Island before the law passed, that the money and effort that was expended on both sides by either fighting for or against the legislation could have been better used in doing something about the problem.

If proponents were sincerely interested in providing homes for people instead of setting a course or way of life for us all to follow, then much could have been accomplished. One reason we were told we needed this type of legislation in Rhode Island was because the community had failed to properly relocate families displaced from their homes in the Lippitt Hill section of Providence. Well, we find some of the leading proponents of this type of legislation as the eventual owners of this area where surveys clearly showed a desire by the people living there to remain in the same general area, and also that the rents were an extremely low average of $35 to $45 per month with most families needing three bedrooms.

But what has happened in this little State of ours where the problem should not have been insurmountable? Well, we now find the area, close by, incidentally, to a large educational institution, is known as University Heights and the beautiful housing finally being constructed after much delay has a rent scale starting with one-room efficiency apartments at $90 per month up to over $200 when you finally hit the three-bedroom units those displaced were in need of.

This, of course, is advertised as truly being an integrated housing development. It is integrated all right—the rich with the richer.

Why even the lower priced apartments on the scale are kept ghetto style together in the same building, separate and not equal with the higher priced ones. If the proponents in Rhode Island were sincere they had a chance in this area to help instead of working for a statewide law as a panacea which has proven to be worthless.

A few years ago, when much more time could have been saved in our State, we offered a piece of legislation that would have started the ball rolling on cooperation between all people of good will. But we were shunted aside, laughed at, and then forgotten. We have gotten used to this type of treatment because it is repetitive whenever you mention another way of attacking this problem other than law.

Now we have the law—it isn't working—and there are people laughing. People who need homes are beginning to find out now that those of us who were considered their opponents and were accused of various things, including bigotry, are really not so bad after all. Knowing the law won't work, we have submitted and offered cooperation on a practical five-point program which hits at the problem. Suddenly there is acceptance of our program which is encouraging.

But strangely it is the same type program we offered before, but in the headlong rush for legislation it was ignored and brushed aside by those who should have known better.

Perhaps we have been somewhat at fault for being unable to get our positive program over before this time but again the same thing is going on now under title IV. When you are talking about voluntary groups it becomes a physical impossibility to protect your rights against the onslaught of unfair legislation and at the same time do everything you should to alleviate the problem.

What we have offered in Rhode Island is no quick cure, but it is a sure one and reasonable men are beginning to see its merits. We think that instead of considering title IV that men of good will, conscience, and a sense of justice should use this type of program.

The problem is a local one and acceptance and support of the following program should be given by local leadership.

1. To establish an assistance program through cooperation with community leaders that will serve individuals and families who are having difficulty in obtaining housing they can afford, located in areas of their choice. To work simply without redtape. To encompass all sections of a community. To offer its help to all applicants.

2. To build neighborhood opinion to accept, without objection or harassment, minority families.

3. To induce acceptance of the right of any citizen to purchase property and the right of any citizen to sell property—by voluntary contract without harassment by others not party to the contract. In this way the right of voluntary contract, which is so important and basic to all, can be protected instead of destroyed as title IV would do.

4. To stamp out the fear—exploiting "blockbusting" practice which is opposed by all of us.

5. To encourage the formation of nonprofit housing corporations, preferably under church and civic auspices, which with current and improved programs of government support can truly hit at the problem of good, integrated low-income housing which cannot be supplied by private enterprise.

If we have been lax in some regards in the past, and we admit our responsibility and obligation to do what we can as good Americans, then this is more than true of many church groups who have only given lipservice to the problem and now expect the Government to do their work for them. They, above all people, should know that you can't rely on a law to carry out a Christian ethic.

It's time for some of these people to stop moralizing and get off their right and more reverend rear ends and do something constructive. Signs of constructive action by such groups are becoming more evident and this should be further encouraged. We have one such group in Rhode Island starting despite the many obstacles that must be overcome to do good work in this field. In areas where urban renewal has been urban removal to minority groups these people must be offered their help.

We offer our help unequivocally to such a program. Attempts to solve the problem by other methods such as title IV will only fail.

In fact, in Rhode Island with our law the easiest course for us to take would be to ignore the law we are so convinced is ineffective. But the easiest way is not the best way in most things, and that holds true here. We want to accomplish something now. We are sincere, and more than this, we are convinced we are right.

There are many truly untested approaches on biracial housing that should be explored. We are not prepared to say our fellow Americans in the church, school, and home have failed. We know that the main problem is an economic one not easily or practically handled by private enterprise. We shall continue to keep the needle out to spur and encourage ourselves, church, and civil groups to live up to our responsibility. Responsibility has been shirked long enough. We have admittedly missed some of ours. We intend to correct that while still maintaining our opposition to law in this field.

We had made forecasts in Rhode Island about our law and can do the same thing, we are sure, nationally under title IV—that it will be ineffective and will not provide housing. It has become apparent that some leaders of minority groups and proponents of "forced housing" legislation do not want to solve the housing problem, but as a result wish to force integration by using it as a tool.

The attitude of some has been to miss the opportunity for good housing by being willing to sacrifice housing for integration, and this is a matter of record. Respectable housing for Negroes and other minorities has been sacrificed on the altar of integration by wasting time trying to accomplish something through force of a law that cannot and will not work.

This is what title IV does. Changing or watering down title IV won't help. The objective remains the same and we know that those who seek the law will, under title IV, as our exeprience has shown us in Rhode Island, only seek to amend it until they think they have what they want, whatever that is. They tend to concentrate one-sidedly upon the seeking of justice, but justice alone is not enough—there must be Christian charity—and Christian charity will not be invoked by law in this case.

(At this point Senator Javits entered the hearing room.)

Mr. LYNCH. One further point regarding our real estate industry is that in Rhode Island, and beginning to spread across the Nation, is

a grassroots homeowner division which is giving organization and representation to the homeowner of his views for the first time. This program is growing, and one reason is obvious. It is growing because of the opposition of the homeowner from all walks of life to subjection of his cherished right of free association to a law of force under the police power of the Government.

These are the people we represent. To dismiss us as representing only a self-centered vested interest is not only unfair, but not true. If it were true, it would be easier to take the view as some have before this Congress that we could sell more houses if everybody were covered by the law. This is a weak argument and should be dismissed as being unworthy and certainly not aimed at the charitable objective of true equality without force for all men.

Thus, while we recognize the legitimate function of government in the field of housing, we are concerned with the use of legal force toward the accomplishment of open occupancy housing. We are concerned that the mention in title IV of "access to or participation in" multiple listing systems in this country might conceivably open up the question of the right of free association within a trade union.

The people of this land are beginning to recognize that the enactment of such laws as title IV divests them of a right that they had assumed until this day was inviolable. They begin to wonder if a new title IV in the future will restrict their mobility and ability to move from place to place. These things used to seem remote but now the homeowner wonders what expedient might, under pressures from minority groups, be used under force of law against him tomorrow.

"Every difference of opinion is not a difference of principle," said Thomas Jefferson, and we subscribe to that theory in registering our opposition to title IV. We are interested in the search for methods to better afford to minorities means of overcoming prejudices that effectively prevent their realizing citizenship rights. While other minorities have faced similar discrimination, the Negro presents a more difficult problem of such long standing that he has the right to seek solutions aggressively. If he does not obtain sympathetic help, he can make mistakes in this field of housing that may seriously damage the Nation. Not only do we not want to damage the Nation, but we also do not want to damage the right of an individual.

If title IV passes, although it would be generally ineffective, there is no doubt but that individuals will be damaged. We are God-fearing and law-abiding citizens. Even if such a drastic measure as title IV became law we would obey the law. This is true even in such times as now when men are encouraged to break the law if they disagree with it. We must, however, take whatever legal steps are necessary to change any law that we are convinced is against the public interests. This we will do in Rhode Island and this we are sure the people will do in the Nation.

We are not basing our argument on whether this bill is unconstitutional or not, although we are convinced that it is, because a bill can still be bad and against the public interests while being found constitutional. This applies fully to title IV which quite bluntly hits us as being un-American by destroying basic tenets that gave us all motivation and initiative and a resulting pride in our country.

A problem exists. Let us not refuse to take it in hand. The problem calls for more attention than we and others have been willing to give it. Let us foreclose further daydreaming. The stage was set for us some 12 generations ago for this Nation to be racially heterogeneous. The pressures for recognition, politically applied, will not go away. Although political pressure is not reason enough for a law like title IV, political pressures do result in such laws, and they can be dangerous as well as beneficial to individual welfare and freedom. When churchmen and others ask you to pass title IV, ask yourselves whom they represent truly, and ask yourselves if they are not abrogating their duty and asking you to do it for them.

"Forced housing" laws first applied only to brokers—licensees of the State—then to Government assisted housing. Next they expanded to private multiple rental units—to the landlord—and now to the individual homeowner, and from there God knows where. Each step has been successively unsuccessful in serving the objective because they will all ultimately fail until people are educated to accept one another.

The alternative to laws like title IV, and they are legitimate and meaningful alternatives, are such as we have previously suggested. It is no longer sufficient to be only either for or against legislation. Community effort and cooperation must be exerted to this end.

Upholding the principle that any citizen has the right to buy, use, and dispose of property without interference by others we strongly urge you to eliminate and defeat title IV entirely from this bill.

If we are ever to truly have a Great Society let's find it where it really is under the guidance of church, school, home, and men of good will. If we are willing to fight for freedom on foreign soils—let's not give it away at home. Let's finally and forever learn to live together and do something concrete for people who have a dire need for homes—not a useless law.

Thank you, Mr. Chairman.

Senator HRUSKA. Thank you, Mr. Lynch. You have tetsified that Rhode Island has a law in this general field. Counsel and staff will insert at some suitable place following the testimony which you have given a text of that law.

(The document follows:)

RHODE ISLAND

I. PUBLIC HOUSING

(*Citation:* R.I. Gen. Laws Ann. §§ 11-24-1 to -4; 28-5-8 to -36 (1956), as amended, R.I. Gen. Laws Ann. § 28-5-11 (Supp. 1963).)

11-24-1. *All persons entitled to full and equal accommodations.*—All persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons.

11-24-2. *Discriminatory practices prohibited.*—No person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement shall directly or indirectly refuse withhold from or deny to any person on account of race or color, religion or country of ancestral origin any of the accommodations, advantages, facilities or privileges thereof, and no person shall directly or indirectly publish, circulate,

issue, display, post or mail any written, printed or painted communication notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race or color, religion or country of ancestral origin, or that the patronage or custom thereat of any person belonging to or purporting to be of any particular race or color, religion or country of ancestral origin is unwelcome, objectionable or not acceptable, desired or solicited. The production of any such written, printed or painted communication, notice or advertisement, purporting to relate to any such place and to be made by any person being the owner, lessee, proprietor, superintendent or manager thereof, shall be presumptive evidence in any action that the same was authorized by such person.

11-24-3. *Places of public accommodation defined.*—A place of public accommodation, resort or amusement within the meaning of §§ 11-24-1 to 11-24-3, inclusive, shall be deemed to include, but not be limited to . . . public housing projects. Nothing herein contained shall be construed to include any place of accommodation, resort or amusement which is in its nature distinctly private.

11-24-4. *Enforcement of anti-discrimination provisions.*—The Rhode Island commission against discrimination is empowered and directed, as hereinafter provided, to prevent any person from violating any of the provisions of §§ 11-24-1 to 11-24-3, inclusive, proivding that before instituting a formal hearing it shall attempt by informal methods of conference, persuasion, and conciliation, to induce compliance with the said sections. Upon the commission's own initiative or whenever an aggrieved individual or an organization chartered for the purpose of combating discrimination or racism or of safeguarding civil liberties, such individual or organization being hereinafter referred to as the complainant, makes a charge to the said commission that any person, agency, bureau, corporation or association, hereinafter referred to as the respondent, has violated or is violating any of the provisions of §§ 11-24-1 to 11-24-3, inclusive, the said commission may proceed in the same manner and with the same powers as provided in §§ 28-5-16 to 28-5-27, inclusive, and the provisions of §§ 28-5-13 and 28-5-16 to 28-5-36, inclusive, as to the powers, duties and rights of the commission, its members, hearing examiners, the complainant, respondent, interviewer and the court shall apply in any proceedings under this section.

28-5-8. *Commission against discrimination—Composition.*—There is hereby created a Rhode Island Commission against discrimination, to consist of five (5) members to be appointed by the governor, with the advice and consent of the senate, one of whom shall be designated by the governor as chairman.

28-5-9. *Terms of commission members.*—The members of the commission shall be appointed for terms of five (5) years each, except that any member chosen to fill a vacancy occurring otherwise than by expiration of term shall be appointed only for the unexpired term of the member whom he shall succeed.

28-5-10. *Quorum of commission.*—Three (3) members of said commission shall constitute a quorum for the purpose of conducting the business thereof. A vacancy in said commission shall not impair the right of the remaining members to exercise all the powers of the commission.

28-5-11. *Compensation of commission members—Reappointment.*—Members of the commission shall receive compensation not exceeding twenty-five dollars ($25.00) for each day, or part thereof, necessarily spent in the discharge of their official duties with a maximum of one thousand dollars ($1,000) in one (1) year. In addition, they shall be entitled to expenses actually and necessarily incurred by them in the performance of their duties. All members of the commission shall be eligible for reappointment.

28-5-12. *Removal of commission members.*—Any member of the commission may be removed by the governor for inefficiency, neglect of duty, misconduct or malfeasance in office, after being given a written statement of the charges and an opportunity to be heard publicly theeron.

28-5-13. *Powers and duties of commission.*—The commission shall have the following powers and duties:

(A) To establish and maintain a principal office in the city of Providence, Rhode Island, and such other offices within the state as it may deem necessary.

(B) To meet and function at any place within the state.

(C) To appoint a full-time executive secretary to the commission and determine his remuneration. The executive secretary shall be selected on the basis of being exceptionally well qualified by education, training, and experience im-

partially to enforce the provisions of this chapter so as to reduce and eliminate unlawful employment practices. The commission is also empowered to appoint such personnel as it shall deem necessary to effectuate the purposes of the chapter. Provided, however, that the provisions of chapter 4 of title 35 shall not apply to the chapter.

(D) To adopt, promulgate, amend, and rescind rules and regulations to effectuate the provisions of this chapter, and the policies and practices of the commission in connection therewith.

(E) To formulate policies to effectuate the purposes of this chapter.

(F) To receive, investigate, and pass upon charges of unlawful employment practices.

(G) To hold hearings, subpoena witnesses, compel their attendance, administer oaths, take the testimony of any person under oath, and, in connection therewith, to require the production for examination of any books and papers relating to any matter under investigation or in question before the commission. The commission may make rules as to the issuance of subpoenas by individual commissioners. Contumacy or refusal to obey a subpoena issued pursuant to this section shall constitute a contempt punishable, upon the application of the commission, by the superior court in the county in which the hearing is held or in which the witness resides or transacts business.

(H) To utilize voluntary and uncompensated services of private individuals and organizations as may from time to time be offered and needed.

(I) To create such advisory agencies and conciliation councils, local or statewide, as will aid in effectuating the purposes of this chapter. The commission may itself, or it may empower these agencies and councils to (1) study the problems of discrimination in all or specific fields of human relationships when based on race or color, religion, or country of ancestral origin, and (2) foster through community effort or otherwise good will among the groups and elements of the population of the state. Such agencies and councils may make recommendations to the commission for the development of policies and procedure in general. Advisory agencies and conciliation councils created by the commission shall be composed of representative citizens serving without pay, but with reimbursement for actual and necessary traveling expenses.

(J) To issue such publications and such results of investigations and research as in its judgment will tend to promote good will and minimize or eliminate discrimination based on race or color, religion, or country of ancestral origin.

(K) From time to time but not less than once a year, to report to the legislature and the governor, describing the investigations, proceedings, and hearings the commission has conducted and their outcome, the decisions it has rendered, and the other work performed by it, and make recommendations for such further legislation, concerning abuses and discrimination based on race or color, religion, or country of ancestral origin, as may be desirable.

28-5-16. *Power to prevent unlawful practices—Preference for informal methods.*—The commission is empowered and directed, as hereinafter provided, to prevent any person from engaging in unlawful employment practices, provided that before instituting the formal hearing authorized by §§ 28-5-18 to 28-5-27, inclusive, it shall attempt, by informal methods of conference, persuasion, and conciliation, to induce compliance with this chapter.

28-5-17. *Conciliation of charges of unlawful practices.*—Upon the commission's own initiative or whenever an aggrieved individual or an organization chartered for the purpose of combating discrimination or racism, or of safeguarding civil liberties, or of promoting full, free, or equal employment opportunities, such individual or organization being hereinafter referred to as the complainant, makes a charge to the commission that any . . . person, hereinafter referred to as the respondent, has engaged or is engaging in unlawful employment practices, the commission may initiate a preliminary investigation and if it shall determine after such investigation that it is probable that unlawful employment practices have been or are being engaged in, it shall endeavor to eliminate such unlawful employment practices by informal methods of conference, conciliation, and persuasion. Nothing said or done during such endeavors may be used as evidence in any subsequent proceeding. If, after such investigation and conference, the commission is satisfied that any unlawful employment practice of the respondent will be eliminated, it may, with the consent of the complainant, treat the complaint as conciliated, and entry of such disposition shall be made on the records of the commission.

28-5-18. *Complaint and notice of hearing.*—If the commission fails to effect the elimination of such unlawful employment practices and to obtain voluntary compliance with this chapter, or, if the circumstances warrant, in advance of any such preliminary investigation or endeavors, the commission shall have the power to issue and cause to be served upon any person or respondent a complaint stating the charges in that respect and containing a notice of hearing before the commission, a member thereof, or a hearing examiner at a place therein fixed to be held not less than ten (10) days after the service of such complaint. Any complaint issued pursuant to this section must be so issued within one (1) year after the alleged unfair employment practices were committed.

28-5-19. *Amendment of complaint and answer—Participation by commissioner assigned to preliminary hearing.*—The commission, member thereof, or hearing examiner conducting the hearing shall have the power reasonably and fairly to amend any written complaint at any time prior to the issuance of an order based thereon. The respondent shall have like power to amend its answer to the original or amended complaint at any time prior to the issuance of such order. The commissioner assigned to the preliminary hearing of any complaint shall take no part in the final hearing except as a witness upon competent matters and will have no part in the determination or decision of the case after hearing.

28-5-20. *Answer to complaint—Respondent's rights at hearing.*—The respondent shall have the right to file an answer to such complaint, and shall appear at such hearing in person, or otherwise, with or without counsel to present evidence and to examine and cross-examine witnesses.

28-5-21. *Rules of evidence.*—In any such proceeding the commission, its member, or its agent shall not be bound by the rules of evidence prevailing in the courts of law or equity.

28-5-22. *Evidence of predetermined pattern.*—The commission shall in ascertaining the practices followed by the respondent, take into account all evidence, statistical or otherwise, which may tend to prove the existence of a predetermined pattern of . . . membership; provided that nothing herein contained shall be construed to authorize or require . . . membership in the proportion which their race or color, religion, or country of ancestral origin bears to the total population or in accordance with any criterion other than the individual qualifications of the applicant.

28-5-23. *Testimony at hearing.*—The testimony taken at the hearing shall be under oath and shall be reduced to writing and filed with the commission. Thereafter, in its discretion, the commission upon notice may take further testimony or hear argument.

28-5-24. *Orders to cease and desist and for further action—Compliance.*—If upon all the testimony taken the commission shall determine that the respondent has engaged in or is engaging in unlawful employment practices, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful employment practices, and to take such further affirmative or other action as will effectuate the purposes of this chapter. . . . Upon the submission of such reports of compliance the commission, if satisfied therewith, may issue its finding that the respondent has ceased to engage in unlawful employment practices.

28-5-25. *Order dismissing complaint.*—If the commission shall find that no probable cause exists for crediting the charges, or, if upon all the evidence, it shall find that a respondent has not engaged in unfair employment practices, the commission shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the said complaint as to such respondent. A copy of the order shall be delivered in all cases to the attorney general and such other public officers as the commission deems proper.

28-5-26. *Modification of findings or orders.*—Until a transcript of the record in a case shall be filed in a court as hereinafter provided, the commission may at any time, upon reasonable notice, and in such manner as it shall deem proper, modify or set aside, in whole or in part, any of its finding or orders.

28-5-27. *Publicity as to proceedings or unlawful practices.*—Until the commission shall determine that a cease and desist order shall be issued, no publicity shall be given to any proceedings before the commission, either by the commission or any employee thereof, the complainant, or the respondent, provided that the commission may publish the facts in the case of any complaint which has been dismissed.

If any individual, prior to resorting to the procedures established by this chapter, shall wilfully make available for publication information purporting to establish an unlawful employment practice against him, he may not subsequently resort to the procedures established by this chapter.

28-5-28. *Right to judicial review or enforcement.*—Any complainant, intervener, or respondent claiming to be aggrieved by a final order of the commission may obtain judicial review thereof, and the commission may obtain an order of court for its enforcement, in a proceeding as provided in §§ 28-5-28 to 28-5-36, inclusive. Such proceeding shall be brought in the superior court of the state within any county wherein the unlawful employment practices which are the subject of the commission's order were committed or wherein any respondent, required in the order to cease and desist from unfair employment practices or to take other affirmative action, resides or transacts business.

28-5-29. *Initiation of judicial proceedings—Powers of court.*—Such proceeding shall be initiated by the filing of a petition in such court, together with a transcript of the record upon the hearing before the commission, and the service of a copy of the said petition upon the commission and upon all parties who appeared before the commission. Thereupon the court shall have jurisdiction of the proceeding and of the questions determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript an order enforcing, modifying and enforcing as so modified or setting aside in whole or in part the order of the commission.

28-5-30. *Objections not urged before commission.*—An objection that has not been urged before the commission, its member, or agent shall not be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

28-5-31. *Additional evidence in court.*—If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the commission, its member, or agent, the court may order such additional evidence to be taken before the commission, its member, or agent and to be made a part of the transcript.

28-5-32. *Modification of commission's findings and orders on additional evidence.*—The commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed. The commission shall file such modified or new findings and its recommendations, if any, for the modification or setting aside of its original order.

28-5-33. *Exclusive jurisdiction of court—Appeal to supreme court.*—The jurisdiction of the court shall be exclusive and its judgment and order shall be, when necessary, subject to review by the supreme court as provided by law, to which court appeal from such judgment and order may be made as provided by law.

28-5-34. *Commission's copy of testimony—Hearing on transcript.*—The commission's copy of the testimony shall be available at all reasonable times to all parties without cost for examination and for the purposes of judicial review of the order of the commission. The petition shall be heard on the transcript of the record without requirement of printing.

28-5-35. *Commission's attorneys.*—The commission may appear in court by its own attorneys.

28-5-36. *Decree for enforcement of commission's order.*—If no proceeding to obtain judicial review is instituted by a complainant, interventer, or respondent within thirty (30) days from the service of an order of the commission pursuant to § 28-5-24, the commission may obtain a decree of the court for the enforcement of such order upon showing that respondent is subject to the commission's jurisdiction, and resides or transcacts business within the county in which the petition for enforcement is brought.

II. URBAN RENEWAL HOUSING

(*Citation:* R. I. GEN. LAWS ANN. §§ 34-37-1—34-37-11 (Supp. 1965).)

NOTE.—These provisions are set forth below under the title Private Housing, but they also apply here.

III. OTHER PUBLICLY ASSISTED HOUSING (FHA, ETC.)

Rhode Island has no statutory prohibition against discrimination in other publicly assisted housing.

IV. PRIVATE HOUSING

(*Citation:* R. I. GEN. LAWS ANN. §§ 34-37-1—34-37-11 (Supp. 1965).)

34-37-1. *Finding and declaration of policy.*—In the state of Rhode Island and Providence Plantations, hereinafter referred to as the state, many people are denied equal opportunity in obtaining housing accommodations and are forced to live in circumscribed areas because of discriminatory housing practices based upon race or color, religion or country of ancestral origin. Such practices tend unjustly to condemn large groups of inhabitants to dwell in segregated districts or under depressed living conditions in crowded, unsanitary, substandard and unhealthful accommodations. Such conditions breed intergroup tension as well as vice, disease, juvenile delinquency and crime; increase the fire hazard; endanger the public health; jeopardize the public safety, general welfare and good order of the entire state; and impose substantial burdens on the public revenues for the abatement and relief of conditions so created. Such discriminatory and segregative housing practices are inimical to and subvert the basic principles upon which the Colony of Rhode Island and Providence Plantations was founded and upon which the state and the United States were later established. Discrimination and segregation in housing tend to result in segregation in our public schools and other public facilities, which is contrary to the policy of the state and the constitution of the United States. Further, discrimination and segregation in housing adversely affect urban renewal programs and the growth, progress and prosperity of the state. In order to aid in the correction of these evils, it is necessary to safeguard the right of all individuals to equal opportunity in obtaining housing accommodations free of such discrimination.

It is hereby declared to be the policy of the state to assure to all individuals regardless of race, or color, religion or country of ancestral origin equal opportunity to live in decent, safe, sanitary and healthful accommodations anywhere within the state in order that the peace, health, safety and general welfare of all the inhabitants of the state may be protected and insured.

This chapter shall be deemed an exercise of the police power of the state for the protection of the public welfare, prosperity, health and peace of the people of the state.

34-37-2. *Right to equal housing opportunities.*—The right of all individuals in the state to equal housing opportunities regardless of race or color, religion or country of ancestral origin, is hereby recognized as, and declared to be, a civil right.

34-37-3. *Definitions.*—When used in this chapter:

(A) The term "person" includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees, other fiduciaries, or real estate brokers or real estate salesmen as defined in chapter 20.5 of title 5.

(B) The term "housing accommodation" includes any building or structure, or portion thereof, or any parcel of land, developed or undeveloped, which is occupied, or is intended to be occupied, or to be developed for occupancy, for residential purposes, but does not include a room or rooms rented or let to a roomer or lodger within a dwelling unit occupied by the owner or tenant; neither does it include a dwelling unit offered for rent or lease within a two-family or three-family dwelling structure one of whose dwelling units is occupied by the bona fide owner thereof as his bona fide residence.

(C) The term "commission" means the Rhode Island commission against discrimination created by §§ 28-5-1 to 28-5-39, inclusive, of the general laws of 1956.

(D) The term "discriminate" includes segregate or separate.

34-37-4. *Unlawful housing practices.*—(A) No owner, lessee, sublessee, assignee, managing agent, or other person having the right to sell, rent, lease or manage a housing accommodation as defined in subsection (B) of § 34-37-3, or an agent of any of these, shall make or cause to be made any written or oral inquiry concerning the race or color, religion or country of ancestrial origin of any prospective purchaser, occupant or tenant of such housing accommodation; or shall refuse to sell, rent, lease, let or otherwise deny to or withhold from

any individual such housing accommodation because of the race or color, religion or country of ancestral origin of such individual; or shall issue any advertisement relating to the sale, rental or lease of such housing accommodation which indicates any preference, limitation, specification or discrimination based upon race or color, religion or country of ancestral origin; or shall discriminate against any individual because of his race or color, religion or country of ancestral origin in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of facilities or services in connection therewith.

(B) No person to whom application is made for a loan or other form of financial assistance for the acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation, whether secured or unsecured, shall make or cause to be made any written or oral inquiry concerning the race or color, religion or country of ancestral origin of any individual seeking such financial assistance, or of existing or prospective occupants or tenants of such housing accommodation; nor shall any such person to whom such application is made in the manner hereinbefore provided discriminate in the terms, conditions or privileges relating to the obtaining or use of any such financial assistance against any applicant because of the race or color, religion or country of ancestral origin of such applicant or of the existing or prospective occupants or tenants.

(C) Nothing in this section contained shall be construed in any manner to prohibit or limit the exercise of the privilege of every person and the agent of any person having the right to sell, rent, lease or manage a housing accommodation to establish standards and preferences and set terms, conditions, limitations or specifications in the selling, renting, leasing or letting thereof or in the furnishing of facilities or services in connection therewith which are not based on the race, color, religion or country of ancestral origin of any prospective purchaser, lessee, tenant or occupant thereof. Nothing in this section contained shall be construed in any manner to prohibit or limit the exercise of the privilege of every person and the agent of any person making loans for or offering financial assistance in the acquisition, construction rehabilitation, repair or maintenance of housing accommodations, to set standards and preferences, terms, conditions, limitations, or specifications for the granting of such loans or financial assistance which are not based on the race, color, religion or country of origin of the applicant for such loan or financial assistance or of any existing or prospective owner, lessee, tenant or occupant of such housing accommodation.

34-87-5. *Prevention of unlawful housing practices.*—(A) The commission is empowered and directed, as hereinafter provided, to prevent any person from violating any of the provisions of this act provided that before instituting a formal proceeding it shall attempt by informal methods of conference, persuasion and conciliation to induce compliance with the said sections.

(B) Upon the commission's own initiative or whenever an aggrieved individual or an organization chartered for the purpose of or engaged in combating discrimination or racism or of safeguarding civil liberties, such organization acting on behalf of one or more individuals being hereinafter referred to as the complainant, makes a complaint, in writing, under oath, to the said commission that any person, agency, bureau, corporation or association, hereinafter referred to as the respondent, has violated or is violating, to the best of complainant's knowledge and belief, any of the provisions of this act, the said commission may initiate a preliminary investigation and if it shall determine after such investigation that it is probable that unlawful housing practices have been or are being engaged in, it shall endeavor to eliminate such unlawful housing practices by informal methods of conference, conciliation, and persuasion. Nothing said or done during such endeavors may be used as evidence in any subsequent proceeding. If after such investigation and conference, the commission is satisfied that any unlawful housing practice of the respondent will be eliminated, it may, with the consent of the complainant, treat the complaint as conciliated, and entry of such disposition shall be made on the records of the commission. If the commission fails to effect the elimination of such unlawful housing practices and to obtain voluntary compliance with this act, or, if the circumstances warrant, in advance of any such preliminary investigation or endeavors, the commission shall have the power to issue and cause to be served upon any person or respondent a complaint stating the charges in that respect and containing a notice of hearing before the commission, a member thereof, or a hearing examiner at a place therein fixed to be held not less than ten (10) days

after the service of such complaint. Any complaint issued pursuant to this section must be so issued within one (1) year after the alleged unfair housing practices were committed.

(C) The commission, member thereof, or hearing examiner conducting the hearing shall have the power reasonably and fairly to amend any written complaint at any time prior to the issuance of an order based thereon. The respondents shall have like power to amend its answer to the original or amended complaint at any time prior to the issuance of such order. The commissioner assigned to the preliminary hearing of any complaint shall take no part in the final hearing except as a witness upon competent matters and will have no part in the determination or decision of the case after hearing.

(D) The respondent shall have the right to file an answer to such complaint and shall appear at such hearing in person, or otherwise, with or without counsel to present evidence and to examine and cross-examine witnesses.

(E) In any such proceeding the commission, its member, or its agent shall not be bound by the rules of evidence prevailing in the courts of law or equity.

(F) The commission shall in ascertaining the practices followed by the respondent, take into account all evidence, statistical or otherwise, which may tend to prove the existence of a predetermined pattern of discrimination in housing.

(G) The testimony taken at the hearing shall be under oath and shall be reduced to writing and filed with the commission. Thereafter, in its discretion, the commission upon notice may take further testimony or hear argument.

(H) If upon all the testimony taken the commission shall determine that the respondent has engaged in or is engaging in unlawful housing practices, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful housing practices, and to take such further affirmative or other action as will effectuate the purposes of this chapter.

(I) If the commission shall find that no probable cause exists for crediting the charges, or, if upon all the evidence, it shall find that a respondent has not engaged in unfair housing practices, the commission shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the said complaint as to such respondent. A copy of the order shall be delivered in all cases to the attorney general and such other public officers as the commission deems proper.

(J) Until a transcript of the record in a case shall be filed in a court as hereinafter provided, the commission may at any time, upon reasonable notice, and in such manner as it shall deem proper, modify or set aside, in whole or in part, any of its findings or orders.

(K) Until the commission shall determine that a cease and desist order shall be issued, no publicity shall be given to any proceedings before the commission, either by the commission or any employee thereof, the complainant, or the respondent, provided that the commission may publish the facts in the case of any complaint which has been dismissed.

If any individual, prior to resorting to the procedures established by this chapter, shall wilfully make available for publication information purporting to establish an unlawful housing practice against him, he may not subsequently resort to the procedures established by this chapter.

34-37-6. *Judicial review and enforcement.*—(A) Any complainant, intervener, or respondent claiming to be aggrieved by a final order of the commission may obtain judicial review thereof, and the commission may obtain an order of court for its enforcement, in a proceding as provided in this section. Such proceeding shall be brought in the superior court of the state within any county wherein the unlawful housing practices which are the subject of the commission's order were committed or wherein any respondent, required in the order to cease and desist from unfair housing practices or to take other affirmative action, resides or transacts business.

(B) Such proceeding shall be initiated by the filing of a petition in such court, together with a transcript of the record upon the hearing before the commission, and the service of a copy of the said petition upon the commission and upon all parties who appeared before the commission. Thereupon the court shall have jurisdiction of the proceeding and of the questions determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript an order enforcing, modifying and

enforcing as so modified, or setting aside in whole or in part the order of the commission.

(C) An objection that has not been urged before the commission, its member, or agent shall not be considered by the court, unless the failure or neglect to urge such objections shall be excused because of extraordinary circumstances.

(D) If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the commission, its member, or agent, the court may order such additional evidence to be taken before the commission, its member, or agent and to be made a part of the transcript.

(E) The commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed. The commission shall file such modified or new findings and its recommendations, if any, for the modification or setting aside of its original order.

(F) The jurisdiction of the court shall be exclusive and its judgment and order shall be, when necessary, subject to review by the supreme court as provided by law, to which court appeal from such judgment and order may be made as provided by law.

(G) The commission's copy of the testimony shall be available at all reasonable times to all parties without cost for examination and for the purposes of judicial review of the order of the commission. The petition shall be heard on the transcript of the record without requirement of printing.

(H) The commission may appear in court by its own attorneys.

(I) If no proceeding to obtain judicial review is instituted by a complainant, intervener, or respondent within thirty (30) days from the service of an order of the commission pursuant to subsection (H) of § 34-37-5 hereof, the commission may obtain a decree of the court for the enforcement of such order upon showing that respondent is subject to the commission's jurisdiction, and resides or transacts business within the county in which the petition for enforcement is brought.

(J) The said commission may proceed in the same amount as provided in [§] 28-5-13 of the general laws of 1956, as to the powers, duties and rights of the commission, its members, hearing examiners, the complainant, intervener and respondent.

34-37-7. *Educational program.*—(A) In order to eliminate the discriminatory practices based upon race or color, religion or country of ancestral origin, and the resulting conditions therefrom, as more fully set forth in § 34-37-1, the commission and the state department of education are jointly directed to prepare a comprehensive educational program, designed for the students of the public schools of this state and for all other residents thereof, calculated to emphasize the origin of prejudice against minority groups, its harmful effects, and its incompatibility with American principles of equality and fair play.

(B) The commission is hereby authorized to accept contributions from any person to assist in the effectuation of this section and may seek and enlist the cooperation of private charitable, religious, labor, civic, and benevolent organizations for the purposes of this section.

34-37-8. *Appropriation.*—The general assembly shall annually appropriate such sums as is deemed necessary to carry out the purposes of this chapter; and the state controller is hereby authorized and directed to draw his orders upon the general treasurer for the payment of said sum or so much thereof as may be required from time to time upon the receipt by him of properly authenticated vouchers.

34-37-9. *Construction.*—The provisions of this chapter shall be construed liberally for the accomplishment of the purposes intended and any provisions of any law inconsistent with any provisions hereof shall not apply. Nothing contained in this chapter shall be construed to repeal any of the provisions of any law of the state prohibiting discrimination based on race or color, religion or country of ancestral origin.

34-37-10. *Separability.*—If any clause, sentence paragraph, or part of this chapter or the application thereof to any person or circumstance shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this chapter or its application to other persons or circumstances.

34-37-11. *Short title.*—This chapter may be cited as "the Rhode Island fair housing practices act."

Senator HRUSKA. You have indicated, Mr. Lynch, that the law has not worked in its application. Could you give us some specific examples or elaborate on that a little bit?

Mr. LYNCH. Yes. Mr. Chairman, as I mentioned earlier, I would appreciate the fact if the gentlemen with me could aid in answering the questions that I might not particularly or personally be as qualified as they to answer.

The law in Rhode Island to my knowledge and in my opinion I would say that it has not helped one single family obtain housing.

Mr. MARTIN. Senator, there have been approximately four cases——

Senator HRUSKA. Your name, please?

Mr. MARTIN. Frank A. Martin, Jr.

There have been approximately four cases brought under the Rhode Island law through the Commission Against Discrimination because of trouble in finding housing in Rhode Island. I personally am in the legislature and have fought this bill for 7 years and repeatedly I said that once they got the law on the books they would try to amend it. This year they tried to amend it because they found that it is not effective. It has not solved the problem. We who opposed it repeatedly said the problem is an economic problem, and his this law would not help them.

Senator HRUSKA. You referred to four cases that were brought. What was the nature of those cases?

Mr. MARTIN. Discrimination in housing.

Senator HRUSKA. And was it a suit against the owner for refusing to sell?

Mr. MARTIN. To my knowledge it did not involve a broker. It involved a purchaser in one case and rentals in three others.

Senator HRUSKA. Dealing directly with the owner of the home?

Mr. MARTIN. Dealing directly with the owner.

Senator HRUSKA. They were individual structures, were they, rather than apartment houses?

Mr. MARTIN. Well, in Rhode Island you find a lot of two- and three-family houses. I would say it was a two- or three-family house.

Senator HRUSKA. While you were giving your testimony, Mr. Lynch, the senior Senator from New York came in. We are glad to see him here.

Senator Javits, have you any questions of the witness?

Senator JAVITS. Yes, I do, Mr. Chairman.

Gentlemen, I noticed with interest your five principles at pages 7 and 8 of your statement. Now, is there any reason why, even if there is a law on the books, Federal or State, those five principles cannot be followed by private business? Is there anything that prevents the five principles from being applied even if there is a law?

Mr. LYNCH. No, I would say that is true, Senator. Even if there is a law, I would say that these five points should be applied. They should have been applied in the past. I think our point is that this is more the answer rather than legislation.

Senator JAVITS. Now you do agree, do you not, gentlemen, that there is a problem.

Mr. LYNCH. Yes, sir.

Senator JAVITS. In other words, it is a fact that there has been housing discrimination on the grounds of race and color.

Mr. LYNCH. That is right. I think we probably would differ as to the matter of degree.

Senator JAVITS. But there is a problem.

Mr. LYNCH. Yes, sir.

Senator JAVITS. A problem large enough to require remedial action, whether by voluntary action on the part of the real estate industry or by law or by both.

Mr. MARTIN. We would like to point out here that in the States where they have passed a law it has not solved the problem.

Senator JAVITS. Yes.

Mr. MARTIN. In Rhode Island we agree there is a slight problem. The law has not solved it. Massachusetts has had the law for several years. It has not solved the problem. Several other States have had the law. It certainly has not solved the problem. We are saying it best should be done through economics, education, and the churches and the schools.

Senator JAVITS. The law has been on the books in Rhode Island for how long?

Mr. MARTIN. One year.

Senator JAVITS. One year. Do you feel that that is a fair test?

Mr. MARTIN. There are only four cases. It has been the law for several years in Massachusetts. Certainly the problem is greater in Massachusetts than it is in Rhode Island.

Mr. LYNCH. I would say in this regard, Senator, that in the argument for the bill, it was constantly brought across to us that cases of discrimination were in such quantity that this law was needed immediately and now. Even though 1 year is a short time, we have found only four cases.

Senator JAVITS. As a practical matter of course that would depend somewhat on the terms of the law, would it not?

Mr. LYNCH. That is true.

Senator JAVITS. I am not aware of the terms of the Rhode Island law, but you are placing them on record as our chairman quite properly provided. We will study them. I would like to ask you this question, however.

Before there was a law in Rhode Island, what did the real estate industry do about trying to deal with discrimination in housing in applying its five principles and how successful was it?

Mr. LYNCH. Well, in 1963 these five points that we are again trying to put forth were incorporated in a law that was introduced by Mr. Martin and Mr. Thompson with bipartisan support in the House of Rhode Island. The law got nowhere.

Senator JAVITS. Did you feel that you could do anything with your principles unless you had some kind of a law, even a law which would just incorporate those principles?

Mr. LYNCH. We were having difficulty getting our type of program across quite honestly. In Rhode Island we are a monopoly State concerning the newspapers. We are almost a one-paper State, a small State, and we were in opposition to that particular paper, and we had a constant problem of trying to do anything positive. I think I have mentioned and brought forth in this statement that in many cases that we have been lax in trying to take a positive approach here.

But we do have a number of cases where realtors prior to the law have tried to accomplish something positive in this program. In Woonsocket, R.I., which borders on Massachusetts, the northern part of Rhode Island, the Woonsocket board of realtors agreed to meet and cooperate with the task force on civil rights in that area. They opened up all of their listings within Woonsocket to this group. They did not get one single answer or request to even see this housing. And then, to cap it all off, the task force met and decided to boycott the realtors suggestion.

Senator JAVITS. How long ago was that?

Mr. LYNCH. This is 2 to 2½ years ago.

Senator JAVITS. That was while the effort was being made to get a law passed.

Mr. LYNCH. That is true.

Senator JAVITS. A fair housing law.

Mr. GREANY. Senator Javits, I am Ralph Greany from Newport. I can cite an example of a principle in that in 1961 I personally, and on my own initiative, approached the leader of the local chapter of the NAACP who I know very well, and I asked if he would join me in an effort to solve some of these problems. Now as far as the law is concerned this was quite a few years ago in 1961, and he absolutely refused. The general tenor of his remarks was they want a law.

Senator JAVITS. It is a fact, is it not, and you may answer affirmatively or not as you choose, that before this law was passed you could not get the bulk of the real estate industry to subscribe to and implement your principles; is that not so?

Mr. LYNCH. I would say that though I am not exactly sure I think that is probably a fair statement. In the last couple of years there is no doubt in my mind that the majority of our industry, certainly within our own State; and I have come to know more of national policy in the last couple of years, there is no doubt in my mind that it is now true. I can speak of my own personal case.

I sold to a Negro minority family in my own neighborhood and I received complaints from people who told me, "Well, everybody in St. Joseph Parish is upset." I said, "Upset over what?" I said, "That is not true anyway because I am in the parish and I am not upset and these people are certainly a credit to our location and to our neighborhood."

We have other cases where, having received front page newspaper treatment in Rhode Island, we called these people to say, "Well, we read in the paper you are having trouble finding housing, we would like to do something about this."

We have a number of instances where it became obvious after working very hard to find them the type of housing that they were looking for, that these people—and I am not saying that this holds true now for everybody who needs housing—but these particular people who were hitting their breasts and saying that legislation is so necessary were not sincere in looking for this housing. They gave us a lot of running around. All they were interested in was the law, and not to help provide housing for people.

Mr. THOMPSON. Senator Javits——

Senator JAVITS. You say most of the housing in Rhode Island is two- or three-family dwellings; is that right?

Mr. MARTIN. Around the cities the majority is two- and three-family houses.

Senator JAVITS. Is it not a fact that the Rhode Island law exempts two- and three-family dwellings?

Mr. MARTIN. Owner occupied.

Senator JAVITS. What about the generality of these buildings, are they not owner occupied?

Mr. GREANY. Not in my area, no.

Mr. THOMPSON. Senator, I am Oliver Thompson.

There has been some misinterpretation of what was said here. That misinterpretation is that I believe you said that we could not get the real estate profession to implement our program. It is not the real estate profession that we have the problem with in implementing the program. The problem exists with the opponents to the plan. The real estate industry was willing to implement the program, but it was not met with success on the other side of the picture.

Senator JAVITS. You say the real estate industry was willing. What is your evidence?

Mr. THOMPSON. I can give you concrete evidence. The Woonsocket plan is one evidence of the problem. I was president of the realtors association for 2 years of the 7 years that we were in opposition to this program. The problem in this particular case, I made the offer in behalf of the Rhode Island State Association of Real Estate Boards and the homebuilders association that we would build and we would sell an integrated housing project. We would do it at cost, and we would do it without any commission, if somebody would finance it, particularly the opponents, the AFL-CIO and anybody that wanted to finance it. Nobody is willing to finance the program.

We met with these people, and I am talking now of the opponents, asked them if we could meet and determine the program. I suggested that we meet in private to see if we could come up with some program that would be suitable to everybody, and they would not meet unless we had the press present, and we had publicity on the program.

Now, over the years we have tried to do what we can in implementing this program.

Senator JAVITS. I have two observations on that. One is you offered that program in lieu of the law. You wanted them to give up the law, is that not right?

Mr. MARTIN. Because we felt the law would not be effective.

Senator JAVITS. I understand, but that is what you wanted.

Mr. THOMPSON. We think there are certain things wrong with the law.

Senator JAVITS. You offered them an alternative. If they gave up the law you would——

Mr. THOMPSON. No, no.

Senator JAVITS. You did not care whether the law stayed on the books or not.

Mr. THOMPSON. The law was not on the books at the time.

Senator JAVITS. But the price of your going ahead with your plan was that these people would no longer press for the law?

Mr. THOMPSON. That is not true.

Senator JAVITS. That is not true?

Mr. THOMPSON. No.

Senator JAVITS. You were perfectly willing to have them press for and pass the law.

Mr. THOMPSON. No.

Mr. MARTIN. We were opposed.

Mr. THOMPSON. We were willing for them to press for it, but not pass.

Senator HRUSKA. Gentlemen, you know the reporter has only one set of fingers, and he has to make a record here. If you speak up in unison it is going to be very difficult for him to get it. May I suggest that Mr. Lynch will answer the questions when questions are given, unless the Senator wants to address a particular witness, and we will make a better record.

Mr. LYNCH. I do not think we can resolve that one, sir.

Senator JAVITS. May I ask you this? Is there anything which would have stopped your realtors from having adopted these principles and implementing them regardless of whether the opponents agree or not?

Mr. LYNCH. Yes.

Senator JAVITS. What?

Mr. LYNCH. The lack of cooperation. We cannot do it alone.

Senator JAVITS. You can offer housing alone, even if they do not cooperate. You can make the offer. If anybody calls for housing anywhere and he is a Negro, then you see that your boards, according to a code of ethics that you have adopted and enforce, will sell it to them. If nobody applies, nobody applies.

Mr. LYNCH. We are doing this now, Senator.

Senator JAVITS. You are doing it now since the law was passed.

Mr. LYNCH. No, and before the law I can tell you this. I personally will not accept a listing where I am told by the owner that it must be racially restricted.

Senator JAVITS. Sir, I pay you all honor and credit, but we are talking about the totality of your business in the State. I am just trying to find out whether there really was an adequate statute. Our friend has just told me that you offered them a project. Well, you know that patronization is as much anathema to the minorities as discrimination. They do not want a project. They want a break with everybody and in every project, and why not?

Mr. LYNCH. I think you are talking about Mr. Thompson's usage of the word "project." I do not think that is the correct—we were not talking about a housing project as you and I would probably think of them. We were talking about housing developments into new areas.

Senator JAVITS. I understand, but why should they be barred from any area if the proposition is valid? But may I ask you one other question? Understand that I am very interested in the private sector myself, and I am really anxious to find out what can be done in the private sector.

President Kennedy issued an Executive order in 1963 which affected allegedly about 20 to 30 percent of the housing. Did that have any measurable effect upon the situation in Rhode Island?

Mr. LYNCH. I would not say so, no.

Senator JAVITS. In other words, that was not particularly evident.

Well, gentlemen, I appreciate the practicalities, and we want to hear them. I would like very much for you gentlemen as you testify also to bear in mind that we have had very similar testimony on a fair employment practice commission as well as elsewhere. People predicted that you are going to cause complexities in work and there would be many vexatious and onerous claims and suits. It has not worked out that way, certainly not in my State, nor does not seem to be working out that way in the Federal establishment. So that I would hope that you gentlemen and future witnesses can give us some reason why you feel that the situation in housing is as different from employment as I gather you have implied.

Mr. LYNCH. I have tried to do that in the statement, Senator. I think I was at that point just shortly before you came in.

Senator JAVITS. I have read your whole statement carefully and I do not feel as yet that the real estate people have met that particular issue, so I invite either you or others to do it.

Mr. LYNCH. All right.

Senator JAVITS. Finally may I say that I think it would be splendid, whatever happens to this law, if the real estate people of the country really got together, either by States or throughout the Nation, and tried to implement the principles you describe. Really enforce them upon brokers and make them stick, but not with the idea, you know, that you can confine people in this day and age to a project in outlying areas.

We must face it, gentlemen. We are going to have to do it or the revolution will inundate us.

Mr. LYNCH. No, that is not our intent, Senator, and with the previous statement we would concur wholeheartedly.

Senator JAVITS. Thank you very much, Mr. Chairman. I do not want to detain the witnesses any further.

Senator HRUSKA. Very well.

Thank you, gentlemen, for appearing here before the committee and contributing to its record.

Mr. LYNCH. Thank you, Mr. Chairman.

Senator HRUSKA. The next witness, Mr. Counsel?

Mr. AUTRY. Mr. Chairman, the next witness is Mr. E. G. Stassens, president of the Oregon Association of Realtors, Beaverton, Oreg., appearing at the request of Senators Neuberger and Morse and Congressman Wyatt.

Senator HRUSKA. Very well, Mr. Stassens, you may proceed with your testimony.

STATEMENT OF E. G. STASSENS, PRESIDENT, OREGON ASSOCIATION OF REALTORS, BEAVERTON, OREG.

Mr. STASSENS. Mr. Chairman and members of the subcommittee, my name is E. G. Stassens and I am a real estate broker with offices in Beaverton and Portland, Oreg. I have been engaged in the residential real estate brokerage business in the Portland metropolitan area for 23 years. My firm maintains four offices in Beaverton and Portland suburbs. I appear today as president of the Oregon Association of Realtors to present the views of the association in opposition to title IV of the pending Civil Rights Act, S. 3296.

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(At this point Mr. Kennedy entered the hearing room.)

Mr. STASSENS. The Realtors of the State of Oregon, representing a large segment of the property owners and other concerned citizens, must of necessity oppose S. 3296. Believing in the fundamental and basic principles of the individual rights as set forth by the Constitution of the United States, we sincerely feel these rights are being endangered by such legislation as is being considered by this subcommittee.

Mr. Chairman and members of the committee, have you gentlemen considered the unfairness of requiring a property owner accused of alleged discrimination being forced to defend himself at great possible financial burden and valuable loss of time against a charge in which he, as a taxpayer, must, by law, share the legal expense of the complainant? Has the subcommittee considered that a property owner, because of financial necessity, having to dispose of his property, or requiring the funds to seek employment elsewhere, must, because of an alleged act of discrimination and a permanent or temporary injunction taking his property off the market, could be caused not only embarrassment and mental suffering but financial chaos and bankruptcy?

The State of Oregon, having had civil rights legislation since 1955 in the interest and protection of all of its citizens—and this State having strong enforcement agencies which have adequately and properly policed the violations of the existing laws—cannot but oppose further legislation which can only be considered as unnecessary and in direct conflict with constitutional freedoms as given by the Founding Fathers of this Nation.

Since 1959, the State of Oregon has had a fair housing law. During that time all charges as to discrimination were heard and found to be invalid, except for one case where one of the principals involved died and the case was never heard, or it may have been discovered that it also had no basis for its complaint. Under this law people are now harassed from time to time, costing a great deal of time and money for the hearings, and it is our opinion that should this proposal be enacted into law, harassment of the innocent would become the new style of entertainment and amusement for any crackpot that might think he had a claim, and supporting his admission with funds furnished by our Government.

One of the most important factors that has contributed to the wealth of this Nation, causing it to be the wealthiest in the world today, is the encouragement of property ownership. Yet we firmly believe that if this bill were enacted, by virtue of the various provisions in the bill—and more especially section 406—it would discourage and take away the incentive of people investing in real estate. Therefore, I strongly suggest that this subcommittee take into consideration the effect on the Nation's economy that the enactment of this bill would cause. There are multitudes of elderly people who are presently investing in duplexes, fourplexes, and other types of small rentals so that they can peacefully occupy their own home and augment their social security and other retirement plans with additional income. The enactment of this bill would leave the door wide open for harassment, lawsuits, embarrassment, and mental suffering of these very people who are endeavoring to help themselves.

I would pose this question: How many community builders, commercial investors and property developers who have for years been directly responsible for the business growth of our country would continue on this same basis knowing that the possibility of continued harassment would also be a part of their investment? Under these circumstances, an investment of Government bonds would be more desirable. The general economy of the entire country would suffer. Lumbering, steel industry, construction industry, property development—they all would have terriffic cutbacks while the trend toward socialism would be enhanced by the growing need for housing which now the individual would be reluctant to supply—again offering to Government a new excuse for furnishing public housing, leading us further and further into socialism.

Gentlemen, this proposed legislation is supposed to be designed to protect the rights of the minority groups in this country. However, after carefully scrutinizing title IV of this bill, the so-called minority groups are going to be harmed by this legislation as much as anyone else. I am sure the so-called minority groups in this Nation of ours want the right to rent, lease, sell, or buy to or from whomsoever they so desire. I am sure that in the so-called minority groups there are people who would not want to rent, sell, or lease their duplex to derelicts and people of questionable character and morals, yet under this proposed legislation a citizen would not have his freedom of choice without possibly subjecting himself to a discrimination charge.

Throughout the many past years I have tried to keep abreast of all legislation that affects our country. I want to say to you today that nothing has disturbed me more than this proposed legislation. I have talked to many citizens of the State of Oregon regarding this and they, too, feel as I do that the enactment of this legislation would be the most socialistic legislation that has ever been proposed, and if this bill is enacted we will have taken the biggest step towards socialism that this Nation has ever seen. Our forefathers, who worked so hard and sacrificed so much to start this Nation and bring it forward, would probably turn over in their graves.

While we are concerned with title IV in its entirely, we are particularly concerned with section 406, permitting the court to grant a permanent or temporary injunction, restraining order, or other order.

It could easily be assumed that a property owner desiring to immediately dispose of his property through personal or financial necessity could be deprived of such action, because of adverse conditions caused by a permanent or temporary injunction. He could be caused not only humiliation, mental anguish and suffering, but also unwarranted financial loss and possible bankruptcy. Because of alleged and unproven discrimination the property owner would be deprived of, or delayed in, the disposition of his property and the obtaining of necessary funds from the sale or rental to improve his position as to housing or employment in Oregon or any other State.

With respect to provisions for penalties or damages, the language in this section is totally unacceptable in that it forces the property owner, because of an alleged but unproven act of discrimination, to seek necessary defense through legal counsel with possible burdensome expense, while the complainant who claims discrimination is given legal counsel and assistance at the taxpayers' expense.

It should be recognized that the realtors of the State of Oregon, joining with their colleagues in the other 49 States of this great Nation, believe in and support the Constitution of the United States and the principles for which we have fought for these many years. We must oppose title IV because of the proposed denial of the rights of citizens as they pertain to property ownership. Freedom has been a cherished symbol of this Nation since the beginning of its existence, and wars have been fought and are now being fought to defend this ideal throughout the world. We cannot believe the legislative body of the greatest nation that has ever been known to mankind would now deprive all of its own citizens of the individual freedom that has given this country its greatness.

We urge the subcommittee to reject title IV. I thank you, Senator.

Senator HRUSKA. Thank you for your testimony. You have also referred to the Oregon statute, and there will be inserted at the conclusion of your testimony a summary of the statute or its text as staff decides.

(The statute referred to follows:)

OREGON

SUMMARY

Oregon prohibits discrimination by persons engaged in the business of selling, leasing, or renting real property. Although no particular type of housing is specified, it would seem that persons engaged in leasing, or renting public housing as well as those engaged in the business of leasing, renting or selling urban renewal housing, other publicly assisted housing, and private housing, would be covered.

Any aggrieved person or the Attorney General may file a complaint with the Commissioner of the Bureau of Labor, who notifies the person named in the complaint. That person is then prohibited from taking any action which would render the property unavailable to the complainant. (The violation of this latter provision gives rise to a cause of action by the complainant against the respondent in which compensatory, and reasonable exemplary damages may be recovered.) The Commissioner investigates and, if a violation is found, the discriminatory practice may be rectified through a written conciliation agreement. In the event that this attempt fails, the Commissioner may call a hearing and, if he finds a respondent has engaged in the unlawful practice charged, issues a cease and desist order.

Any conciliation agreement or cease and desist order may be enforced through mandamus, injunction, or a suit in equity. Persons aggrieved by an order may obtain judicial review thereof. The violation of an order of the Commissioner is a criminal act punishable by imprisonment for not more than a year and/or a fine of not more than $500. Further, the Real Estate Commissioner may suspend or revoke the license of any real estate broker or salesman who violates this act.

I. PUBLIC HOUSING

(*Citation*: ORE. REV. STAT. § § 659.010–.115, .990 (1963); § § 183.310–.510 (1963).)

NOTE.—These provisions are set forth below under the title Private Housing, but they also apply here.

II. URBAN RENEWAL HOUSING

(*Citation*: ORE. REV. STAT. § § 650.010–.115, .990 696.300 (1963); § § 183.310–.510 .510 (1963).)

NOTE.—These provisions are set forth below under the title Private Housing, but they also apply here.

III. OTHER PUBLICLY ASSISTED HOUSING (FHA, ETC.)

(*Citation*: ORE. REV. STAT. §§ 659.010–.115, 990, 696.300 (1963); §§ 183.310–.510 (1963).)

NOTE.—These provisions are set forth below under the title Private Housing, but they also apply here.

IV. PRIVATE HOUSING

(*Citation*: ORE. REV. STAT. §§ 659.010–.115, .990, 696.300 (1963); §§ 183.310–.510 (1963).)

659.010 *Definitions for ORS 659.010 to 659.110.*—As used in ORS 659.010 to 659.110, unless the context requires otherwise:

* * * * * * *

(2) "Cease and desist order" means an order signed by the commissioner, taking into account the subject matter of the complaint and the need to supervise compliance with the terms of any specific order issued to eliminate the effects of any unlawful practice found, addressed to a respondent requiring him to:

(a) Perform an act or series of acts designated therein and reasonably calculated to carry out the purposes of ORS 659.010 to 659.110, eliminate the effects of an unlawful practice found, and protect the rights of the complainant and other persons similarly situated;

(b) Take such action and submit such designated reports to the commissioner on the manner of compliance with other terms and conditions specified in his order as may be required to assure compliance therewith; or

(c) Refrain from any action designated in the order which would jeopardize the rights of the complainant or other person similarly situated or frustrate the purpose of ORS 659.010 to 659.110.

(3) "Commissioner" means the Commissioner of the Bureau of Labor.

(4) "Conciliation agreement" means a written agreement settling and disposing of a complaint under ORS 659.010 to 659.110 signed by a respondent and an authorized official of the Bureau of Labor.

* * * * * * *

(10) "National origin" includes ancestry.

(11) "Person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy or receivers.

(12) "Respondent" includes any person or entity against whom a complaint or charge of unlawful practices is filed with the commissioner or whose name has been added to such complaint or charge pursuant to subsection (1) of ORS 659.050.

* * * * * * *

(14) "Unlawful practice" means . . . any violation of ORS . . . 659.033 [Discrimination in selling, renting or leasing real property] . . . or rules and regulations adopted pursuant to subsection (1) of ORS 659.103 but, does not include a refusal to furnish goods or services when the refusal is based on just cause.

659.031 *Definitions for ORS 659.033.*—As used in ORS 659.033, unless the context requires otherwise:

(1) "Person engaged in the business of selling real property" includes:

(a) A person who, as a business enterprise, sells, leases or rents real property.

(b) A person who sells, leases or rents real property in connection with or as an incident to his business enterprise.

(2) "Purchaser" includes an occupant, prospective occupant, lessee, prospective lessee, buyer or prospective buyer.

659.033 *Discrimination in selling, renting or leasing real property prohibited.*—(1) No person engaged in the business of selling real property shall, solely because of race, color, religion or national origin of any person:

(a) Refuse to sell, lease or rent any real property to a purchaser.

(b) Expel a purchaser from any real property.

(c) Make any distinction, discrimination or restriction against a purchaser in the price, terms, conditions or privileges relating to the sale, rental, lease or occupancy of real property or in the furnishing of any facilities or services in connection therewith.

(d) Attempt to discourage the sale, rental or lease of any real property to a purchaser.

(2) No person shall publish, circulate, issue or display, or cause to be published, circulated, issued or displayed, any communication, notice, advertisement or sign of any kind relating to the sale, rental or leasing of real property which indicates any preference, limitation, specification or discrimination based on race, color, religion or national origin.

(3) No real estate broker or salesman shall accept or retain a listing of real property for sale, lease or rental with an understanding that a purchaser may be discriminated against with respect to the sale, rental or lease thereof solely because of race, color, religion or national origin.

(4) No person shall assist, induce, incite or coerce another person to commit an act or engage in a practice that violates this section.

659.045. *Complaints of discrimination in housing or in place of public accommodation, resort or amusement or in private vocational, professional or trade school.*—(1) [A]ny person claiming to be aggrieved by . . . a violation of ORS 659.033 may, by himself or his attorney, make, sign and file with the Commissioner of the Bureau of Labor a verified complaint in writing which shall state the name and address of the person, the place of accommodation, resort or amusement or the vocational, professional or trade school alleged to have committed the act complained of and which complaint shall set forth the particulars thereof. The complainant may be required to set forth in the complaint such other information as the Commissioner of the Bureau of Labor may deem pertinent.

(2) The Attorney General may make, sign and file a complaint in a like manner as a complaint filed under subsection (1) of this section whenever he has reason to believe . . . that any person has violated the provisions of ORS 659.033.

659.050 *Elimination of unlawful practice by conciliation; written agreement.*—After the filing of any complaint under ORS 659.040 or 659.045, the commissioner shall cause prompt investigation to be made in connection therewith. If during the course of such investigation or upon the conclusion thereof it appears to the commissioner that additional persons should be named as respondents in the complaint the names of such persons may be added as respondents thereto. If the investigation discloses any substantial evidence supporting the allegations of the complaint the commissioner shall cause immediate steps to be taken through conference, conciliation and persuasion to effect a settlement of the complaint and eliminate the effects of the unlawful practice and to otherwise carry out the purpose of ORS 659.010 to 659.110.

(2) The terms of any settlement of a complaint under this section shall be contained in a written conciliation agreement filed with the commissioner. Such agreement may include any or all terms and conditions which may be included in a cease and desist order.

(3) The commissioner may relax any terms or conditions of a conciliation agreement or cease and desist order, the performance of which would cause an undue hardship on the respondent or another person and are not essential to protection of the complainant's rights. In the absence of such relaxation by the commissioner, no respondent shall violate any terms or conditions of a cease and desist order or conciliation agreement to which he was a party; nor shall his agent or successor in interest to the particular business involved violate any terms or conditions thereof.

659.055 *Complainant not to be deprived of . . . real property . . . pending determination of complaint.*—Prior to a final administrative determination on the merits of a complaint filed against him under ORS 659.010 to 659.110 and subsequent to receipt of notice from the commissioner or his deputy that such complaint has been filed subject to ORS 659.105 (Civil action for damages), no respondent shall, with an intention to defeat a purpose of this chapter, take any action which makes unavailable to the complainant therein, any . . . real property . . . sought by said complaint upon administrative determination on the merits thereof.

659.060 *Charges by Attorney General; hearing on complaints; findings; orders.*—(1) In case of failure to resolve a complaint after reasonable effort under ORS 659.050 a copy of the records on file in the case shall be certified by an officer of the Bureau of Labor familiar with the details thereof. He shall deliver such copy, together with a list of available dates for hearing, to the Attorney General or an Assistant Attorney General authorized to receive it.

(2) Upon receipt of the copy of records referred to in subsection (1) of this section the Attorney General shall prepare and serve upon the commissioner and

each respondent required to appear at a hearing before the commissioner, specific charges in writing he intends to prefer against such respondents, together with a written notice of the time and place of such hearing. The commissioner shall immediately schedule a hearing on the case at the time and place specified in the notice prepared and served by the Attorney General.

(3) All proceedings before the commissioner under this section shall be in conformity with the provisions of ORS chapter 183.

(4) After considering all the evidence, the commissioner shall cause to be issued findings of facts and conclusions of law. He shall also issue an order dismissing the charge and complaint against any respondent not found to have engaged in any unlawful practice charged and an appropriate cease and desist order against any respondent found to have engaged in any unlawful practice charged.

(5) Nothing stated in ORS 659.010 to 659.110 shall be construed to prevent a settlement of any case scheduled for hearing under the provisions of ORS 659.010 to 659.110 by conciliation, conference and persuasion, nor to prevent the commissioner from appointing a special tribunal to hear and determine matters of fact under ORS 659.010 to 659.110, reserving to himself the conclusions of law and formulation of an order appropriate to the facts as found.

659.070. *Enforcement of conciliation agreements and orders.*—Any conciliation agreement or order issued by the commissioner under ORS 659.060 may be enforced by mandamus or injunction or by a suit in equity to compel specific performance of such order.

659.080. *Appeal to circuit court.*—Any party aggrieved by an order of the commissioner issued after hearing under ORS 659.060, may appeal from such order to the circuit court in accordance with the provisions of ORS chapter 183. For the purpose of this section a conciliation agreement disposing of a complaint is an order of the commissioner against a complainant who did not approve of such agreement, and such complainant is a party aggrieved thereby.

659.090. *Appeal to Supreme Court.*—Either party aggrieved by order or decree of the circuit court may appeal therefrom to the Supreme Court in the same manner that appeals may be taken from a decree in a suit in equity.

659.100. *Elimination and prevention of discrimination by Bureau of Labor; employment of personnel.*—

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(3) The Bureau of Labor may eliminate and prevent violations of ORS 659.033 [Discrimination in selling, leasing or renting real property]. . . . The Bureau of Labor hereby is given general jurisdiction and power for such purposes.

(4) The commissioner shall employ a deputy commissioner and such other personnel as may be necessary to carry into effect the powers and duties conferred upon the Bureau of Labor and the commissioner under ORS 659.010 to 659.110 and may prescribe the duties and responsibilities of such employes. The Commissioner of the Bureau of Labor may delegate any of his powers under ORS 659.010 to 659.110 to the deputy commissioner employed under this subsection.

(5) No person delegated any powers or duties under this section and ORS 659.103 shall act as prosecutor and examiner in processing any violation under ORS 659.010 to 659.110.

659.103. *Rules for carrying out ORS 659.010 to 659.110.*—(1) In accordance with any applicable provision of ORS chapter 183, the commissioner may adopt reasonable rules:

(a) Establishing what acts and communications constitute a notice, sign or advertisement that public accommodation or real property will be refused, withheld from, or denied to any person or that discrimination will be made against him because of race, religion, color or national origin.

* * * * *

(d) Establishing rules for internal operation and rules of practice and procedure before the commissioner under ORS 659.010 to 659.110.

(e) Establishing rules covering any other matter required to carry out the purpose of ORS 659.010 to 659.110.

(2) In adopting rules under this section the commissioner shall consider the following factors, among others:

* * * * *

(b) Available reasonable alternative ways of obtaining requested information without soliciting responses as to race, religion, color, national origin or age.

(c) Whether a statement or inquiry soliciting information as to race, religion, color, national origin or age communicates an idea independent of an intention to limit, specify or discriminate as to race, religion, color, national origin or age.

(d) Whether the independent idea communicated is relevant to a legitimate objective of the kind of transaction which it contemplates.

(e) The ease with which the independent idea relating to a legitimate objective of the kind of transaction contemplated could be communicated without connoting an intention to discriminate as to race, religion, color, national origin or age.

659.105. *Cause of action for violation of ORS 659.050 or 659.055: defenses.*—(1) Any person aggrieved by a violation of ORS 659.055 [Deprivation of real property pending determination of complaint] or subsection (3) of ORS 659.050 [Violation of conciliation agreement or cease and desist order] shall have a cause of action against the violator thereof for damages sustained thereby and also for such additional sum as may be reasonable as exemplary damages.

(2) As a defense to any cause of action arising under this section based on a violation of ORS 659.055 the defendant may plead and prove that either:

(a) Subsequent to the defendant's conduct on which the plaintiff bases his cause of action, the complaint under ORS 659.040 or ORS 659.045 has been dismissed by the commissioner or his deputy, or that court, either for want of evidence to proceed to a hearing or for lack of merit after such hearing; or

(b) Defendant's conduct giving rise to plaintiff's cause of action was neither committed within the first 90 days after notice by the commissioner or his deputy of the filing of the complaint of discrimination under ORS 659.010 to 659.110, nor within any extended period of time obtained at the request of respondent for disposition of the case.

659.110 *Willful interference with administration of law and violation of orders of commissioner prohibited.*—(1) No person shall willfully resist, prevent, impede or interfere with the commissioner or any of his authorized agents in the performance of duty under ORS 659.010 to 659.110 or willfully violate an order of the commissioner.

(2) As appeal or other procedure for the review of any such order is not deemed to be such willful conduct.

659.115. *Advisory agencies and intergroup-relations councils.*—(1) The Commissioner of the Bureau of Labor shall create such advisory agencies and intergroup-relations councils, local, regional or state-wide, as in his judgment will aid in effectuating the purposes of ORS 659.010 to 659.110. The commissioner may empower them:

(a) To study the problems of discrimination in all or specific fields of human relationships or inspecific instances of discrimination because of race, religion, color, or national origin.

(b) To foster, through community effort or otherwise, good will, cooperation and conciliation among the groups and elements of the population of the state.

(c) To make recommendations to the commissioner for the development of policies and procedures in general and in specific instances, and for programs of formal and informal education.

(2) Such advisory agencies and councils shall be composed of representative citizens, serving without pay, but with reimbursement for actual and necessary expenses in accordance with laws and regulations governing state officers.

(3) The commissioner may make provision for technical and clerical assistance to such agencies and councils and for the expenses of such assistance.

659.990. *Penalties.*—(1) Violation of ORS 659.110 [Willful interference with administration of law and violations of orders of commissioner] is punishable, upon conviction, by imprisonment in the county jail for not more than one year or by a fine of not more than $500, or by both.

696.300 *Grounds for revocation or suspension of licenses.*—(1) The [Oregon Real Estate] [C]ommissioner may, upon his own motion, and shall upon the verified complaint in writing of any person, provided such complaint, or such complaint together with evidence, documentary or otherwise, presented in connection therewith, shall make a prima facie case, investigate the actions of any real estate broker or real estate salesman, or any unlicensed person who assumes to act in either such capacity within this state, and has the power to suspend or revoke any license issued under ORS 696.005 to 696.490 and 696.610 to 696.730

at any time . . . where the licensee, in performing or attempting to perform any of the acts mentioned in ORS 696.005 to 696.490 and 696.610 to 696.730 is deeded to be guilty of:

* * * * * * *

(v) Violating ORS 659.033 [Discrimination in selling, renting or leasing real property].

183.310 *Definitions for ORS 183.310 to 183.510; agencies excepted from definition of "agency."*—As used in ORS 183.310 to 183.510:

* * * * * * *

(2) "Contested case" means a proceeding before an agency in which the individual legal rights, duties or privileges of specific parties are required by statute or constitution to be determined only after an agency hearing at which such specific parties are entitled to appear and be heard and shall include in all cases proceedings for the suspension, revocation or refusal to renew of licenses required to pursue any commercial activity, trade, occupation or profession where the licensee demands such hearing.

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183.420 *Notice, hearing and record in contested cases.*—In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice. The notice shall state the time, place and issues involved, but, if, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of the hearing, or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable and opportunity shall be afforded all parties to present evidence and argument with respect thereto. This section shall not be construed as authorizing any agency to proceed against any person unless there is reasonable cause for such action. At such hearing, each party shall have the right to introduce evidence for the record and to be represented by counsel. The agency shall prepare an official record which shall include testimony and exhibits, in each contested case, but it shall not be necessary to transcribe testimony unless requested for purposes of rehearing or court review. Informal disposition may also be made of any contested case by stipulation, agreed settlement, consent order or default; provided that an order adverse to a party may be issued upon default only upon prima facie case made on the record by the agency. Each agency shall adopt appropriate rules of procedure for notice and hearing in contested cases. Testimony shall be taken upon oath or affirmation of the witness from whom received unless all parties affected stipulate in writing to the contrary. For purpose of judicial review under ORS 183.310 to 183.510, testimony not taken upon oath or affirmation shall be excluded from the record of the case. Officials presiding at such hearings shall have authority, subject to the rules of the agency, to administer oaths and affirmations to witnesses.

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183.440 *Subpoenas in contested cases.*—Agency subpoenas authorized by law shall be issued to any party to a contested case upon request and, to the extent required by agency rule, upon a statement or showing of general relevance and reasonable scope of the evidence sought. If any person fails to comply with any subpoena so issued or any party or witness refuses to testify on any matters on which he may be lawfully interrogated, the judge of the circuit court of any county, on the application of the agency or of a designated representative of the agency, shall compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from such court or a refusal to testify therein.

183.450. *Evidence, cross-examination and official notice in contested cases.*—In contested cases:

(1) Any oral or documentary evidence may be received, provided that hearsay evidence shall not be admissible over an objection based on lack of opportunity to cross-examine, but every agency shall, as a matter of policy, provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence, and no sanction shall be imposed, or rule or order be issued, except upon consideration of the whole record or such portions thereof as may be cited by any party, and as supported by, and in accordance with, reliable, probative and substantial evidence. Agencies shall give effect to the rules of privilege recognized by law.

(2) All evidence shall be offered and made a part of the record in the case, and except as provided in subsection (4) of this section no other factual informa-

tion or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

(3) Every party entitled as of right to hearing under subsection (2) of ORS 183.310 shall have the right of cross-examination of witnesses who testify and shall have the right to submit rebuttal evidence. Parties permitted to intervene by the agency shall have such rights as determined by the agency by rule or otherwise.

(4) Agencies may take notice of judicially cognizable facts, and they may take notice of general, technical or scientific facts within their specialized knowledge. Parties shall be notified, either before or during the hearing, or by reference in a tentative decision, or otherwise, of the material so noticed and shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence and specialized knowledge in the evaluation of the evidence presented to them.

183.460. *Examination of evidence by agency in contested cases.*—Whenever in a contested case a majority of the officials of the agency who are to render the final decision have not heard or read the evidence, the decision, if adverse to a party entitled as of right of hearing under subsection (2) of ORS 183.310, but not including the agency itself, shall not be made until a proposal for decision, including findings of fact and conclusions of law, has been served upon the parties and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decisions, who shall in such case personally consider the whole record or such portions thereof as may be cited by the parties.

183.470. *Decisions and orders in contested cases.*—Every decision and order adverse to a party to the proceeding, rendered by an ageny in a contested case, shall be in writing or stated in the record, may be accompanied by an opinion, and shall be accompanied by findings, of fact and conclusions of law. The findings of fact shall consist of a concise statement of the determination of each contested issue of fact. Parties to the proceeding shall be notified of the decision and order in person or by mail. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed upon request to each party or to his attorney of record.

183.480. *Judicial review of contested cases.*—(1)(a) Except as otherwise provided specifically by statute, any party to an agency proceeding aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form is entitled to judicial review thereof under ORS. 183.310 to 183.510.

(b) Judicial review of decisions in contested cases by parties shall be solely as provided by ORS. 183.310 to 183.510.

(2) Jurisdiction for judicial review is conferred upon the Circuit Court for Marion County and upon the circuit court for the county in which the petitioner resides or has his principal business office. Proceedings for review shall be instituted by filing a petition in either of such courts. The petition may be filed within 60 days only following entry of the decision. The petition shall state the nature of the petitioner's interest, the facts showing how the petitioner is aggrieved by the agency decision, and the ground or grounds upon which the petitioner contends the decision should be reversed and set aside. True copies of the petition shall be served by registered mail upon the agency and all other parties of record in the agency proceedings. No responsive pleading shall be required of the agency. The court, in its discretion, may permit other interested persons to intervene; provided that this section shall not be construed so as to authorize the court to grant any right to such intervening parties where agency action is required by law for such grant.

(3) The filing of the petition shall not stay enforcement of the agency decision, but the agency may do so, or the reviewing court may order a stay upon the giving of a bond or other undertaking or upon such other terms as it deems proper. All proceedings for review shall be given precedence on the docket over all other civil cases except those given equal status by statute. Any bond or other undertaking executed pursuant to this subsection shall be in favor of the State of Oregon for its benefit and for the benefit of whom it may concern and may be enforced by the agency or any other persons concerned in an appropriate proceeding as their interests may appear.

(4) Within 30 days after service of the petition, or within such further time as the court may allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review, but, by stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record when deemed desirable. Except as specifically provided in this subsection, the cost of the record shall not be taxed to the petitioner or any intervening party.

(5) If, before the date set for hearing, application is made to the court for leave to present additional evidence to the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good and substantial reasons for failure to present it in the proceeding before the agency the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and decision by reason of the additional evidence and shall, within a time to be fixed by the court, file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision, or its certificate that it elects to stand on its orginal findings and decision, as the case may be.

(6) The review shall be conducted by the court without a jury as a suit in equity and shall be confined to the record, except that, in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs.

(7) The court may adopt the agency findings of fact and affirm the decision of the agency; or it may reverse and set aside the agency decision, or reverse and remand for further proceedings, after review of all the facts disclosed by the record, and any additional facts established under the provisions of subsection (6) of this section. The court shall thereupon enter its decree. In the case of reversal the court shall make special findings of fact based upon evidence in the record and conclusions of law indicating clearly all respects in which the agency's decision is erroneous.

183.490. *Agency may be compelled to act.*—The court may, upon petition as described in ORS 183.480, compel an agency to act where it has unlawfully refused to act, or unreasonably delayed action.

183.500. *Appeals.*—Any party to the proceedings before the circuit court may appeal from the decree of that court to the Supreme Court. Such appeal shall be taken in the manner provided by law for appeals from the circuit courts in suits in equity.

Senator HRUSKA. Since you have commenced your testimony, Mr. Witness, we have been joined by the junior Senator from Massachusetts, though I see now that he has left. However, Senator Javits is here from New York and I will ask him if he has any questions at this time.

Senator JAVITS. I don't have many, but I would like to ask the witness one or two questions. The Oregon law was passed in 1963; is that right?

Mr. STASSENS. Well, we adopted a form of fair housing in 1959.

Senator JAVITS. In 1959. Now has that destroyed the real estate business in Oregon?

Mr. STASSENS. We have a unique proposal there. We have what I referred to as a discrimination bill in opposition to a discrimination law.

This law in Oregon is aimed at the broker himself. The property owner in our State still has a freedom of choice. The broker does not.

Actually, Senator, I believe that in Oregon we have probably had a unique experience because basically we have very, very little racial problems. Possibly this is because we are considered probably the last of the frontiers. The Negroes coming to Oregon were accepted

as free people, and I think that their job opportunity is probably greater than it is in other sections of the country I believe that there has been discrimination against the Negro, but in my personal opinion not in the form of housing.

They have been discriminated against as far as fair employment is concerned, and I believe if the job improvement for Negroes would improve, that they would be able to buy a home wherever they could afford to buy one, and there would be nothing said. I think that this is pretty much proven in the Northwest States, especially the State of Oregon.

Senator JAVITS. So that whatever the law dealt with in terms of realtors, it hasn't materially spoiled your business. It is a pretty good business out there.

Mr. STASSENS. Of course the law was put in and naturally some of the real estate people in Oregon were apprehensive. However, I can't speak for all 100 percent of the real estate people in Oregon. There are some 8,500. But I can speak for the greatest majority, and I say that all of these brokers have conscientiously endeavored to assist in the sale of all property to any one that wished to buy it.

Senator JAVITS. My point is that the law hasn't spoiled your business, has it?

Mr. STASSENS. This particular law has not.

Senator JAVITS. Has not.

Mr. STASSENS. That is right.

Senator JAVITS. So if we passed a similar law at the Federal level, the logic of it is that it shouldn't spoil your business either, should it?

Mr. STASSENS. It would spoil the principle on which this Nation is founded, freedom of choice.

Senator JAVITS. But I am talking now about the practical business aspect. If your own State law didn't spoil your business, a similar national law wouldn't spoil your business either, would it?

Mr. STASSENS. I would think that it definitely would hurt my business.

Senator JAVITS. It would?

Mr. STASSENS. Yes, sir.

Senator JAVITS. What is the difference between a State law and a Federal law?

Mr. STASSENS. The difference in my opinion, Senator, is that if I as an investor, and admittedly the investors of this Nation are basically responsible for its tremendous growth, they are the farsighted people that went out and built cities, communities, and businesses, I would say that if I as one of these investors were required, upon construction of real estate projects, and so forth, that I would have nothing to say as to who would go in them and I would hesitate to invest in this property.

Senator JAVITS. I think that we are talking at cross purposes. You said that the Oregon law didn't hurt the real estate business. I said that if we passed a Federal law, similar to the Oregon law, logically it shouldn't hurt the Oregon real estate business either, should it?

Mr. STASSENS. Then I misunderstood you. You are correct.

Senator JAVITS. That is correct?

Mr. STASSENS. A similar law if it were nationally effective I would say it wouldn't affect us.

Senator JAVITS. Really you are opposing the terms of this law.

Mr. STASSENS. This new bill?

Senator JAVITS. The terms of this new bill.

Mr. STASSENS. Yes.

Senator JAVITS. Now may I ask you this question. This law is heavily premised upon enforcement by the individual himself.

We will get into the ideology—I understand your point on that and we could argue at great length on that I am sure—but as a businessman, do you think a commission enforcement type is better than an individual enforcement type? Do you feel that you would avoid a multiplicity of suits, by going through the commission, which is a quasi-judicial body and that therefore it is to be preferred from the business point of view?

Mr. STASSENS. Well, of course I personally don't like the elimination of any freedom of choice. However, in answer to your question, if we had to have such a thing, the program as we have it in Oregon, now it is a part of our State real estate law that a broker cannot discriminate, and if action is brought against a broker involving discrimination, and he should be found guilty, he will lose his license to sell real estate. So naturally this is a policing job done by a commission, and it has been accepted and it has since 1959, we have had quite a number of harassment cases.

But to this date none of them have proven that there have been actual discriminations. I believe that this could be worked out very amiably on the basis of a commission; yes.

Senator JAVITS. Thank you very much. Now you understand too, of course, sir, I noticed that you and the Rhode Island people talked about price; in other words, the capability of the individual minority member to acquire property.

Of course there is nothing in this legislation that deals with price. If he is not capable of buying on the same terms as anyone else, or at least as another offeree, there is nothing in the law that changes that.

Mr. STASSENS. No.

Senator JAVITS. You understand that.

Mr. STASSENS. Yes, I do. In one of my offices, Senator, we are in the north end of Portland where probably 95 percent of the Negro population in the State of Oregon resides, and consequently we sell a number of houses to Negro people, and our problem there is these people, due to the type of jobs that they have, are financially unable to buy homes in an area of their desire, and their desires are the same as any one of us American people.

They want homes to satisfy the needs of their family, and they want good schooling and education for their children, and that is why I made the statement a moment ago that if all of our efforts were extended that are now being extended toward this forced housing bill, were extended to job improvement for the Negro people, they would rise on their own merits and they would be entitled to buy homes wherever they desire.

I could sell them many homes in other areas, but their credit and financial situation won't allow it. I believe that this is the answer, not forced legislation.

Senator JAVITS. Thank you very much.

Senator HRUSKA. Very well. Thank you, sir, for your appearance here.

Mr. STASSENS. Thank you very much for having me.

Senator HRUSKA. The next witness, Mr. Counsel.

Mr. AUTRY. Is professor Sparks here?

Senator HRUSKA. The witness is absent momentarily from the committee room. He will be here very shortly. We will take a brief recess.

(A short recess was taken.)

Senator HRUSKA. We will resume the session. Counsel, will you call the next witness, please.

Mr. AUTRY. Mr. Chairman, the next witness is Bertel M. Sparks, professor of law at New York University. Professor Sparks received his LL.B. degree from the University of Kentucky and his masters and doctorate degrees from the University of Michigan. He is the author of two books on contract and property law.

Senator HRUSKA. Mr. Sparks, you may proceed in your own way. You have filed with the committee a memorandum. You may either highlight it or you may read it, whichever you choose.

STATEMENT OF BERTEL M. SPARKS, PROFESSOR OF LAW, NEW YORK UNIVERSITY

Mr. SPARKS. Thank you, Mr. Chairman. If I may, I would prefer to present the statement, and if there are any questions later, I will be glad to answer them as best I can.

Senator HRUSKA. Very well, you may proceed.

Mr. SPARKS. First, I am deeply grateful and I feel highly honored at the privilege of being before this distinguished committee to present my views. This is especailly true in view of the fact that I am here for no reason and in no capacity other than that of being a citizen of a free Republic. I am not representing any particular group or faction or special interest or anything of that sort.

A person might be against a proposed piece of legislation because he does not approve of the objectives sought or he might approve of the objectives but still be opposed to the particular statute because he does not consider it a proper means of achieving the desired goals. It is assumed, and I am willing to assume, that the objectives of title IV of Senate bill 3296 are to provide additional means for enforcing the constitutional provisions for equal protection of the laws and to give to Negroes, and possibly other groups, a better opportunity to obtain more desirable housing.

These are worthy goals indeed and it is doubtful if anyone can be found who will disagree with either of them.

I assume that there is no one present or absent who would disagree with that.

But in spite of the good intentions, inquiry must be made into the actual results title IV is likely to produce in the marketplace. For I believe that Daniel Webster spoke the truth when he said the "Constitution was made to guard the people against the dangers of good intentions."

In the popular press, the bill is being referred to as a civil rights bill. But the experienced legislator can never be content with labels alone. He must ask himself, in connection with civil rights, what rights, to whom are they being given, and who is giving them? Upon these questions title IV is extremely ambigous. It purports to give a right to everyone to purchase or lease real estate without regard to his "race, color, religion, or national origin." But that right already exists in every instance where the prospective buyer locates the desired housing and offers the price for which a willing seller is prepared to sell.

That brings us more directly to the question as to how title IV proposes to improve the buyer's position. A reading of the bill, especially section 403, makes it quite clear that its purpose is to improve the buyer's position by providing for him a willing seller in circumstances where a willing seller might not otherwise be available.

There are a number of rather extensive enforcement provisions concerning the bringing of lawsuits, payment of attorney's fees, and the regulation of real estate brokers and financial institutions. Many of these are of highly questionable viability within themselves.

I might say that I have assumed that a lot of them were put in there for negotiating purposes. But that is not what I am going to talk about now, because I assume they are all in one way or another to support or supplement what purports to be the one basic right extended to the buyer. It is that central basic provision that I wish to discuss. And it will be my position that if the bill is enacted, its principal effects will be (1) to reduce the total amount of housing available by discouraging building, and (2) to put Negroes and other groups the legislation is intended to help at an increasing disadvantage in their attempts to buy what is available.

The bill attempts to provide a willing seller by denying to every property owner the right to consider "race, color, religion, or national origin" as influencing factors in the selection of a tenant or customer. But that provision raises two further questions of primary importance: (1) What personal right does this take from every homeowner in the land? and (2) What effect will this have upon the ability of Negroes and other minority groups to obtain better housing? These are important questions.

The constitutional prohibition as well as the longstanding legal tradition against the taking of property without due process of law brings us down to bedrock as to the meaning of the word "property" and what constitutes a "taking." The question is an important one, not only because of the provision in the Constitution, but also because of its significance in every aspect of human affairs. I am afraid that my discussion on this point will appear excessively esoteric to some and excessively simple and unnecessary to others. Whichever group you happen to be in, I beg you to bear with me because I believe a careful analysis of the nature of the property being taken is essential to an understanding of the effect this bill is likely to have in the marketplace.

In its legal sense, the word "property" does not refer to material things such as houses and lands, articles of clothing, tools, machinery, or other things capable of being owned. But rather property has reference to an individual's legal rights with respect to those things.

There is the right to use, the right to exclude others, the right to sell, the right to devise, and others. A person's property in a given object then consists of the total bundle of rights he has in that object. Those different rights are all different items of property. They are not all of equal importance.

It is possible that one or more of them may be taken away while the others are left undisturbed. One of the dangers inherent in this possibility is that we might consent to having them taken away one by one until there is scarcely anything left in the bundle. Another danger is that we might let one slip away thinking that we can hold on to all the others and then discover too late that that one, the one we have surrendered, is the one upon which the very existence of all of the others essentially depend.

The particular right involved in title IV is the right to sell. And here I am using the word "sell" to include the right to transfer for a term, that is to say, the right to rent or lease. In an effort to evaluate the importance of that particular right it might be well to begin by reminding ourselves briefly of a bit of history that all of us have been taught but which we might have a tendency to forget in this age when we are more concerned with the enjoyment of the fruits of freedom than we are with the sacrifices necessary to achieve it. And I might say necessary to maintain it.

And if I seem to dwell too long on what appears to be history of a bygone age, my purpose is to call attention to the fact that the right to sell, the right that is under attack in title IV, is the very right which supports and sustains most of the civil and political liberties held sacred by all Americans. While we might overlook that fact in our day, the Founding Fathers certainly did not forget it in theirs.

From the very foundation of our Republic, and in English jurisprudence even before that, down to the present time, our legal system has considered the right to sell as an essential feature of any free society. Some of our State constitutions have provisions declaring the right of property to be "before and higher than any constitutional sanction." (Arkansas constitution, art. 2, sec. 7.)

And more recently it has been declared that, "In organized societies the degree of liberty among human beings is measured by the right to own and manage property, to buy and sell it, to contract." (Garber, "Of Men and Not of Law" 34 (1966).)

Now one, certainly, is justified in asking whether all these assertions are mere examples of holiday rhetoric or whether they actually do epitomize the lifeblood of freedom and the building blocks of a free society and economic stability.

A close examination will reveal that it was the right to sell, to give away, or even to dissipate one's interest in property that enabled the serfs and villeins of the feudal period to emerge from their servile status to the status of freemen.

Maybe it doesn't appear that there is any need to go back to that, but I think there is. It puts us right in our present predicament.

The men who occupied the land and tilled the soil were referred to as freemen even in the feudal period, but then, as is true in the minds of some men even now, freedom had become deeply involved in semantics. A freeman in that period could not transfer his holdings,

which in practical experience meant he could not cash in on the fruit of his own labor without the consent of his lord, his lord representing an ascending political hierarchy with the crown, in other words the state, as the ultimate authority.

Of course the lord was under a similar burden so far as his efforts to transfer his own holdings were concerned. But his position was different in that his holdings were larger and of a higher order. He was economically secure and had a comfortable income.

It was the fellow who had the least that was under the heaviest burden for until the man higher up let loose, there was nothing available for the man on the bottom to acquire. And whether a clog on the right to sell is labeled a medieval doctrine of feudal tenure or a Civil Rights Act of 1966, its effect in the marketplace will be the same and the man at the bottom will still be the loser.

Of course it must be recognized that during the feudal period there were restrictions upon the right of inheritance, use, and other incidents of property ownership as well as upon the right to transfer. But the point to be made here is that the right to sell was the particular right that held the center of the stage, and until that right was achieved, political freedom and the whole gamut of civil rights, that we like to talk about so much, lay dormant, and it will become dormant again. And that right to sell, that economic mobility, or in the jargon of the profession that freedom of alienation, soon became the chief factor in the development of individual freedom of all kinds and it stimulated the economic development of property.

When the occupant of land became free to sell at a price agreeable to him without seeking the consent of his lord and without paying a fine to his lord for having done so, he began to take on the coloration of a freeman in the true sense of that word.

This might sound rather obvious to us, but we should remember that that right to transfer land has not prevailed throughout the world and has not prevailed throughout history. But where it has prevailed happens to be that particular area of the earth's surface where the better things of life we might say, the comforts, have been developed.

Ownership took on new meaning. It included a power to cash in as well as a power to use. And when that freedom was obtained men no longer remained serfs, they no longer remained slaves, and the economy no longer remained static. It is no mystery that the real beneficiaries of this political and economic transition were those who possessed the least, it was the "have nots" rather than the "haves."

With free economic mobility the fellow at the very bottom of the heap could exchange his services for a share in what was held by the man near the top. In this system of free exchange, not only was there no necessity for serfs or slaves but there ceased to be any place for parasites. Property tended to shift to those who put it to the most economic use. And there emerged the day of plenty which, although it is unique in the history of the world and is to this day confined to a comparatively small part of the earth's surface, it is so taken for granted in this country that we tend to forget its source.

But this personal liberty to deal in, dispose of, and profit from ownership of property did not come at a single stroke nor will it be lost at a single stroke. Its coming was a step-by-step process in which each

step was characterized by a bitter struggle. Those who are already wealthy, who are already entrenched, who "have it made," are more likely to be interested in preserving their holdings than they are in searching for easier means of transferring it. But unless that right to transfer is recognized and is readily available, the "have not" fellow has little opportunity to improve his lot. The legal history from the feudal period into the industrial economy of our present era can be quite accurately described as a struggle for an expansion of the rights of property ownership available to the individual and it can be asserted with a high degree of confidence that if we retreat back into a lethargic age of tyranny, it will be a step-by-step surrender of those same personal rights. And let no one forget that it is a personal right that we are dealing with in title IV. It is the right of an individual to deal with the fruits of his own labors in the way that seems most pleasing to him. And if he is not free to sell that which he acquires, he will be much less interested in acquiring it. If the restrictions imposed by title IV are imposed upon the ownership of property, it is inevitable that there will be less incentive to acquire, build, and develop. This means that there will be less housing and you will not improve the housing of Negroes or anyone else by reducing the total amount of housing available.

You might point out to me that title IV doesn't take away the right to sell, that it takes away only a limited part of that right, that is to say the right to select one's own customers, and that is true. But how much have you withdrawn from the rights of a prospective seller when you have withdrawn or even restricted his power to choose the persons with whom he deals?

There is a 1965 decision in the North Dakota Supreme Court [*Holien* v. *Trydahl*, 134 N.W. 2d 851 (N.D. 1965)] that casts some light here. It held that freedom to select one's customers was such an inherent part of ownership that an arrangement entered into by the voluntary act of private parties requiring an owner, even though offering his property to a particular person before being permitted to sell to anyone else, was void.

In the North Dakota case the restriction wasn't imposed by the State. No principles of constitutional law were involved. Nevertheless the North Dakota Supreme Court considered even this mild restriction on the power to select one's own customers such a state of ownership that it was not to be tolerated in a free society, even where the parties so desired.

It is doubtful if very many of our courts will go quite as far as the North Dakota court did, but it does illustrate the importance at least some judges have attached to the doctrine of economic mobility.

Title IV proposes, not only to permit a much greater restriction on the freedom to select customers, but to impose that restriction without regard to the wishes of the parties.

Now to say that a provision such as title IV will discourage building, and thereby make less housing available is no idle guess. Any kind of building, whether it be individual homes or apartment houses, calls for a substantial investment. It requires the assumption of substantial responsibility.

There will always be some people who will prefer the relative calm of remaining a tenant to the responsibility and uncertainty involved

in ownership. And the tenant by preference group will necessarily be enlarged by anything that increases the risks of ownership without offering commensurate hope of reward.

There are a number of States, as you gentlemen are all well aware, that already have laws similar to title IV, although I do not know of any that is quite so broad in the extent of its coverage. I have not heard or read anything to indicate that housing is any more readily available to minority groups in these States than it is elsewhere. Nor should anyone be surprised at that.

The so-called ghettos, where members of a particular racial or religious group are congregated in large numbers are not brought about by the refusal of landowners in other areas to sell to the members of that racial or religious group. The thing that prompts a free man to sell is his own self-interest, and the price he receives is far more important in the marketplace than is the racial characteristics of the person from whom the price is being obtained.

Some of the high concentrations of a particular racial or religious group have developed because the members of that particular group chose to live near each other. Others have developed because the members of conflicting racial or religious groups have moved away. This tendency to move away until the minority becomes the majority is probably the biggest single factor in the development of what is popularly known as ghettos or ghetto areas.

I believe that each one of you can confirm that within your own experience, if you will just take a serious look at the Negro sections of the cities with which you are familiar—not what I say, not what you read, not anything else. Just look at those areas with which you are personally familiar and I dare say that you will find very few if any that have developed because of a refusal of persons outside that area to sell to Negro customers.

What you are more likely to find is that a once thriving white population has moved away. That is precisely what is happening in New York City, especially Manhattan at the present time. And New York City was one of the first, if not the first, localities in the country with a so-called fair housing law. And although it started in the city, it was soon extended to the whole State.

There is no evidence that I have been able to see anywhere that the statute has had any effect on the continued tendency of Negroes and Puerto Ricans to become concentrated in particular areas. Title IV makes no provision for preventing whites from moving away from these areas. We may say it would be sad if it did, but it doesn't. And yet this tendency to move away, not the tendency to keep others from buying, appears to have been the principal factor in the development of the existing ghettos.

But even if the freedom to select one's own customers should be considered less important than I have indicated, and if it did not have any depressing effect upon the economy and did not curtail the total housing available, the question still remains as to whether title IV will make it easier for a Negro or member of some other minority group to purchase appropriate quarters.

I should like to reduce that to very simple terms and discuss it from the point of view of a homeowner who is ready to sell his house and

has listed it with a real estate broker. When a prospective buyer presents himself, there are many factors to be considered and many reasons might arise as to why the seller does not wish to deal with that particular buyer. The most important of these is usually the buyer's financial position.

Concerning that one item, uncertainties and doubts might arise that cannot be objectively demonstrated, but which are sufficient to discourage the seller, who will then choose not to deal.

Or on purely subjective grounds, but for reasons sufficient to himself, the seller might suspect that the buyer has such a personality that he will be difficult to deal with on the matter of the transfer of possession, condition of the premises at the time of transfer, or some other relevant circumstance of that sort. For any one of these reasons, or for no reason at all, the seller might elect to do business or he might elect not to do business with that particular buyer who has presented himself.

If title IV becomes law, how have you changed the situation? If title IV becomes effective, a potential seller will be in precisely the same position as we have described, except for one thing. In his mind now all customers, all prospective buyers, are divided into two groups. In the usual situation, for this is the main target of the limitation, one group will be whites and the other group will be Negroes. Let's say that our particular seller is unconcerned as to the race of the buyer, but he is still interested in these various objective factors previously mentioned.

Title IV tells him that if he rejects a white buyer for whatever reason, no explanation will be called for. But if he rejects a Negro buyer, he will subject himself to possible litigation, and the necessity of proving that the Negro was not rejected because of his race. What kind of proof will he present?

As already indicated, many of the usual reasons for refusing to deal with a customer are subjective, and they are not susceptible to judicial proof. But even if our seller succeeds in his proof, he will have been subjected to troublesome, embarrassing, and expensive litigation, in which no good citizen desires to become involved. Faced with this situation, with these two groups and these two prospects, what is the seller most likely to do? If he is at all prudent, he will avoid seeing any colored buyers.

Now I realize that the proposed law prohibits this, but such a provision just can't be enforced. It has been analogized by some people before this committee as being somewhat similar to the prohibition, but I think that is treating it too fairly. I would say it is much more analogous to a law prohibiting a man from kissing his own wife in his own home after dark. Anyone who knows anything about the buying and selling of real estate knows how easy it is to avoid offers he doesn't want to receive.

One method that I am told is currently a common practice in some areas where State laws similar to title IV are already in effect is that of managing not to be at home when the broker shows up with a Negro to look at the house. There are many ways that this can be done and still be absolutely immune from the detection by even skillful investigators.

But this is only one method of never receving this unwanted offer, and while it has some practical shortcomings, I assure you that there are lots of ways that can be used, and no broker's office need be confined to any particular scheme.

The important thing here is what title IV has done to the Negro. The seller in our illustration had no objection to selling to Negroes. In the absence of title IV, he would have had no objection to seeing them or selling to any one of them who otherwise met with his approval. But now the danger of litigation that has been forced upon him is going to force him into searching for devious ways to avoid ever receiving the offers that he would have otherwise been happy to receive and possibly have been happy to accept.

Or let's take another illustration. There is the university professor who takes a year's leave of absence, in order to accept a temporary appointment at another institution as a visiting professor. He plans to move his family to the new location for 1 year. He would like to rent his house, and he has no objection to renting it to a Negro. But he wants to be reasonably sure that he can trust the tenant to take reasonably good care of his furniture.

He also knows that if he rejects a prospective tenant who happens to be a Negro, he might be called upon for the same kind of proof that was demanded of the seller in our previous illustration. But here the real reasons are likely to be even more subjective and less susceptible of proof than they were when a sale was involved.

As a result, the professor is likely to employ some scheme similar to that used by the seller, or he might decide to avoid the difficulty by leaving his house vacant for the year.

If he chooses the former, a prospective Negro tenant has been deprived of the opportunity to bid on an accommodation that was actually on the market. If he chooses the latter, there will be one less housing unit in that city that year than would otherwise have been the case. In one instance, Negro tenants are the losers, and in the other, all tenants, both Negro and white, are losers.

Someone might ask "what about the seller who refuses to sell for no reason other than the race of the buyer?" We must assume that some sellers of that type do exist, but I would suggest that any estimate of their number is likely to be based more on emotion than it is on fact.

It should be pointed out, however, in order for them to exist at all, there will have to be a seller who is more concerned about the race of his buyer than he is for the purchase price that he receives. I doubt if there are very many sellers who are that oblivious to the power of the dollar. But even if they exist in large quantities, they will always have available to them all the devious subtleties employed by the nonprejudiced sellers who are merely trying to avoid exposure to litigation. Their apprehension will be next to impossible.

If title IV becomes law, it is going to have two significant effects, in my judgment. It is going to discourage building, and it will deprive the members of minority groups of opportunity to compete for the housing that remains available. The entire bill, gentlemen, should be rejected.

Senator HRUSKA. Thank you, Professor Sparks, for your statement. It represents a fine addition to our record on this very important legislation.

You have gone into some of the situations where, by devious routes, a seller, a potential seller or one who wants to sell, could probably circumvent the law. You have also outlined some of the unfairnesses that might be thrust upon him in certain specific situations.

One situation which has been called to our attention, and discussed in some detail is this: Where a price will be asked let us say for the purposes of convenience, a price of $20,000. All of us know what happens when a house is offered for sale. A price of $20,000 is quoted, and perhaps it will be a price that the owner at that time would be willing to accept.

A potential buyer appears and says, "I will buy it." He will offer $18,000 rather than the $20,000. And the offer is refused.

Time goes on. The owner must sell for some reason. The man who bid the $18,000 disappears. He is not there to renew his offer. Eventually the house is sold for $17,000.

Now, under those circumstances, if that prospective buyer who bid $18,000 can come along and show that the actual sale was for $17,000 to a white man, and he himself was colored, what do you think the court will do under circumstances of that kind by way of entertaining proof? What would be the situation with reference to the owner of that house in a legal way?

Mr. SPARKS. It is very difficult to predict precisely what would happen there, but what I would expect to happen, if I understood you correctly, it is the Negro buyer who offered at one time $18,000 for a house that is now sold for $17,000?

Senator HRUSKA. That is right.

Mr. SPARKS. Once he has shown that fact, I think that there is going to be such a presumption against that seller in most of our courts that he is going to be in real trouble, and I think what is an even greater danger is that when he is about to sell it for $17,000, but he hasn't really sold it yet, and our Negro buyer who offered $18,000 will come into court asking for injunctive relief.

The court will enjoin our seller from selling it at all. And now let's suppose that our seller can go on through with his proof, and that he can convince the court that his reason was not racial. By the time he is through with his litigation, it is likely that both buyers will have faded away, and he still has an unsold house. I think that is really likely to be the result.

Senator HRUSKA. That was in the thinking of those who have advanced that type of situation. The restraining order, even the temporary restraining order provided for is a pretty severe remedy.

Mr. SPARKS. Yes; it is.

Senator HRUSKA. A pretty severe remedy, and one in which normally there is required the posting of a bond.

Mr. SPARKS. And unfortunately we have the specific provision in this bill as it now stands that not only will he not have to post a bond, he will not have to be responsible for attorney's fees. He can do it purely for annoyance, with nothing to lose.

Senator HRUSKA. What about the man who does come along and buy a house from a seller? What assurance will he have that there are no clouds against the title of that house on account of dealings of that seller with someone else which were not successful and not fruitful toward the sale?

Mr. SPARKS. I have thought of that very thing here, and so far as anything I can find in the bill, it doesn't specifically cover it, but in view of this provision for injunctive relief, for equitable relief of all kinds, it is almost a completely blanket clause, I assume that the sale might be set aside, and if it is, well, then all real estate titles are going to be uncertain.

Senator HRUSKA. And there is a period of 6 months within which suit may be brought.

Mr. SPARKS. Right.

Senator HRUSKA. And until that time has run there would be a cloud as we lawyers like to call it, a cloud on the passage of title.

Mr. SPARKS. And once we have a decision to that effect in court, we have immediately clouded titles everywhere. Even assuming that some lawyers are not afraid of the bill itself. As soon as we have the decision we do have that cloud, and real estate transactions are going to be in a state of turmoil that they have not been in in this country heretofore.

Senator HRUSKA. Of course, we could require that the money be put in escrow for 6 months and the transaction be consummated 6 months later, but that would represent a real impediment in the ordinary course of commerce, wouldn't it?

Mr. SPARKS. More than that. Usually when you are buying a house, if it is a house for a home, it is because you are moving to that community and you need to get in it. And if it is for business purposes, which could be equally covered here, the situation is equally bad. If I am ready to go into business, I am either going to go into business or I am not. I can't wait 6 months for the determination of this title before I do any building on it.

Senator HRUSKA. Mr. Counsel, have you any questions?

Mr. AUTRY. Just two, Mr. Chairman.

Professor, it has been called to the subcommittee's attention that successful voluntary projects have been assumed around the country in integrated communities whereby neighbors get together and establish arbitrary quotas and maintain an integrated community.

Since these actions are by definition based upon sale according to race and color, this would be absolutely outlawed by this bill, wouldn't it?

Mr. SPARKS. I would assume that it would. You asked for my opinion. If it is at all relevant further, I think that kind of arrangement is extremely unwise in any event, because what you are doing then, you are laying down racial or national origin patterns for housing and for living and for business. You are really establishing the very thing which we thought we were wanting to get away from.

Mr. AUTRY. Professor, the Attorney General, as you may know, advanced two theses to justify this legislation: first, humanitarian—more housing should be available to Negroes; and secondly, that the absence of a title IV provision nationally provides us with an adverse impact on interstate commerce.

I think your conclusion is that title IV would have exactly the opposite effect of that which the Attorney General professes.

Mr. SPARKS. That is my position. I cannot conceive of how you are going to increase the quantity of housing available by making it more difficult to build a house, and you are not going to increase the amount of housing available by imposing extra burdens upon the man who sells a house. You are making it more difficult for him to sell.

You are making it more difficult for him to get rid of it. You are complicating his building. You are imposing added burdens upon his ownership. If he decides to rent it, he is at the same disadvantage, only even more so.

Mr. AUTRY. Thank you, Mr. Chairman.

Senator HRUSKA. Thank you, Professor Sparks, for your appearance before this subcommittee.

Mr. SPARKS. Thank you.

Senator HRUSKA. We stand in recess until 10:30 tomorrow morning in this same chamber.

(Whereupon, at 1:15 p.m., a recess was taken until 10:30 a.m., Wednesday, June 15, 1966.)

CIVIL RIGHTS

WEDNESDAY, JUNE 15, 1966

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:35 a.m., in room 2228, New Senate Office Building, Senator John L. McClellan presiding.

Present: Senators McClellan and Javits.

Also present: George Autry, chief counsel; H. Houston Groome, Lawrence M. Baskir, and Lewis W. Evans, counsel; and John Baker, minority counsel.

Senator MCCLELLAN. The committee will come to order.

Senator Ervin is chairman of this subcommittee. He is unable to be present today but he had hearings scheduled and some witnesses were advised they could testify today, and in order not to inconvenience them, and with the view of also proceeding expeditiously with these hearings, he asked if I would preside in his absence, which I agreed to do. I am advised that other members of the subcommittee may be able to attend during the morning. Some of them will be late. There is no one else present as of now but I see no reason why we cannot proceed.

Our first witness this morning is Mr. Charles J. Bloch, attorney, of Macon, Ga., who is appearing, as I understand it, at the invitation of the chairman of the subcommittee, Senator Ervin.

Mr. Bloch, we are very glad to have you. I notice you have a prepared statement, do you?

STATEMENT OF CHARLES J. BLOCH, ATTORNEY AT LAW, MACON, GA.

Mr. BLOCH. Yes, sir.

Senator MCCLELLAN. Do you wish to read your statement?

Mr. BLOCH. I would prefer to read from the statement, skipping parts of it.

Senator MCCLELLAN. I direct the reporter that any part of the statement that Mr. Bloch may not read will be inserted in the record as if read at the proper place.

Very well, Mr. Bloch, you may proceed.

Mr. BLOCH. I am here, Senator McClellan, at the invitation of my dear friend, Senator Ervin, and I have used as a basis of the proposed

discussion Senate bill 3296, which is denominated the Civil Rights Act of 1966.

Title I thereof amends chapter 121 of title 28, United States Code. Chapter 121 is entitled "Juries; Trial by Jury." Its provisions are confined to grand and petit juries in the district courts of the United States.

Title II has as its first section:

> No person or class of persons shall be denied the right to serve on grand and petit juries in any state court on account of race, color, religion, sex, national origin or economic status.

The quoted section indicates the purpose of that title II, and indicates to me its utter invalidity on the basis of presently established rules of law.

Title III is entitled "Nondiscrimination in Public Education and other Public Facilities."

Title IV has as its first section:

> It is the policy of the United States to prevent, and the right of every person to be protected against, discrimination on account of race, color, religion, or national origin in the purchase, rental, lease, financing, use and occupancy of housing throughout the nation.

The quoted section indicates the purpose of that title IV, and, too, to me indicates its utter invalidity as tested by the Constitution of the United States as presently construed.

Title V is entitled "Interference with Rights."

Evidently it seeks to supplant or amend section 241 of title 18, United States Code.

Such seeking doubtless stems from the decision of the Supreme Court of the United States in *United States* v. *Guest et al.* (March 28, 1966) 383 U.S. 745, 86 S. Ct. 1170.

In that case, I was appointed by the Supreme Court of the United States to represent one of the appellees. Therefore, I have more than ordinary interest in and familiarity with the case.

It was argued orally and by brief November 9, 1965. It was decided almost 5 months later, March 28, 1966. The time factor and the opinions in the case demonstrate the thorough consideration given by the Court to the problems and questions there involved.

Mr. Justice Stewart delivered the opinion of the Court, reversing and remanding the case to the district court for further proceedings consistent with that opinion for the reasons stated.

Mr. Justice Clark wrote a concurring opinion in which Mr. Justice Black and Mr. Justice Fortas joined.

Mr. Justice Harlan wrote an opinion concurring in part and dissenting in part (86 S. Ct. at p. 1180 et seq.).

Mr. Justice Brennan wrote an opinion in which the Chief Justice and Mr. Justice Douglas joined, concurring in part and dissenting in part (86 S. Ct. at p. 1187 et seq.).

Here is the following language in the concurring opinion of Mr. Justice Clark, supra, in which Justices Black and Fortas concurred (86 S Ct. at p. 1180):

> The Court carves out of its opinion the question of the power of Congress, under subsection 5 of the Fourteenth Amendment, to enact legislation implementing the Equal Protection Clause or any other provision of the Fourteenth Amendment. The Court's interpretation of the indictment clearly avoids the

question whether Congress, by appropriate legislation, has the power to punish private conspiracies that interfere with Fourteenth Amendment rights, such as the right to utilize public facilities. My Brother Brennan, however, says the Court's disposition constitutes an acceptance of appellees' aforesaid contention as to subsection 241. Some of his language further suggests that the Court indicates sub silentio that Congress does not have the power to outlaw such conspiracies.

Although the Court specifically rejects any such connotation, ante, p. 1176, it is, I believe, both appropriate and necessary under the specific language of subsection 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights.

That suggests the question: What is a "14th amendment right"?

While that will be more fully discussed later in this memorandum, I suggest that actions of private individuals against private individuals with respect to rights which the Constitution merely guarantees from interference by a State cannot be classified as 14th amendment rights.

The opinion of Justice Stewart in the *Guest* case (86 S.Ct. 1170, at 1179) cites *United States* v. *Moore*, 129 Fed. 630, 633. Of course I do not know exactly what language at page 633 he had in mind, but I call attention to this categorical statement of District Judge Jones at page 633:

The power conferred upon Congress by the Constitution concerning these rights in some instances, as under the Fourteenth Amendment, is corrective merely of invasion of them by state law or authority.

The second headnote in that case commences (129 Fed. at p. 630):

The fourteenth amendment of the federal constitution * * * adds nothing to the rights of any citizen against another, but merely furnishes additional guaranties against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society.

District Judge Jones who wrote that opinion was Judge Thomas Goode Jones, of Montgomery, Ala., appointed to the Federal bench by President Theodore Roosevelt in the early part of the century. In April of 1865, it is interesting to note, particularly in the light that his opinion was cited by Mr. Justice Stewart, Judge Jones had been aide to Gen. John B. Gordon at the surrender at Appomattox. General Gordon was afterwards Governor of Georgia and a U.S. Senator from Georgia.

At page 1176 of the opinion in the *Guest* case as reported in 86 Supreme Court Reporter is this cogent language:

It is a commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority. The Equal Protection Clause "does not * * * add anything to the rights which one citizen has under the Constitution against another." *United States* v. *Cruikshank*, 92 U.S. 542, 554–555, 23 L. Ed. 588. As Mr. Justice Douglas more recently put it, "The Fourteenth Amendment protects the individual against state action, not against wrongs done by individuals" (*United States* v. *Williams*, 341 U.S. 70, 92, 71 S. Ct. 581, 593, 95 L. Ed. 758 (dissenting opinion)).

Senator MCCLELLAN. May I interrupt to say now it is your contention here that the Congress would be exceeding its authority in undertaking to protect one individual against a wrong committed by another individual, a wrong which might trespass upon that individual's rights?

Mr. BLOCH. That has been the construction of the 14th amendment from the beginning.

Senator McCLELLAN. Up until now.

Mr. BLOCH. Down to March 28, 1966.

Senator McCLELLAN. We do have a practice up here of reversing all previous precedents, you know.

Mr. BLOCH. Well, they had an opportunity——

Senator McCLELLAN. You would not be greatly surprised if it happened again, would you?

Mr. BLOCH. All we lawyers can do with it is deal with it as we find it.

Senator McCLELLAN. We deal with it as lawyers and the court deals with it as the final authority.

Mr. BLOCH. They have the right to take it all back.

Senator McCLELLAN. Go ahead and make your case. Proceed. I can sympathize with you.

Mr. BLOCH. Shall I go ahead, sir?

Senator McCLELLAN. Yes.

Mr. BLOCH. This has been the view of the Court from the beginning. *United States* v. *Cruikshank*, supra; *United States* v. *Harris*, 106 U.S. 629 (1882); *Civil Rights* cases, 109 U.S. 3 (1883); *Hodges* v. *United States*, 203 U.S. 1 (1905); *United States* v. *Powell*, 212 U.S. 564 (1908). It remains the Court's view today. See e.g. *Evans* v. *Newton*, 382 U.S. 296 (1965); *United States* v. *Price*, 383 U.S. 786, 86 S. Ct. 1152 (1966).

While we are discussing title V, we may as well complete the discussion as to that title, applying to it the rule just emphasized as the Court's view, as of March 28, 1966.

That rule is summarized in headnote 6 of the *Guest* case as it appears 86 S. Ct. 1171, as follows:

> Equal protection clause of Fourteenth Amendment speaks to state or to those acting under color of its authority.

The eighth and ninth headnotes are:

> Rights under equal protection clause arise only where there has been involvement of state or of one acting under color of its authority; equal protection clause does not add anything to rights which one citizen has under constitution against another.

That is not quite 3 months ago that they said that.

> Fourteenth Amendment protects individual from state action, not against wrongs done by individuals.

I repeat this isn't merely "old law." It is a restatement of "old law" as announced by the Supreme Court less than 3 months ago.

Senator McCLELLAN. Was that decision unanimous?

Mr. BLOCH. That is the decision in the *Price* case and in the *Guest* case.

Senator McCLELLAN. Was it a unanimous decision of the Court?

Mr. BLOCH. No, sir, the *Price* case was practically unanimous. There was a slight what may be called a dissent by Justice Black. But the *Guest* case had all these opinions that I have pointed to in my statement, and I analyze them here in this memorandum just a little later, because it is right hard to tell just who decided what, as I will point out to you in just a few minutes.

The opinion of the Court of Mr. Justice Stewart in that case shows clearly that he was of the opinion that the indictment at issue there

"in fact contains an express allegation of State involvement sufficient at least to require the denial of a motion to dismiss." He proceeded to show (p. 177) what that allegation was, and concluded:

> Although it is possible that a bill of particulars, or the proofs if the case goes to trial, would disclose no cooperative action of that kind by officials of the State, the allegation is enough to prevent dismissal of this branch of the indictment.

So the chairman will see that, as I construe it, the reason that Judge Bootle's decision in the *Guest* case was reversed by Court was because the opinion of the Court, written by Mr. Justice Stewart, concluded that there was a sufficient averment in the indictment to constitute a charge of State action, State participation.

Now therefore, having been reversed on that ground, what the other justices may have said with respect to whether or not State action was required would be purely dicta. I interpolate this in my statement. It is not in the written statement. That case is coming up for trial again in the District Court of the United States for the Middle District of Georgia sitting in Athens on June 27, I believe it is. I make that statement from having read it in the newspapers. I have no further connection with the case. I was simply appointed by the Court to represent one defendant there who had no lawyer, who had been admitted to the Court, and after the decision my connection with the case ceased, and other counsels were appointed to do the trial of it.

True it is, that the concurring opinion of Mr. Justice Clark concludes:

> * * * there now can be no doubt that the specific language of subsection 5 (of the amendment) empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with the Fourteenth Amendment rights.

I interpolate this. The chairman may have noticed that I emphasized as I read, and I will show you why just a little later, I emphasized the phrase "punishing all conspiracies."

True it is, too, that the opinion of Mr. Justice Brennan, with whom the Chief Justice and Mr. Justice Douglas joined, which opinion concurs in part and dissents in part, contains similar or even stronger language.

True it is, too, that that opinion contains these words:

> But since the limitation on the statute's effectiveness derives from the Congress failure to define—with any measure of specificity—the rights encompassed, the remedy is for Congress to write a law without this defect.

Evidently it is now suggested that Congress accept that invitation by enacting title V.

Inasmuch as Justice Clark used the phrase "14th amendment rights," as do the opinions of some of the other justices (e.g., p. 1175, second column) it seems that the first facet in a discussion of title V ought to be a determination, or certainly a consideration of what is a 14th amendment right?

There can be no doubt in my mind but that 14th amendment rights are these and only these:

1. The right of a citizen not to have his privileges or immunities abridged by the making or enforcement by a State of any law;
2. The right of all persons not to be deprived by any State of life, liberty, or property without due process of law;

3. The right of all persons within the jurisdiction of a State not to be denied by that State the equal protection of the laws.

The second facet in a discussion of title V must be a complete realization that in the *Guest* case the Court was considering a statute which sought to punish a conspiracy (18 U.S.C. 241) and an indictment which specifically charged a conspiracy. The Court took pains (p. 1175) to point out that "The gravamen of the offense is conspiracy."

Also the opinion of the Court (p. 1176) contains these words:

> * * * nothing said in this opinion goes to the question of what kinds of other and broader legislation Congress might constitutionally enact under subsection 5 of the Fourteenth Amendment to implement that clause (the Equal Protection clause) or any other provision of the Amendment.

[In *Pettibone* v. *United States*, 148 U.S. 197, 203, the Court said:]

> A conspiracy is sufficiently described as a combination of two or more persons, by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means * * *.

Title V in section 501 of the proposed bill thereof departs from title 18 U.S.C., subsection 241 involved in the *Guest* case. It departs from any rules of law governing conspiracies. It seeks to make certain acts substantive crimes.

Illustrating, section 501(a)(5), carved out of its surroundings, would read:

> Whoever, whether or not acting under color of law, by force or threat of force—(a) injures, intimidates, or interferes with, or attempts to injure, intimidate, or interfere with any person because of his race, color, religion, or national origin while he is engaging or seeking to engage in—(5) selling, purchasing, renting, leasing, occupying, or contracting or negotiating for the sale, rental, lease or occupation of any dwelling; * * * shall be fined not more than $1,000.00 or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

If that is enacted into law, then a private person, who hears that a Buddhist is about to rent a house next door to him, goes to that Buddhist and says: "I hear you are negotiating to rent a house next door to me; I warn you that if you rent it and occupy it, harm will come to you and your family," he would be guilty of a Federal crime, and subject to the punishment quoted.

I say to you that there is nothing in the Constitution of the United States which authorizes the Congress to enact such a law.

I have carved out and quoted 501(a)(5).

I say to you that under the law of the land as declared in the *Guest* case Congress has no constitutional power to enact any part of proposed section 501 of title V for all of it is addressed to private persons, not acting under color of law.

The Supreme Court made it abundantly clear in the *Guest* case that—

> The Fourteenth Amendment protects the individual against state action, not against wrongs done by individuals * * * This has been the view of the Court from the beginning * * *. It remains the Court's view today (March 28, 1966).

Decided that same day was *United States* v. *Price et al*, that was a Mississippi case. The *Guest* case was a Georgia case. The *Price* case was a Mississippi case (86 Sup. Ct. 1152) in which Mr. Justice Fortas wrote for the Court. There was no dissent except perhaps a short

one of Mr. Justice Black (p. 1163). At page 1160 (of 86 Sup. Ct.) the Court said:

> As we have consistently held "The Fourteenth Amendment protects the individual against state action not against wrongs done by individuals." * * *

In the present case, the participation by law enforcement officers, as alleged in the indictment, is clearly State action, as we have discussed and it is therefore with [sic] the scope of the 14th amendment.

In other words, I interpolate, the *Price* case, the indictment was held good because it charged the participation of State officers in what the individuals did out there in Mississippi as charged, were alleged to have done as charged in the indictment.

Just after this quotation, the Court (speaking through Mr. Justice Fortas) has, in the words which I now quote, stated the question which was presented for decision in the *Price* case:

> The argument, however, of Mr. Justice Frankfurter's opinion in Williams I. upon which the District Court rests its decision, cuts beneath this. It does not deny that the accused conduct is within the scope of the Fourteenth Amendment, but it contends that in enacting subsection 241, the Congress intended to include only the rights and privileges conferred on the citizen by reason of the "substantive" powers of the federal government—that is, by reason of federal power operating directly upon the citizen and not merely by means of prohibition of state action.

This—and what follows—is important particularly because of a statement made by the Attorney General before Subcommittee No. 5 in support of H.R. 14765 on May 4, 1966.

Said he:

> The really important fact about the *Guest* decision, however, is that six justices declared that Congress has the power under section 5 of the Fourteenth Amendment, to reach such purely private misconduct if it chooses to do so.

Page 25 of his statement.

I do not so read what the six Justices said in their varying opinions. I have referred to them hereinbefore, and shall again hereinafter.

I do know that the *Price* case (from Mississippi) was argued practically contemporaneously with the *Guest* case (November 9, 1965) and decided the same day (March 28, 1966).

Practically speaking there is but one opinion in the *Price* case—that of Justice Fortas.

There is no doubt of the meaning and intent of that opinion.

I quote from its concluding paragraph:

> The present application of the statutes at issue (title 18 subsections 241, 242) does not raise fundamental questions of federal-state relationships. We are here concerned with allegations which squarely and undisputably involve state action in direct violation of the mandate of the Fourteenth Amendment—that no state shall deprive any person of life or liberty without due process of law. This is a direct, traditional concern of the federal government.

And almost the very last sentence of the opinion is:

> Today, a decision interpreting a federal law in accordance with its historical design, to punish denials by state action of constitutional rights of the person can hardly be regarded as adversely affecting "the wise adjustment between state responsibility and national control . . ."

Parenthetically, there is an historical error in Justice Fortas' opinion as reported at page 1162 of 86 Sup. Ct. Reporter. There it is stated:

> On June 13, 1866, the Fourteenth Amendment was proposed, and it was ratified the next month.

As a matter of historical fact, it was proposed June 16, 1866, but it was by no means ratified the next month. It was not ratified until 2 years and a month had elapsed, to wit, in July 1868. (See U.S.C.A.)

I am advised, since I wrote that, by the Reporter of Decisions of the Supreme Court that this error was detected and immediately corrected. That ratification came only after considerable arm twisting in certain of the late Confederate States.

Justice White's name is not mentioned in the opinions in the *Guest* case. Justice Stewart delivered the opinion of the Court.

Justice Harlan wrote an opinion, concurring in part and dissenting in part. It is quite clear from it that he did not declare or believe that Congress has power, under section 5 of the 14th amendment, to reach purely private misconduct if it chooses to do so.

So the statement of the Attorney General as to what "six justices declared" in the *Guest* case must have as its basis something written by Mr. Justice Clark, with whom Mr. Justice Black and Mr. Justice Fortas joined (p. 1180 of 86 Sup. Ct.) or something written by Mr. Justice Brennan with whom the Chief Justice and Mr. Justice Douglas joined. (86 Sup. Ct., pp. 1187, et seq.)

Previously, I have quoted what Mr. Justice Clark had to say in that respect (p. 1180).

So, it remains to inquire what Mr. Justice Brennan had to say, and then it will remain for us to learn what Congress will have to say on the subject.

It is to be hoped that Congress, in having its say and in enacting any legislation will recall that since the *Civil Rights cases*, 109 U.S. 3, were decided in 1883, almost a century ago, it has been the law of the land—"that Congress' power under subsection 5 is confined to the adoption of 'appropriate legislation for correcting the effects of * * * prohibited state law and state acts, and thus to render them effectually null, void, and innocuous."

Those words were uttered by the Supreme Court of the United States on the 15th day of October 1883. Many Congresses have come and gone since; many Presidents have come and gone; many Chief Justices and Associates Justices have come and gone; opportunities to amend the Constitution to correct any erroneous opinion of the Court if it were erroneous, have come and gone, but it wasn't until March 28, 1966, that any Justice of the Supreme Court of the United States even went so far as to say, after quoting the above words from the *Civil Rights Cases*, "I do not accept—and a majority of the Court rejects—this interpretation of section 5."

That interpretation has been the law of the land for 83 years.

The opinion of the Court in the case to which Justice Brennan's opinion is appended categorically states: "It remains the Court's view today."

If at this late day that time-honored view is to be repealed, let it be done as provided in article V of the Constitution.

Too, Justice Brennan's opinion seems to have as its broadest thesis only, "For me, the right to use State facilities without discrimination on the basis of race is, within the meaning of section 241, a right created by, arising under and dependent upon the 14th amendment

and hence is a right 'secured' by that amendment" (p. 1190 of 86 S. Ct.).

Previously (p. 1188) in that same opinion, he had written:

> I am of the opinion that a conspiracy to interfere with the right to equal utilization of state facilities . . . is a conspiracy to interfere with "a right . . . secured . . . by the Constitution."

If those and similar words constitute the basis of the Attorney General's statement, I submit that they utterly fail to support legally title V in its entirety.

They fail for at least three reasons:

1. Title V goes beyond punishing conspiracies;
2. Title V goes beyond punishing discriminations "on the basis of race"; it seeks to punish discriminations (injuries, intimidations or interferences) on account of "race, color, religion, or national origin";
3. Title V goes beyond punishing discriminations in the use of "State facilities." In this respect, particular attention is called to title V, section 501(a)(9), and its breadth.

Under that section, if a person sought admission to a "motion picture house," and another person said to him, "You can't go in there; you are not a Christian," that latter person would be guilty of a Federal crime! That is reducing it to its least common denominator.

Examine closely, too, section 501(a)(7).

Titles I and II—these may logically be discussed together although title I deals with juries in the Federal courts, and title II with juries in State courts.

In the original Constitution, article III, section 2, paragraph 3, it is provided that the "trial of all crimes, except in cases of impeachment, shall be by jury."

In the Bill of Rights, amendment VI provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and districts wherein the crime shall have been committed. Amendment VII provides for trial by jury in suits at common law where the value in controversy exceeds $20.

The origins of the right of trial by jury in criminal cases antedate Magna Carta.

Amendment VII answered a question which had been hotly debated by the delegates in the Federal Convention of 1787. Hugh Williamson of North Carolina and Elbridge Gerry of Massachusetts had urged the adoption in the Constitution of a general provision to safeguard the jury system in civil cases. The proposal was defeated not because the delegates opposed the use of juries in such cases but because they felt that differing practices of the States made it impossible to frame a general rule.

What were the practices of the various States at the time of the adoption of the Constitution? What were the practices in the years just after the adoption of the Constitution? And what were the practices in later years in States subsequently admitted to the Union?

I have particular reference to qualifications of jurors. There, Mr. Chairman, you will find in the memorandum about five pages which are devoted to the laws of the various States with respect to the quali-

fications of jurors in State courts. I divided them into three classes of States. I had an examination made of the old laws as to what were the qualifications of jurors as to three groups of States:

One, the group of States, the 13 Original States which adopted the Constitution. What qualifications did they have?

Secondly, I took the States which were admitted to the Union shortly after 1789. What laws did they have when they came into the Union?

Thirdly; to show a continuity of practice, I took the States which had been most recently admitted, Arizona and New Mexico. I did not take Hawaii and Alaska, I believe, but I did have Arizona and New Mexico and some of the other States more recently admitted so as to show, and it does show, almost without exception, that every one of the 13 Original States, every State admitted shortly after the adoption of the Constitution, such as Mississippi, Alabama, Louisiana, Ohio, Vermont, and the more recent States all have property qualifications as a condition for service on a State court jury.

Now that is important to be considered in connection with some of the decisions of the Supreme Court of the United States.

First, let us examine the statutes of some of the 13 Original States at the time of their formation of the Union.

In Connecticut, jurors were required to be "able, judicious freeholders * * *." Statutes of Connecticut, book 1, page 426 (1808).

(The word "freeholder" is generally used to designate the owner of an estate in fee in land. See, e.g. *State* v. *Ragland*, 75 N.C. 12, 13.)

In Delaware, jurors were required to be "discreet and judicious freeholders" (Laws of Delaware, 1700–1797, p. 241).

Georgia required jurors to be "free, white, male citizens above the age of 21 years and under 50 years" (Georgia Digest, 1755–1799, p. 627).

In Maryland, jurors were required to be "freemen of their respective counties, of the most wisdom and experience, having a free hold of 50 acres of land in his county, or property in the state above the value of three hundred pounds current money . . ." (Maryland Laws 1692–1784, vol. 1, October 1777, ch. 16).

In Massachusetts, jurors were required to be freeholders, qualified electors, "good and lawful men" of their town and "of good moral character" (Massachusetts Laws, 1780–1787, vol. 1, p. 184).

In New Hampshire it was required that "the selectmen of each town, and of each parish . . . shall take a list of the names of all persons living within their respective limits, qualified, in the opinion of the selectmen, to serve as petit jurors; each of whom to have an estate of free hold of forty shillings per annum, or other estate to the value of fifty pounds" (New Hampshire Perpetual Laws, 1776–1789, p. 43).

In New Jersey, jurors were required to be "a citizen of this State and resident within the country, above the age of 21, and under the age of 65 years and (have) a freehold in land, messuages or tenements in the county . . ." (Laws of New Jersey (1821) 1797, p. 311).

In New York jurors should "every one of them, be above the age of 21 and under the age of 60 years and shall each of them have . . . in his own name or right, or interest for him or in his wife's right in the same county, a freehold in land messuages or tenements, or of rents in fee or for life, of the value of sixty pounds, free of all reprises,

debts, demands or encumbrances whatsoever . . ." (Laws of New York, 1785–1788, vol. I, p. 275).

In North Carolina, jurors were only required to be "freeholders" (North Carolina Revised Laws, 1715–1796, vol. I, p. 395).

Pennsylvania jurors were required to be "sober and judicious persons of good reputation and none other" (Pennsylvania Statutes at Large, 1682–1801, vol. XI, p. 487).

Rhode Island jurors were required to be freeholders who have "a sufficient estate to him free of this State" (Rhode Island public laws, revised 1798, p. 186).

In South Carolina, jurors were drawn from lists drawn up by the general assembly. The laws provided that "the several persons whose names are mentioned and contained in the lists or schedule hereunto annexed and all persons who hereafter shall be named and appointed to serve as jurymen by the General Assembly . . . shall be deemed and taken to be qualified to serve and act as jurymen on all trials and inquests whatsoever . . ." (South Carolina Statutes, 1716–1752, p. 781).

In Virginia, jurors were required to be "discreet freeholders" and "citizens of the State" (Virginia Laws, 1776–1801, pages 139, 442).

Soon after the adoption of the Constitution, Alabama, Illinois, Louisiana, Ohio, Mississippi, among others, were admitted.

In Alabama, jurors were required to be over 21 years of age, under 60, and not in ill health (Alabama Digest of Laws, 1833, p. 295).

Illinois required her jurors to be "good and lawful men." Housekeepers were also deemed qualified (Pope's Digest 1815, vol. II, p. 71).

Louisiana required jurors to be qualified electors. Qualified electors were those persons who owned at least 50 acres of land in the State. (General Digest of the Acts of the Legislature of the State of Louisiana, 1816, pp. 192, 282).

In Ohio, jurors were required to be "judicious persons having the qualification of electors. . . ." (Ohio Laws, revision 1824, p. 95).

Qualified electors were—

all white male inhabitants above the age of 21 years, having resided in the State one year next preceding the election . . . who have paid or are charged with a state or county tax . . . (Statutes of Ohio, vol. XXII, p. 21).

In Mississippi, the jury requirements were that—

No person under the age of 21 years, or above the age of 60, nor any person continually sick, or who may be diseased at the time of the summons . . . shall be summoned on a jury.

Additionally, only "freeholders" and "householders" were drawn for such service (Statutes of the Mississippi Territory (1816) pp. 157, 182).

Of the States later admitted, I have selected at random Arizona, California, Florida, Oklahoma, Oregon, Michigan, Montana and New Mexico.

Arizona required her jurors to be citizens of the United States, electors of the county in which they are returned, but failure to pay poll taxes would not disqualify persons from serving as jurors, over 21 and under 60 years of age, in the possession of his natural faculties.

In California, a juror was required to: (1) Be a citizen of the United States, a qualified elector of the county, and a resident of the township

at least 3 months, (2) be in possession of his natural faculties, (3) have sufficient knowledge of the language in which the proceedings of the courts are had (with the exception of certain counties), (4) have had assessed on the last assessment roll of the township or county on real or personal property or both, belonging to him, if a resident at the time of the assessment. (California General Laws, 1850–1864, p. 561.)

In Florida, all jurors were required to be free, white, male citizens of the United States; householders, inhabitants and residents of the State, above the age of 21 years and under 60 years (Florida Digest of Laws, 1847, p. 344).

Oklahoma required her jurors to be male residents, qualified electors over 21 years of age and of sound mind and discretion (Oklahoma Laws, 1907, 1908, p. 467).

Oregon and Michigan both required their jurors to be electors. (Oregon Stat. 1853, p. 166; Michigan Rev. Stat. 1838, p. 35, 429.)

Montana required jurors to be taxpayers (Montana Compiled Statutes 1887, p. 1008). New Mexico required jurors to be owners of real estate and head of a family (Laws 1865, p. 496).

Down through the years, it has always been the law that the qualifications of jurors in State courts are matters of legislative control, subject only to the 14th amendment (*United States* v. *Roemig*, 52 F. Supp. 857; *Howie* v. *United States*, 15 F. 2d 762; *Tynam* v. *United States*, 297 Fed. 177).

In the Federal courts, Congress may determine such qualifications.

State legislatures determine the qualifications in State courts.

In my State, jury commissioners select from the books of the tax receiver "upright and intelligent citizens" to serve as jurors.

The late Justice Warren Grice of our supreme court, who was for many years one of my law partners, wrote on the subject in *Watkins* v. *The State*, 199 Ga. 81, 95. He used language which is still worthy of consideration. By the way, Justice Warren Grice has a son, Justice Benning Grice, who is now sitting on the Supreme Court of Georgia.

Jury service is not a right, nor a privilege; but a burden which the State summons certain of its citizens to bear. In the administration of justice with us, issues of fact are submitted to a jury. Mr. Justice Black in *Smith* v. *Texas*, supra, (311 U.S. 128) remarked that, "It is a part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."

Justice Grice continues:

No such tradition has been established in Georgia. In every community in this State, as in every other State, there are idiots, insane persons, men enfeebled by age, vagabonds, and also men of bad character, white and black. We in this State exclude all such from jury service. We also exclude (1945) females and minors.

That was in 1945.

Our juries, therefore, are not bodies "truly representative of the community." We go further. We impose the burden only on those who are upright and intelligent, and not upon all of them. We leave it to the discretion and judgment of the jury commissioners to place on the jury list such of these as in their opinion constitute a sufficient number of carry on the work required of juries. Under our system, the jury is not, therefore, necessarily a cross section of the entire community, but a chosen body selected from a larger number to assist in the administration of justice.

It was after that that the *Thiel* case, which was referred to by the Attorney General in his statement before the House committee was decided. Not *Thiel* v. *Union Pacific*, but *Thiel* v. *Southern Pacific R. Co.*, 328 U.S. 217—it is important to note that.

That case pertained to the composition of juries in the Federal courts and announced the rule that prospective jurors should be selected by court officials without systematic and intentional exclusion of any economic, social, religious, racial, political, and geographical group of the community.

In that case, as Justice Frankfurter pointed out in his dissent (328 U.S. at p. 227) no constitutional issue was at stake. The sole question was whether the established practice in the northern district of California not to call for jury duty those otherwise qualified but dependent on a daily wage for their livelihood required the reversal of a judgment which was inherently without a flaw.

The Court decided six to two that it did.

This Congress has a perfect constitutional right, if it so desires, to write into the Federal statutes the principle of that decision and so prescribe a rule for the composition and selection of juries in the Federal courts.

It has a perfect right, if it so desires, to provide for a jury commission (sec. 1863) and compel that jury commission to maintain a master jury wheel, and to place in it "names selected at random from the voter registration lists" (sec. 1864).

Probably realizing that those lists may now contain names of those whom the State may not subject to literacy tests, the drafters prescribe some qualifications for jury service (sec. 1866) which shall be determined by the jury commission solely on the basis of information provided on the juror qualification form or a returned summons (sec. 1865).

(At this point Senator Javits entered the hearing room.)

Those qualifications would debar certain people (sec. 1866(b)). Among those debarred from jury service would be a person convicted in a State or Federal court of a crime punishable by imprisonment for more than 1 year whose civil rights have not been restored by pardon or amnesty.

It would make no difference that he had been many times convicted of various misdemeanors. He would still be qualified to pass on the life, liberty, or property of persons prosecuted or litigating in Federal courts.

If the Congress desires juries so composed to act in the administering of justice in the courts it has ordained and established, Congress has that power. Such juries will sit in the North as well as the South, in the East as well as the West.

But I suggest to you that today, when the courts are so zealously and jealously guarding the right of trial by jury, it does seem to me that the Congress would be of the mind to strengthen the jury system rather than weaken it. Those juries ought to be so composed as to be equipped to decide intelligently as well as numerically the questions which are presented to them. A jury composed of people without sufficient intelligence to understand the instructions given in charge by the presiding judge is no jury. When the Constitution preserved and guaranteed trial by jury it contemplated trial by a

jury whose members were equipped to determine the questions submitted to them. Due process so requires.

A person may be able to read, write, speak, and understand the English language (sec. 1866(2)) as required by the bill, and yet not be able to add 2 and 2, or know the meaning of the simplest terms which recur in the trial of the simplest law suit.

Even as applied to Federal courts, this bill is just another step in the process of establishing a government of the ignorant by the ignorant, for the ignorant.

Of course, it will be quite a boon to the Department of Justice to be able to try income tax cases and condemnation cases and antitrust cases or any other cases involving the property of citizens before a jury composed of those dependent of their subsistence on payments of one kind or another from the Government. But will that boon tend to promote impartial, complete administration of justice? So much for the juries in Federal courts.

Title II presents very different questions.

Its basis is section 201:

> No person or class of persons shall be denied the right to serve on grand and petit juries in a state court on account of race, color, religion, sex, national origin, or economic status.

In the first place a person has no "right" to serve on any jury. Jury service is a privilege conferred by the State upon such of its citizens as it deems worthy of the privilege of participating in the administration of justice.

It is no more a right than is the privilege or license of engaging in the practice of law or medicine, or of practicing as a barber, beautician, embalmer, or plumber. The State may require certain qualifications in those whom it permits to affect the health, safety, and general welfare of its citizens—and it may require qualifications deemed necessary by it to be possessed by those to whom it entrusts the life, liberty, and property of those within its jurisdiction.

The right of a State to establish those qualifications existed when the Union was formed. The right was reserved to it by the 10th amendment.

The right may now be exercised as the judgment of the State dictates unless it has been restricted by an amendment later than the 10th.

Does the 14th amendment give to Congress the right to enact a statute providing that a State may not restrict the privilege of jury service to males?

Does it give to Congress the right to enact a statute providing that a State may not consider the economic status of its citizens in determining their qualifications for jury service in courts of the State?

Those are the great questions which this bill in title II involves.

Strauder v. *West Virginia*, 100 U.S. 303, was one of the very first cases decided construing the 14th amendment. The Court there held that—

> compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects—

is a denial to him of equal legal protection. That has been the law since 1883.

It was in this case, that, too, the Supreme Court said:

> We do not say that within the limits from which it is not excluded by the Amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the 14th Amendment was ever intended to prohibit this (p. 310).

Contemporaneously, the Court held that that did not mean that every colored man had a right to be tried by a jury composed in part of colored men.

Virginia v. *Rives*, ibid, page 313.

And see *Neal* v. *Delaware*, 103 U.S. 370.

When it was the "law of the land" that the first 10 amendments to the Federal Constitution contain no restrictions on the powers of the State, but were intended to operate solely on the Federal Government, the Supreme Court (1899) decided the case of *Brown* v. *New Jersey* (175 U.S. 172).

This case dealt with the validity of what was known to the New Jersey statutes as a "struck jury." These statutes provided for a method of choosing a jury from a panel.

In the course of the opinion the Court said:

> The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.
>
> . . . "The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own method of judicial proceeding."
>
> * * * The State is not tied down by a provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary. For instance, while at the common law an indictment by the grand jury was an essential preliminary to trial for felony, it is within the power of a State to abolish the grand jury entirely and proceed by information. *Hurtado* v. *California*, 110 U.S. 516. In providing for trial by a struck jury, impaneled in accordance with the provisions of the New Jersey statute, no fundamental right of the defendant is trespassed upon. The manner of selection is one calculated to secure an impartial jury. "The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more" (op. cit. p. 175).

Even if under more recent adjudications of the Supreme Court, the sixth and seventh amendments now apply to the States, the legal situation would not be changed for property owning and taxpaying qualifications were not forbidden by the common law. As I have shown, many of the original 13 States had them.

As late as 1946, the qualifications of Federal court jurors were determined under State law. (28 U.S.C.A. old sec. 411.) Undoubtedly the sixth and seventh amendments applied to the United States but such application was not deemed to have any effect on their adoption of the State law. (See *Ballard, et al.* v. *United States*, 329 U.S. 187 (1946).)

In 1948, old section 28–411 of the United States Code was revised so as to prescribe (sec. 28–1861) uniform standards of qualifications

for jurors in Federal courts instead of making qualifications depend upon State laws.

Even that revision had a provision (sec. 28–1861(4)) that one could not serve as a Federal juror if he was incompetent to serve as a grand or petit juror by the law of the State in which the district court was held.

In 1957, that section was amended by eliminating that provision.

The next year it was decided that Congress has authority to set up qualifications for Federal jurors without regard to qualifications that may be set up by State legislatures of the States wherein the Federal district courts sit. *United States* v. *Wilson*, 158 F. Supp. 442, affirmed 255 F. 2d 686, cert. denied 358 U.S. 865, 79 S. Ct. 97.

Fay v. *People of the State of New York*, 332 U.S. 261, was decided in 1947.

The opinion of the Court contained this language; this is New York we are talking about:

> The function of this federal Court under the 14th Amendment in reference to state juries is not to prescribe procedures but is esesntially to protect the integrity of the trial process by whatever method the state sees fit to employ. No device, whether conventional or newly devised, can be set up by which the judicial process is reduced to a sham and the courts are organized to convict. They must be organized to hear, try and determine on the evidence and the law. But beyond requiring conformity to standards of fundamental fairness that have won legal recognition, this Court has always been careful not so to interpret this Amendemnt as to impose uniform procedures upon the several States whose legal system from diverse sources of law and reflect different historical influences.[36]

More recently (1961) the Court has decided *Hoyt* v. *Florida*, 368 U.S. 57, wherein at pages 59–60, the Court said—it is particularly important on account of the provision in this bill as to sex:

> "We of course recognize that the 14th Amendment reaches not only arbitrary class exclusions from jury service based on race or color but also all other exclusions which "single out" any class of persons "for different treatment not based on some reasonable classification."

It was in that case that the Court said:

> We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from

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[36] "While English common law is the source from which it often is assumed a uniform system was derived by the States of the United States, it must not be overlooked that many of them have been deeply influenced by Roman and civil law to which their history exposed them. None of the territory west of the Alleghenies was more than briefly or casually subject to common law before the Revolution. French civil law prevailed in most of the Ohio and Mississippi Valleys from their settlement until Wolfe's decisive victory before Quebec in 1763. Its ascendancy in the north then was broken, and in 1803, the Louisiana Purchase ended French sovereignty in the rest of the Mississippi area. Louisiana continues, however, a system of law based on the Code Napoleon. The Southwest and Florida once were Spanish. See Colvin, Participation of the United States of America with the Republics of Latin America in the Common Heritage of Roman and Civil Law, 10 Proceedings of the Eighth American Scientific Congress 467.

"Even among the early seaboard States, the English common law had rivals. The swedes on the banks of the Delaware held one of the earliest jury trials on this continent. The Governor followed Swedish law and custom in calling to his aid in judging 'assistants' who were selected from among 'the principal and wisest inhabitants' and were both judges and jurors and sometimes witnesses. See 1 Johnson, The Swedish Settlements on the Delaware (1911) 450 et seq. In New York, there was a deep and persistent influence from Roman and Dutch law. Upon capitulation of New Amsterdam, it was stipulated that certain Dutch law, and judgments and customs should be respected. But even beyond this, in the organization of the courts the Dutch rule persisted although contrary to the 'Duke's Laws' enacted by the conqueror. The history of the early Dutch influence in New York court procedure was preserved by the diligence and foresight of Judge Daly. 1 E. D. Smith's Reports (New York Common Pleas) xvii, xxxiv, xxxvii. The Roman-Dutch element in New York law is recognized by its courts, e.g. *Dunham* v. *Williams*, 37 N.Y. 251, 253; *Van Olessen* v. *Bridgford*, 83 N.Y. 348, 350; *Smith* v. *Evans*, 131 N.Y. 160, 175, 30 N.E. 54, 15 L.R.A. 138."

the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities (op. cit. p. 62).

That being the law of the land, how, then, can Congress say to the States that no person or class of persons shall be denied the right to serve on their juries on account of sex?

There remains for discussion, therefore, the question of whether a State may establish some form of "economic status" as a criterion or classification for jury service.

It is important in this connection to recall that many of the States at the time of the adoption of the Constitution and thereafter required that the jurors in their courts be taxpayers or freeholders.

For many, many years the Federal Government recognized the reasonableness of this criterion or classification by adopting the States' rules of qualification as its own.

Another important factor is stated by Mr. Justice Black in the opinion of the Court in *Kotch et al.* v. *Board of River Port Pilot Commissioners for the Port of New Orleans, et al.*, 330 U.S. 552, at page 557: "And an important factor in our consideration is that this case tests the right and power of a State to select its own agents and officers. *Taylor* v. *Beckwith*, 178 U.S. 548 ——; *Snowden* v. *Hughes*, 321, U.S. 1, 11–13.

Just a few weeks ago, March 24, 1966, Justice Black very forcefully applied the *Kotch* case, supra, in his dissenting opinion in the *Virginia Poll Tax* case, 86 S. Ct. 1079, 1085. In the final analysis, I assume that if Congress enacts title II of this bill its constitutionality will be determined by the yardstick of that case. (*Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 86 S. Ct. 1079.)

So this phase of this statement may well conclude with applications to this title of (*a*) Justice Black's dissent; (*b*) the dissent of Justices Harlan and Steward; (*c*) the reasoning of the opinion of the Court delivered by Justice Douglas.

The rest of this memorandum deals with excerpts from the decisions in that *Virginia Poll Tax* case and justifies in my opinion the conclusion that the States have a perfect right historically, constitutionally, and legally to include economic status of its citizens as a factor in whether or not the States will permit those citizens, regardless of race or color or religion, talking about the pure question of economic status, that under the *McGowan* case, the *Maryland Sunday Law* case, if it is a reasonable classification and the Congress has no right to say to the States under the Constitution as it now exists that you can't consider that factor.

Time does not permit me to include in this statement the entire dissenting opinion of Mr. Justice Black. Even if it did, it would be unnecessary, for anyone desiring to read all of it will find it beginning at page 1083 of 86 Supreme Court Reporter (advance sheet of April 15, 1966).

Bear in mind that what the majority there held was that voter qualifications have no relation to wealth nor to paying or not paying a tax.

Justice Black pointed out:

The equal protection cases carefully analyzed boil down to the principle that distinctions drawn and even discriminations imposed by state laws do not violate the Equal Protection clause so long as these distinctions and discrimina-

tions are not "irrational," "irrelevant," "unreasonable," "arbitrary," or "invidious." The restrictive connotations of these terms * * *

citing cases—

are a plain recognition of the fact that under a proper interpretation of the Equal Protection clause States are to have the broadest kind of leeway in areas where they have a general constitutional competence to act.

At this point Justice Black quoted from *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U.S. 580, as follows:

A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it.

Bear in mind that the equal protection clause applies not only to citizens but to all persons within the jurisdiction of the State.

Despite that, certainly a State may restrict service as jurors to those persons who are citizens.

And, there is nothing in the 14th Amendment which prevents a State from excluding and exempting from jury duty certain classes on the bona fide ground that it is for the good of the community that their regular work should not be interrupted.

Rawlins v. Georgia, 201 U.S. 638 (per Justice Holmes).

So lawyers, ministers, doctors, dentists, railway engineers, and firemen may be excluded. There may be age limits.

And "economic status" as a factor will not be considered as arbitrary or invidious if there is any state of facts which reasonably may be conceived to justify it.

I should think that if a person is entirely dependent upon the Government of the United States or the State government for his subsistence, that the State might well think that he should not be a juror—particularly in cases in which the United States or a State is a party.

I should think that if a person has not been able to accumulate and retain an amount of property sufficient for his name to appear on the tax digests of his county that the State might well think that he should not adjudge the rights of a fellow citizen whose life, liberty, or property were in jeopardy.

"Economic status" as a criterion cannot be judicially determined to be arbitrary and capricious when we know that—

In England a property qualification for jury duty was required by statute at a very early date (*Commonwealth* v. *Dorsey*, 103 Mass. 412) and similar statutes have from time to time been enacted in this country. Although . . . these statutes usually relate only to the ownership and occupancy of real property, in some cases the statutes may require the ownership of personal property of a certain value. (*Conway* v. *Clinton*, 1 Utah 215.)

Juries, 50 C.J.S. Section 147, p. 869 (citation interpolated). See also 50 C.J.S. Section 147(b), p. 869; and *Kerwin* v. *People*, 96 Ill. 206; *Bradford* v. *State*, 15 Ind. 347; *McKnight* v. *Seattle*, 39 Wash. 516, 81 Pac. 998.

Under some statutes it is required that a juror be a person whose name is on the assessment rolls as a taxpayer. (50 C.J.S. Section 148.)

The Supreme Court of the United States in *Brown* v. *Allen*, 344 U.S. at page 471, quotes from *Strauder* v. *West Virginia*, 100 U.S. 303, 310 (supra) showing that a State was permitted to—

confine the selection (of jurors) to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications.

The Court today might not agree with that Court of 1880 "composed of Justices familiar with the evils the amendment sought to remedy" but whether or not it agrees, that ruling would prevent a classification as to "freeholders" from being arbitrary or capricious.

And in that case at page 474 (*Brown* v. *Allen*, 344 U.S. 443, 474) the Supreme Court said:

> Short of an annual census or required population registration, these tax lists offer the most comprehensive source of available names. We do not think a use, non-discriminatory as to race, of the tax lists violates the 14th Amendment . . .

Justice Black continued:

> And if history can be a factor in determining the "rationality" of discrimination in a state law (which we held it could in *Kotch* v. *River Ports Pilot Comms.* supra), then whatever may be our personal opinion, history is on the side of "rationality" of the State's poll tax policy. Property qualifications existed in the Colonies and were continued by many States after the Constitution was adopted (86 S.Ct. at pp. 1085–6).

Georgia was using the books of the receiver of tax returns as a basis for determining the constitution of "the body of petit jurors" certainly as early as 1861. (See Code of 1861, sec. 3837.)

Those books were not being so used for the purpose of barring Negroes from jury service for they were expressly barred, (Code of 1861, sec. 3836) by a section of the same code which confined competency to "free white male citizens."

Passing to the dissent of Justices Harlan and Stewart, at page 1090, they posed the question at issue: "Is there a rational basis for Virginia's poll tax as a voting qualification?"

They thought the answer to that question to be "Yes." They supported their opinion thus:

> Property qualifications and poll taxes have been a traditional part of our political structure. In the Colonies the franchise was generally a restricted one. Over the years these and other restrictions were gradually lifted, primarily because popular theories of political representation had changed. Often restrictions were lifted only after wide public debate. The issue of woman suffrage, for example, raised questions of family relationships, of participation in public affairs, of the very nature of the type of society in which Americans wished to live; eventually, a consensus was reached, which culminated in the 19th Amendment no more than 45 years ago.
>
> Similarly with property qualifications, it is only by fiat that it can be said, especially in the context of American history, that there can be no rational debate as to their advisability. Most of the early Colonies had them; many of the States have had them during much of their histories; and whether one agrees or not, arguments have been and still can be made in favor of them. For example, it is certainly a rational argument that payment of some minimal poll tax promotes civic responsibility, weeding out those who do not care enough about public affairs to pay $1.50 or there abouts a year for the exercise of the franchise. It is also arguable, indeed it was probably accepted as sound political theory by a large percentage of Americans through most of our history, that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means, and the community and Nation would be better managed if the franchise were restricted to such citizens. Nondiscriminatory and fairly applied literacy tests, upheld by this Court in *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072, find justification on every similar grounds.
>
> Property and poll-tax qualifications, very simply, are not in accord with current egalitarian notions of how a modern democracy should be organized. It is of course entirely fitting that legislatures should modify the law to reflect such changes in popular attitudes. However, it is all wrong, in my view, for the

Court to adopt the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process. It was not too long ago that Mr. Justice Holmes felt impelled to remind the Court that the due process clause of the 14th amendment does not enact the laissez-faire theory of society, *Lochner* v. *People of State of New York*, 198 U.S. 45, 75–76, 25 S. Ct. 539, 546, 49 L. Ed. 937. The times have changed, and perhaps it is appropriate to observe that neither does the equal protection clause of that amendment rigidly impose upon American an ideology of unrestrained egalitarianism.

The foregoing are the views of the three dissenting Justices.

It remains to be demonstrated that the reasons assigned by the majority of the Court for nullifying Virginia's poll tax would by no means support the conclusion that a State cannot use "economic status" as one of its legislative criteria for the determination of the competency of jurors in its courts.

The very basis of the majority opinion is that the right to vote in Federal elections is conferred by the Constitution, and once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the 14th amendment.

Service on a jury is a privilege—not a right. The Constitution confers upon no one the right to serve on a jury. The State legislature grants the privilege which is quite different from "the political franchise of voting" and not a "fundamental political right, because preservative of all rights."

The concluding paragraph of the opinion graphically demonstrates the differences.

Justice Douglas concluded "* * * wealth or fee paying has, in our view, no relation to voting qualifications * * *."

"Economic status" did under the common law of England have a relation to the privilege of serving on a jury, and continues to have, in the view of many State legislatures, a relation to that privilege.

The question is not whose "view" is correct.

The question is merely whether the view of the State legislatures is arbitrary, capricious, invidious, without any justification based on any state of facts which may be reasonably conceived.

In the light of repeated decisions of the Supreme Court of the United States, it is difficult to imagine how this question is capable of being answered save in one way.

I cannot see how there can be a more complete answer to it than that given by Chief Justice Warren in his opinion for the Court in *McGowan, et al,* v. *State of Maryland*, 366 U.S. 420. That case was decided May 21, 1961. Only Justice Douglas dissented. Justices Black, Clark, Harlan, Brennan, and Stewart of those now on the Court were there then.

Restating the age-old doctrine, "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it," the Chief Justice and the Court (save Justice Douglas) applied it in upholding Maryland's Sunday closing laws or Sunday blue laws.

Almost contemporaneously (May 29, 1961), Chief Justice Warren wrote for a majority of the Court in *Gallagher* v. *Crown Kosher Super Market of Massachusetts, Inc., et al.*, 366 U.S. 617, and in *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582, and in

Braunfield, et al. v. *Braun*, 366 U.S. 599, all upholding State Sunday closing laws (May 29, 1961).

Finally as to this title let it be observed that if it becomes effective, its application will not merely be local. It will not affect the South alone. The States of the North, the East and the West will feel its impact perhaps even more strongly than the Southern States.

Title IV—section 401 of this title provides:

> It is the policy of the United States to prevent, and the right of every person to be protected against, discrimination on account of race, color, religion, or national origin in the purchase, rental, lease, financing, use, and occupancy of housing throughout the nation.

Assuming that to be a correct statement of the policy of the United States, which I rather doubt when I read the outcries against this particular title, the question is whether the Congress has the constitutional power to enforce that policy as it is requested to do in the sections of the title which follow 401.

As I write this (June 8, 1966) it appears that the "policy" expressed in section 401 may be abandoned by its sponsors.

The principle expressed in the policy may be about to succumb to political expediency.

Writing of this section that would in the words of the editorial writer "ban discrimination in sale or rental of residential units," an editorial writer in the Atlanta Constitution of June 8, 1966 (p. 4) says:

> Laudable as the aims of this section are, the proposal is questionable on constitutional grounds. And, more to the point, it simply doesn't have the Republican support needed to counter-balance Southern Democratic opposition. It's time to be realistic. The housing section just doesn't have a chance at this session. The personal protection and jury list sections are vital. So it's time to separate the housing section from the main bill and press on to adoption of the other portions.

The statement that the section is "questionable on constitutional grounds" is a model of understatement.

The statement that the jury list section is vital would be difficult to understand in the absence of the thought that the writer of that editorial had probably never read the "jury list section" or, if he had, had considered its implications.

I then go on to demonstrate that this section 401, aside from any application of it, which is sort of out of my field, that section 401 is absolutely unconstitutional under the law of the land has it, has been declared up through yesterday.

That the section is unconstitutional is thoroughly demonstrated by the *Civil Rights Cases*, 109 U.S. 3, which still live and were applied by the court in the famous case of *Shelley* v. *Kraemer*, 334 U.S. 1, which held (1948) that State court enforcement of restrictive covenants which have for their purpose the exclusion of persons of designated race or color from ownership or occupancy of real property could not be justified.

But, even in so holding, the Court said:

> Since the decision of this Court in the *Civil Rights* cases, 1883, 109 U.S. 3, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the 14th amendment is only such action as may fairly be said to be that of the States. That amendment erects no shield against merely private conduct, however discriminatory or wrongful (334 U.S. at p. 13).

As late as March 28, 1966, the Court said:

> This has been the view of the Court from the beginning * * *. It remains the Court's view today (86 S.Ct. 1170, at p. 1176).

And just 2 months before (Jan. 17, 1966), Mr. Justice Douglas had written in *Evans, et al.* v. *Newton, et al.*, 86 S. Ct. 486, 488:

> There are two complementary principles involved in this case. One is the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses.

And further, p. 489:

> If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control, or management of that facility, we assume arguendo that no constitutional difficulty would be encountered.

Despite these established principles of constitutional law, the Attorney General of the United States, on May 4, 1966, commenced his discussion (before the House committee) of the housing title by saying:

> In the Civil Rights Act of 1866 Congress declared:
> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. (42 U.S.C. 1982)."

That is a correct statement.

It is also correct to say that this section was formerly section 1978 of the Revised Statutes, and 8 U.S.C. section 42. When so designated it was considered by the Supreme Court of the United States in *Hurd* v. *Hodge*, 334 U.S. 24, and of it (pp. 31–32) the Court said:

> We may start with the proposition that the statute does not invalidate private restrictive agreements so long as the purposes of these agreements are achieved by the parties through voluntary adherence to the terms. The action toward which the provisions of the statute under consideration is directed is governmental action. Such was the holding of *Corrigan* v. *Buckley*, supra (271 U.S. 323, 46 S. Ct. 521).

Corrigan v. *Buckley*, as well as *Hurd* v. *Hodge*, involved restrictive covenants as to the sale of real estate. The former involved dwelling houses of S Street between 18th and New Hampshire Aveune in the city of Washington. In it (271 U.S. at p. 330) the Court said:

> . . . the prohibitions of the 14th Amendment "have reference to State action exclusively, and not to any action of private individuals." . . . "it is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment." *Civil Rights* Cases, 109 U.S. 3, 11 . . . It is obvious that none of these amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; . . .

At page 331, considering, among others, the very statute which the Attorney General took as his text, the Court said:

> . . . it is obvious, upon their face, that while they provide, inter alia, that all persons and citizens shall have equal rights with white citizens to make contracts and acquire property, they, like the constitutional amendment under whose sanction they were enacted do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property.

The Court which so stated was headed by Chief Justice Taft, and had among its members Justices Holmes, Brandeis, and Stone. There were no dissents.

Despite this established law of the land, the Attorney General seeks to have Congress enact legislation banning and rendering illegal "contracts entered into by private individuals" and acts and actions of private individuals, and seeks to justify such legislation "primarily on the commerce clause of the Constitution and on the 14th amendment." "I have no doubts whatsoever" he says, "as to its constitutionality."

So far as the 14th amendment is concerned, I have no doubts whatsoever as to its unconstitutionality unless the Supreme Court should, for some reason, overrule a continuous line of authorities extending over a period from 1883 to March of 1966.

As to the commerce clause, I merely say that since the decisions in the *Heart of Atlanta Motel* case (379 U.S. 241), and *Katzenbach* v. *McClung* (379 U.S. 294), I do not pretend to know just what the scope of the commerce clause is.

I do suggest that in the *Heart of Atlanta Motel* case, the opinion of the Court considered and deemed "without precedential value" the decision in the civil rights cases because the 1875 act there involved broadly proscribed discrimination in inns et cetera "without limiting the categories of affected businesses to those impinging upon interstate commerce" (p. 250).

"In contrast" said the Court (p. 250–251)—

> the applicability of Title II is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people, except where state action is involved.

In the *McClung* case, the Court considered the application of title II "to restaurants which serve food a substantial portion of which has moved in commerce" (p. 298).

In title IV of S. 3296, I do not find any reference to the commerce clause, or its language, or any words indicating that the discriminations sought to be banned have any relation whatever to the interstate flow of goods and people.

If A refuses to rent a dwelling to B because of B's race, color, religion, or national origin (title IV, sec. 403(a), it is impossible for me to see how commerce between the States is affected in the remotest degree.

The impossibility, as far as I am concerned, extends to sections 403(b–3), and to section 404, although I have read what the Attorney General said on that phase of the subject matter (pp. 21, et seq. of his statement to the House committee).

The Attorney General seems to rely greatly on *Wickard* v. *Filburn* (317 U.S. 111), wherein the Court held that the Agricultural Adjustment Act could validly apply to a farmer who sowed only 23 acres of wheat, almost all of which was consumed on his farm. I think this is most important to have in mind, dealing with the question that the Attorney General stated in his statement before the House committee that the housing section, section 401, was justified under the commerce clause.

Senator McClellan. Justified under the commerce clause?

Mr. Bloch. Under the commerce clause of the Constitution. It was justified under the power to regulate commerce between the States as well as under the 14th amendment, he stated.

I live in a dwelling which I purchased in 1919. I have lived in it continuously since. The mortgage which formerly covered it has long since been removed. If its brick or hardware or plaster or paint ever "moved" in interstate commerce, they have long since come to rest. If I should refuse to sell that house to a person because of his race, color, religion, or national origin, would I be subject to the sanctions of title IV? Where does the 14th amendment come in? Where does the interstate commerce clause?

Senator McCLELLAN. Selling a house that adjoins his residence, or if he owned a house that adjoined his residence, could he refuse to sell it to a Black Muslim, or would he be guilty of violating this statute?

Mr. BLOCH. As I construe the statute, if a person refused to sell his own home, such as the one I am talking about——

Senator McCLELLAN. Not only his own home but I am talking about sometimes people own houses and live in one and have another one. Some relative lives in it and they decide to move away or they decide to sell it. Would he be compelled to sell?

Mr. BLOCH. I don't so construe the statute that he would be compelled to sell it.

Senator McCLELLAN. He couldn't refuse to sell it if he had it up for sale.

Mr. BLOCH. If he refused to sell it to a person on account of his race, color, religion, or national origin, and that was followed to its logical conclusion, then it might result that he couldn't sell it at all. But I don't think the statute as I read it attempts to compel him to sell it to a person of a certain race, color, religion, or national origin.

Senator McCLELLAN. It has the same effect.

Mr. BLOCH. It has the same effect.

Senator McCLELLAN. If he has to keep it.

Mr. BLOCH. It reaches the same conclusion.

Senator McCLELLAN. If he sells he has got to sell, if the applicant or proposed purchaser happens to come within that category, he has got to sell it, or if he refuses to, he has committed a crime.

Mr. BLOCH. That is right, because it has the same effect, Mr. Chairman.

Senator McCLELLAN. It is compelling to the extent that if you decline or refuse, you have committed a crime.

Mr. BLOCH. If he declines or refuses he has committed a crime.

Senator McCLELLAN. That is pretty compulsory in my opinion.

Mr. BLOCH. It has the same effect as the school case. They started out by saying that the school segregation cases didn't compel integration, that they simply were designed to prevent segregation. But in the 12 years or so that have passed since the school cases were handed down on May 17, 1954, now the guidelines that are being adopted by one of the departments not only seek to prevent segregation, but to compel integration.

Senator McCLELLAN. This compels you to sell or be subjected to punishment, under a given state of circumstances. You either must sell or be subjected to the penalty of the law.

Mr. BLOCH. That is right.

Senator McCLELLAN. You can refuse to sell, but you are penalized.

Mr. BLOCH. That would be the effect of it.

Senator McCLELLAN. Well, that is it. That is what it is intended to do.

Mr. BLOCH. I think so.

Senator McCLELLAN. Nothing else.

Mr. BLOCH. It would certainly be the effect.

Senator McCLELLAN. What else does it propose to do except that?

Mr. BLOCH. I think that is what it intends to do, but I am not sufficiently familiar with the language of the bill to say that it would compel a man to sell his house to a colored person or a person of a different race.

Senator McCLELLAN. The only way he can escape the penalty of the law would be to sell.

Mr. BLOCH. That is right.

Senator McCLELLAN. That is just as near to compulsion as you can make it.

Mr. BLOCH. It might be.

Senator McCLELLAN. Except you are willing to pay a penalty not to be compelled.

Mr. BLOCH. That is right.

Senator McCLELLAN. I think that is clear.

Mr. BLOCH. But I can't say in all fairness that the language of the statute is such that it compels you to sell it to anyone.

Senator McCLELLAN. It doesn't use the word "compel," but the consequences and ultimate effect is to compel or to punish.

Mr. BLOCH. That is right. I thoroughly agree with that.

Senator McCLELLAN. All right.

Mr. BLOCH. You either do or you will be sorry.

Senator McCLELLAN. That is right. That is compulsion in my book. That is not freedom.

Mr. BLOCH. I didn't hear that, sir.

Senator McCLELLAN. That is compulsion in my book. It is certainly not freedom.

Mr. BLOCH. Certainly, it is practically compulsion.

Conclusion—I cannot conceive of a better reply to the statement of the Attorney General to which I have referred than words of Mr. Justice Hugo Black uttered March 24, 1966, in his dissent in the case of *Harper, et al. Appellants* v. *Virginia State Board of Elections et al.*, 86 S. Ct. 1079, 1087–8.

They are, I think, particularly apt and timely because of the appeal which is being made to the Congress to disregard the past adjudications of the Court, to disregard the Constitution, and to substitute for them its own conceptions of right and wrong, to enact a law said to be "designed to help achieve equality in the marketplace" (p. 15).

Justice Black's words follow:

> The Court's justification for consulting its own notions rather than following the original meaning of the Constitution, as I would, apparently is based on the belief of the majority of the Court that for this Court to be bound by the original meaning of the Constitution is an intolerable and debilitating evil; that our Constitution should not be "shackled to the political theory of a particular era,' and that to save the country from the original Constitution the Court must have constant power to renew it and keep it abreast with this

Court's more enlightening theories of what is best for our society. It seems to me that this is not only an attack on the great value of our Constitution itself but also on the concept of a written constitution which is to survive through the years as originally written unless changed through the amendment process which the Framers wisely provided. Moreover, when a "political theory" embodied in our Constitution becomes out-dated, it seems to me that a majority of the nine members of this Court are not only without constitutional power but are far less qualified to choose a new constitutional political theory than the people of this country proceding in the manner provided by Article V.

I suggest therefore that the Congress ought not to be asked to enact a statute, and certainly should not enact it merely because the Court may test its validity not by established constitutional principles but by some "new constitutional political theory."

That far in my quoting from Justice Black he was treating of the Court's power and duty.

He proceeded:

The people have not found it impossible to amend their Constitution to meet new conditions. The Equal Protection Clause itself is the product of the people's desire to use their constitutional power to amend the Constitution to meet new problems.

I interpolate: So are the income tax amendment, and the direct elections of Senators amendment and the woman suffrage amendment. So was the prohibition amendment, and its repealing amendment. So was the amendment limiting the terms of service of a President. When one man was elected President four successive terms, the people acted as provided in the Constitution.

Justice Black proceeded:

Moreover, the people, in Section 5 of the 14th Amendment, designated the governmental tribunal they wanted to provide additional rules to enforce the guarantees of that Amendment. The branch of government they chose was not the Judicial Branch but the Legislative. I have no doubt at all that Congress has the power under Section 5 to pass legislation to abolish the poll tax in order to protect the citizens of this country if it believes that the poll tax is being used as a device to deny voters equal protection of the law. See my concurring and dissenting opinion in *South Carolina* v. *Katzenbach*, 86 S. Ct. 803.

It is quite clear that discriminatory use by the State of a poll tax created by State statute would be "State action" and therefore subject to control by appropriate legislation under the 14th amendment (sec. 5). In the *Katzenbach* case (at p. 832) Justice Black had said:

I have no doubt whatever as to the power of Congress . . . to enact the provisions of the Voting Rights Act of 1965 dealing with the suspension of state voting tests that have been used . . . to deny and abridge voting rights on racial grounds.

It is equally clear that Congress does not have the power under section 5 to pass legislation preventing "discrimination" if the discrimination consists of wrongs done by individuals (86 S. Ct. at 1176): "This has been the view of the Court from the beginning * * *. It remains the Court's view today" (86 S. Ct. 1176 (Mar. 28, 1966)).

Thank you very much.

Senator McCLELLAN. Anything further?

Mr. BLOCH. No; that is all.

Senator McCLELLAN. Thank you kindly. I appreciate very much your presence. I am sorry that your good friend, the chairman of this subcommittee, couldn't be here to hear your testimony, but I know he will be very interested in reading the record.

Mr. BLOCH. Thank you, sir.

Senator MCCLELLAN. Thank you kindly.

Mr. BLOCH. Thank you, sir. I am glad you were here.

Senator MCCLELLAN. The next witness is Mr. Arthur F. Mohl.

Will you come around, please, sir?

Mr. Mohl, I understand you are appearing at the request of Senator Dirksen.

STATEMENT OF ARTHUR F. MOHL, ON BEHALF OF THE ILLINOIS ASSOCIATION OF REAL ESTATE BOARDS; ACCOMPANIED BY ROBERT E. COOK, EXECUTIVE VICE PRESIDENT

Mr. MOHL. That is correct, sir.

Senator MCCLELLAN. Will you identify yourself for the record then?

Mr. MOHL. My name, Mr. Chairman, is Arthur F. Mohl, of Chicago. I have been engaged in the real estate business in Chicago for 30 years. I appear here as spokesman for the Illinois Association of Real Estate Boards, and unofficially as spokesman for those millions and thousands of frugal property owners whose best interests are in jeopardy.

We urge the rejection of title IV of the Civil Rights Act of 1966 for the following reasons:

1. Title IV requires a citizen to unwillingly rent or sell to another citizen. Such a requirement might be just if it were in the public interest, but here it is improperly invoked for the benefit of one citizen against another.

2. Title IV makes no contribution to the problems of the ghettos as evidenced by the fact that New York City—with such a law for 8 years—has experienced serious riots and had a 65-percent increase in substandard housing units over a 10-year period, while Chicago—without such a law—had no major riots and had a 33-percent reduction in substandard housing units.

Senator MCCLELLAN. I thought you were about to have a riot in Chicago this week, were you not?

Mr. MOHL. We did not call it a major riot, Mr. Chairman. We do not think it had any racial——

Senator MCCLELLAN. We have got these riots down now to where we classify them as little, mediocre——

Mr. MOHL. We do not think it had any housing or racial overtones.

Senator MCCLELLAN. Very well.

Mr. MOHL. 3. Title IV has no means for defining its violation unless the accused admits violation. Most property owners refrain from assigning reasons for refusal to sell or to rent. Inevitably those who prosecute pressure the accused into having to prove his innocence by making him assign a reason for refusal. And if he assigns a reason based on behavior, he exposes himself to character defamation charges.

4. Title IV becomes self-defeating in its application. The Chicago community of single-family homes known as Marynook has achieved reasonably stabilized integration. Its concern is to persuade as many whites as Negroes to buy and move in—and thus far it has

succeeded. With title IV on the books Marynook would become all Negro, because the residents would be prohibited from holding out for a white buyer.

Even though they may not acknowledge it, Lake Meadows and Prairie Shores, which are privately owned urban renewal projects in Chicago and which are successfully integrated, use quotas in order to maintain stable integration, but title IV would make such a system illegal. The report of Chicago Housing Authority chairman, Charles Swibel, on October 26, 1965, stated clearly that despite its nondiscrimination policy, it cannot achieve integration so long as it is not permitted to assign apartments on a quota system.

As an example, its Leclaire Courts project in an all-white area started out 80 percent white in 1950 but by 1965 its white population was down to 4 percent.

Senator McCLELLAN. Why is that?

Mr. MOHL. Why is it?

Senator McCLELLAN. Yes.

Mr. MOHL. Because it follows naturally that when a predominance of Negroes move into a building, a predominance of white people move out. This is a human nature fact of life.

Senator McCLELLAN. Can we change that by law, by compulsion?

Mr. MOHL. You cannot change human nature by compulsion of law.

Senator McCLELLAN. That is what we are trying to do, are we not?

Mr. MOHL. I agree with you, sir.

Senator McCLELLAN. Proceed.

Mr. MOHL. Most successfully integrated communities maintain benevolent quotas, which title IV would outlaw.

Gentlemen, title IV attempts to deal unnaturally with human beings. We believe, therefore, that the enactment of title IV would contribute to, rather than thwart the growth of, segregated neighborhoods. For this reason alone we urge the subcommittee to reject title IV.

We submit that any law which attempts to regulate a personal relationship between two individual citizens, where the public interest is not involved, is un-American and undemocratic. It is a device by which minority rule prevails, for the great majority of citizens have opposed such a law each time they were permitted to vote.

We hope that the subcommittee in its consideration of title IV will weigh carefully the future consequences of enacting into law a concept which prohibits private individuals from exercising some degree of selection in the choice of those with whom they will execute a contract for the sale or rental of property. The American is basically an individualist who guards carefully his inherent right to choose his friends, his associates, and those who desire to share his residence whether it be a home, a duplex, or a multifamily structure.

The problem in race relations which develops in the intimacy of housing are far more complex and more delicate than those in education or in employment. We are fearful that the injection of the legal force of the State in the making of these choices will generate resistance and bitterness which would inevitably retard, rather than advance racial amity. For decades, progress in race relations was slow, but now it is improving rapidly for every year sees more and more integrated neighborhoods achieved through natural voluntary methods.

We strongly urge that you do nothing to impede progress, for progress is being made. Let us not forget that in California the people voted 2 to 1 against legislation such as title IV, nevertheless, through voluntary efforts they are achieving notable results.

For example, for the first 11 months of 1965, of the 286,406 listings in all of the State's multiple listing systems, less than six-tenths of 1 percent contained some racial restriction. This is an example of voluntary effort toward open occupancy which I am sure is being duplicated throughout the United States. Give this a chance.

We hope you will reject title IV.

I appreciate the privilege of appearing here, Mr. Chairman.

Senator McCLELLAN. Thank you.

You did not identify the gentleman with you. Will you identify yourself for the record?

Mr. COOK. Yes, my name is Robert E. Cook, executive vice president of the Illinois Association of Real Estate Boards.

Senator McCLELLAN. Do you wish to make any comments, Mr. Cook?

Mr. COOK. No, sir.

Senator McCLELLAN. Very well.

Do I understand this law, you made some reference to it here, this proposed title IV would apply to a room in one's residence if he wanted to rent it?

Mr. MOHL. I am not sure, but I believe it does.

Mr. COOK. Yes.

Senator McCLELLAN. The way I read it, it does. There used to be such things as folks having a spare room to rent. I think that still exists to some extent.

Suppose a family in their residence had a spare room that they wanted to rent. Now apply title IV to that and tell me whether there could be any discretion, any choice made by the owner, by the residents of that home, as to whether he could have a white tenant, a colored tenant, a Baptist, Catholic, or a Muslim.

Could he make any choice, discriminate in any area whatsoever?

Mr. MOHL. The definition under title IV includes any portion of a structure, which would include the room.

Senator McCLELLAN. What we would call a spare room?

Mr. MOHL. That is correct.

Senator McCLELLAN. Which one sometimes wants to rent.

What was that fellow's name, X, Malcolm X, if one of his tribe came along and said "I want to rent this room, you have got it advertised here for rent, I will pay you the price", if they declined to rent it to him because of his religion or because of his color, this proposed statute would apply, would it not?

Mr. MOHL. It certainly would.

Senator McCLELLAN. What would the penalty be?

Mr. MOHL. There is money penalty up to a $500 fine.

Senator McCLELLAN. Up to $1,000, is it not, or is it $500?

Mr. MOHL. It is $500.

Mr. AUTRY. That is punitive damages.

Senator McCLELLAN. This is punitive, that is damages up to a $500 fine and a year in jail, is it not?

Mr. MOHL. That is correct.

Senator MCCLELLAN. The sentenced can take his choice, the owner of the property. He can rent it or Mr. Malcolm X can make him pay a fine and he can go to prison for a year. Is that what we are coming to in this country?

Mr. MOHL. That is correct.

Senator MCCLELLAN. Thank you very much for your appearance?

Mr. MOHL. Thank you, Mr. Chairman.

Senator MCCLELLAN. The next witness is the Reverend Walter Royal Jones.

All right, you have a prepared statement.

STATEMENT OF REV. WALTER ROYAL JONES, JR., CHAIRMAN, COMMISSION ON RELIGION AND RACE, UNITARIAN UNIVERSALIST ASSOCIATION, CHARLOTTESVILLE, VA.; ACCOMPANIED BY ROBERT E. JONES, DIRECTOR, DEPARTMENT OF SOCIAL RESPONSIBILITY, WASHINGTON OFFICE

Reverend JONES. I do, sir.

Senator MCCLELLAN. Will you identify yourself for the record, please, sir?

Reverend JONES. I am Walter Royal Jones, Jr., minister of the Thomas Jefferson Memorial Unitarian Church of Charlottesville, Va., and chairman of the Commission on Religion and Race and the Department of Social Responsibility of the Unitarian Universalist Association.

Senator MCCLELLAN. You have someone with you, Reverend?

Reverend JONES. I have Mr. Robert E. Jones, who is the director of our Washington department.

Senator MCCLELLAN. You may proceed with your statement.

Reverend JONES. I appear here today in support of S. 3296, a bill to assure nondiscrimination in Federal and State jury selection and service, to facilitate the desegregation of public education and other public facilities, to provide judicial relief against discriminatory housing practices, to prescribe penalties for certain acts of violence or intimidation, and for other purposes.

The revolution for civil rights taking place in our time is delayed thunder from the bolt of lightning that struck in 1776, when Thomas Jefferson and his colleagues proclaimed the concept of a government and a society predicated on the equality of men before God and the law. Our Nation's history has in large measure been wrought in the reverberations issuing from that original shock. The civil rights movement is but the latest, although in many ways the widest spreading, as it touches the dignity of men among all minorities.

The Congress is to be commended for its growing sensitivity and response to the mounting imperative, over recent years. But the legal posture of our Nation is still wanting in some particulars, a need which features of the present bill are designed to meet.

The Unitarian Universalist denomination, and its antecedents the American Unitarian Association and the Universalist Church of America, have a history of commitment to human rights going as far back as 1790, when Universalists adopted one of the earliest resolu-

tions against slavery. Down across the years in pronouncements and action, laymen and ministers continued this witness.

At its most recent general assembly in Miami May 16 to 22, the association adopted a comprehensive consensus on racial justice, gathering and rounding out the substance of resolutions passed over the past 5 years. All of the matters touched in the present bill find echo and support in that consensus, which was passed with a near-unanimous vote of the delegates.

I believe there were tallied 3 dissents at the time out of 800 delegates. A copy of the consensus is appended to this testimony.

I am also submitting for the record the reports of two official observers to the trial of the men accused of slaying the Rev. James J. Reeb, held in Selma, Ala., the week of December 6, 1965.

Senator JAVITS. Without objection, let it be received.

Reverend JONES. We have copies here.

(The document referred to follows:)

SPECIAL REPORT—THE REEB MURDER TRIAL

I. JUSTICE IN AN ALIENATED COMMUNITY

by Rev. Walter Royal Jones, Jr.

Chairman, Unitarian Universalist Commission on Religion and Race Minister, Thomas Jefferson Memorial Unitarian Church, Charlottesville, Virginia

THE GENERAL SITUATION IN SELMA

Selma is getting ready for Christmas. The pervasive shabbiness of Broad Street is partly concealed, partly accented by the bright decorations which, especially at night, give an air of commercial gaiety. But Selma is still a town out of another generation. There are a few contemporary bank buildings and stores, but by and large the architecture dates from the 19th century and earlier, more often decrepit than graceful. As one approaches the Edmund Pattus Bridge from Highway 80, one sees a billboard extending welcome from the Selma National Bank. Selma, it proclaims, is "the Town With 100% Human Interest."

On the surface, little tension is visible. Negroes can be seen patronizing Broad Street stores alongside whites, despite a partial boycott. Dolls for Negro girls grace the windows of the five-and-ten-cent store, alongside white dolls. There seems to be full freedom of movement for Negro shoppers.

Although it takes a while to penetrate, however, the tension is there. I was only one of many outsiders in Selma the week of the trial, of course. But my presence was noted. In the courtroom, where I sat beside Daniel Bickford, a Boston attorney also observing the trial for the Unitarian Universalist Association, I heard whispered speculation whether we were Department of Justice lawyers. In restaurants, the strange face was noted, with many a lengthy and inquiring glance. In the Negro section, on the other hand, quite to my surprise, there were some who allowed as having recognized me from March ninth. Whatever the case of memory, identification with the Unitarian Universalist Association was an instant open-sesame.

Monday evening (December 6) I retraced the steps of the march to the bridge, having parked—quite by coincidence—directly in front of Walker's Cafe. The highway and streets bore nothing but traffic, this night. Traffic, and the ghosts of another day. It seemed a longer walk, than in the tension of that other afternoon, with the Sheriffs deputies lining the streets, taking photographs, and making cryptic radio reports from their patrol cars.

I stopped at the parsonage of the Brown Memorial Chapel, to inquire after Lonzey West, who might put me in touch with the Rev. Francis Walter, an Episcopal priest who is our interreligious "man in Selma." He is the new director of the Selma Inter-Religious Ministry. At West's home, and later in the Brown Chapel where Dr. Martin Luther King, Jr., once again spoke on Tuesday night, I learned about the SCLC boycott of downtown stores, and the projected march to protest segregated southern justice.

The trail to Francis Walter took me first to Father MacNeice of St. Edmunds Mission, and thence to Rev. Everett Wenrick, an Episcopal theological student who, with his wife, has taken up residence in Selma to continue the witness of the martyred Jonathan Daniels. Wenrick is working on the Poverty Program, and has so far succeeded in maintaining tenuous contacts with both the Negro community and local Episcopal churches. The poverty project is a particularly sore point with the Negro leadership. There has been no breakthrough in employment in Selma, and a resolute refusal by the city to seek any of the Poverty Program funds. SCLC and SNCC workers tried long and unsuccessfully to engage the Mayor and the white establishment in joint sponsorship. At length, fearing Federal support might go to Negro leadership alone, by default, the Mayor submitted a plan of his own, which, behind a facade of elaborate committees and subcommittees, left final control of funds and program in his hands. It was rejected both by Selma Negroes and in Washington. Meetings continue, seeking a workable compromise, but thus far unavailing. Wenrick was stopped by police from distributing leaflets calling attention to a meeting of the Poverty Program Council. He expected that an appeal to Police Chief Wilson Baker would remove the interference. The boycott of stores by Negroes at Christmas is aimed both at frustration over failure to obtain employment and to launch the Poverty Program. Speakers at the Brown Memorial Chapel recounted how merchants had asked for a reprieve from an earlier boycott, so that they could act "without being under pressure." The boycott had been lifted—and nothing happened. So it is being revived.

Tuesday, I succeeded in reaching Francis Walter, who is also working in Tuscaloosa, Selma, Camden, and Wilcox County. Walter confirmed the impressions I had gained from Wenrick and West about the Selma situation. He added that SCLC and SNCC are involved in a deep re-appraisal of tactics, tending to de-emphasize marches now, in favor of reorganization and cultivation of resources—economic and educational—in the Negro community itself. This is partly in response to the more sophisticated (and frustrating) attitude of the white Establishment, since March. Acts of violence against demonstrators are rare. The new tack is to give them police escort, receive them with a show of cordiality, send them off again, and do nothing!

There is little sign of re-appraisal in the white community. Segregationist literature crowds the newsstands. Radio programs originating in Selma's local station, or linked with the hard right—like Carl MacIntyre's "20th Century Reformation Hour"—din the favorite fantasy into listeners' ears day and night. During the trial, the *Selma Times Journal* carried a page two photograph of the defendants jovially gathered with their attorney in the court library. But for the caption beneath, one would have taken it for a group of visiting delegates to a Junior Chamber of Commerce convention, just a few fine up-and-coming American young businessmen. Drinking fountains in the Court House are of the cup-and-faucet variety, the fountains having been plugged. Sheriff Clark still proudly displays his gold NEVER button, even in court, as he stalks the corridors with that curiously menacing smile which is the special accomplishment of policemen and Senate Investigators. Doctors' offices downtown still announce Colored Waiting Rooms in the rear. It is alleged that there are five or six chapters of the John Birch Society in Selma. There are no Negro police officers. The hospitals are segregated. During the trial the defense attorney asked Dr. W. B. Dinkins, a Negro physician who first attended James Reeb, whether Good Samaritan Hospital (a Catholic mission hospital) was not in fact the best equipped in Selma. He could not answer, said Dinkins, because he had never been permitted inside the others.

Selma is a small town, even though its internal subdivisions are sharp. Culturally ingrown, it lives in a world but little penetrated by the 20th century, and inclined to close ranks defensively against any incursion in depth. Efforts on the part of Negro and white civil rights leaders to build bridges with their Establishment counter parts have ben rebuffed, so far. With white Selma, it is still a family affair, with the tangible virtues and appalling hazards of parochialism.

THE TRIAL

The trial began Tuesday morning (December 7) with Judge Moore's charge and questions to the 104 potential jurymen. News reports have it that 13 among these were Negro. Dan Bickford and I saw only four, and, in any case, none was selected. Several jurymen sought to disqualify themselves on ground

of close relationship, fixed opinion, and opposition to capital punishment, and were excused. To the additional stipulation, suggested in absentia by Alabama Attorney-General Flowers, concerning bias against civil rights workers, two men rose and sought to be excused. It was an interesting look into the Southern conscience struggling with itself. I could not withhold respect from these men, wrestling with fairness, even though they were eventually not excused, having affirmed that if they were truly convinced by overwhelming evidence, they would have to find a verdict of "guilty" despite all. None of those who had sought disqualification were included in the final panel. But one juror proved to be, later, the brother of a key witness of the defense, whose testimony would have to be evaluated by the jury. Why either prosecutor or defense counsel allowed this, I find hard to understand.

The case was tried by Circuit Court Justice L. S. Moore, a paternal and seemingly conscientious figure. From what I saw, I was convinced he sought to conduct the trial with true impariality.

The prosecutor, Circuit Solicitor Blanchard McLeod, was a weak figure, perhaps attributable in part to his convalescence from a recent heart attack, but over and above that obviously reluctant in his role. Deputy Disrtict Attorney Virgis Ashworth carried the major burden of the prosecution. He was at his best in discrediting defense alibi witnesses, and in resisting Defense Attorney Pilcher's occasional efforts to make emotional hay with resentment against the civil rights movement as a whole. But he had little to work with. The prosecution's case was meagre. Only three out of six witnesses ever got to the stand at all. Strongest were Clark Olsen and Orloff Miller, whose positive identification of Elmer L. Cook as one of the assailants was never, to my mind, effectively refuted. The fourth witness was declared incompetent, after an inquiry that was itself fantastic, with the witness's medical history including very personal details being paraded before the court by a doctor presuming to offer a psychiatric analysis, although he was not a psychiatrist and had never examined the man in question. The fifth witness, R. B. Kelley, was dismissed since he intended to invoke the Fifth Amendment, being threatened with indictment in a Federal Court for a similar charge. The sixth was in Mississippi, and prudently elected not to come at all.

For a liberal, observing the Fifth Amendment episode was excruciating. There was no doubt of the witness's being in jeopardy, and thus entitled to its protection. At the same time it was the virtual death-blow to the prosecution's case to lose this witness, who may have testified earlier to a grand jury. Was such testimony available, if it occurred? Would it, too, be covered by the Fifth Amendment now? These are distressing, unanswered questions. The prosecution offered no visible objection to the judge's ruling, which was made with apparent reluctance.

As the state rested its case, two things only had been established: 1-Elmer C. Cook had been identified as one of the assailants, and 2-James Reeb had died as the result of the blow received, although his actual attacker was unknown. Judge Moore refused a defense motion, however, to dismiss charges against the Hoggle brothers, insisting that the jury should hear all the evidence.

If the prosecution's case was weak, the defense was ludicrous. It consisted of three points: 1-an alibi for the presence of O'Neal Hoggle at a nearby cafe at the time of the attack, 2-a string of witnesses to attest all three men were dressed in clothing different from that described by Olsen and Miller on that day, and 3-an effort to insinuate deliberate delay and perhaps additional injury to the wounded man, for the purpose of producing a martyr for the civil rights cause.

The first alibi seemed plausible enough, until it was disclosed that the witness 1-was a brother of one of the jurors, 2-was a business partner of Elmer Cook, and 3-that his testimony was being tied to the succession of witnesses on clothing. The longer this succession continued, the less convincing it became. I was more sure the Hoggle brothers were involved in the attack after the defense had concluded, than when it began. Of the third point, it need only be said that it was as cruel as it was fatuous. Only in Selma could it be taken seriously by a jury, if indeed it was.

I regret that I was unable to stay in Selma for the prosecution's and defense's summations and the judge's charge to the jury. Dan Bickford will fill in details on these. When I heard the radio account of the verdict, later on Friday, I was not surprised, although I had hoped for the possibility of a hung jury—at least that much of a glimmer of conscience in Selma. But there was none.

News reports told of applause and joyous greeting of the defendants. The family had come through; our boys were safe again.

Friday morning, before court opened, Solicitor McLeod saw some old friends sitting among the family of the Hoggle brothers. Wreathed in smiles he came over, and there was warm handshaking. Apparently no one doubted it would come out all right. They were not disappointed.

JUSTICE IN AN ALIENATED COMMUNITY

When a determined jury defied both magistrate and the law of the colonies to find John Peter Zenger not guilty of sedition, for his criticisms of the Governor of New York, a powerful blow was struck, not only for the freedom of the press, but the independence of juries. It was also a testament, handwriting on the wall, to the emergence of a new community, later to cut its ties with England altogether. We cite the incident with approval, for the new community is our own.

But Selma is also a severed community. Its cord, cut in the 1860's, has never wholly been repaired. This is ironic, for the same belligerent local pride that alienates it from the overall American community, is deemed to unite it in the more belicose aspects of super-patriotism. This affinity for the violent is mistaken for authentic unity and devotion to American ideals.

To a degree this is the plight of the total Deep South, for whom Americanism is a mixture of hard-core political conservatism, economic atomism, anti-Communism, fundamentalist religion, sex puritanism, and segregation. This is the official Dixie package; and deviation from any particular is viewed as an attack on the whole. In this complex the Negro is welcome only if he accepts "his place." But from Reconstruction days onward, his political ambitions have always been viewed as a menace, the rise of a rival and therefore hostile power center. It is one of the ironies of history that the Southern poor white, whose plight both politically and economically most closely parallels that of the Negro, has been effectively neutered as a force for change by exploitation of race tensions. One of these days he will wake up and discover he has been "had," victimized by his own propensities for hating the colored counterpart. But for the moment he still dwells in the reverie of identity with the white establishment, whose ladder of opportunity he may hope to climb, and to which he does indeed have a marginally better access than the Negro.

Withal its inner contradictions, however, the Southern community is a community, and tensely self-conscious. It has been long under attack by the culture of the 20th century, with its anti-parochialism in politics and world affairs, its religious pluralism, and the drives towards racial equality. The stance of the South is therefore defensive. It has admitted at a superficial and technological level the world of today; but it steadfastly resists the implications of that world for religion, mortals, and society.

Our American system of law, more particularly our tradition of court action, cuts across such local differences: that is both its majesty and its peril. For the finely-made instrument, with its built-in protections for accused, is only partly responsive to its own precedents. It may function perfectly as an instrument; it cannot escape the influence of the community, working through the persons who set out the drama.

The trial in Selma may have had some defects, but by and large the effect of these defects on the outcome was miniscule compared to the forces with which the court could not possibly cope; which indeed it had to do its best to ignore, by the legal pretense of banishing them, through oaths, and proper instructions to the jury.

The jurors swore to come to an impartial judgment. But could they keep their oath? They could swear not to be swayed by the fact that James Reeb was in Selma as part of a civil rights protest; and the defense attorney could be prevented from ringing the changes of this theme. But could it be eliminated from their thinking? They could try not to recognize the three defendants as neighbors and friends, as members of "our side" in the siege, while the victim was the outsider and thus the enemy. But could this possibly be forgotten? The law prescribed the ultimate penalty for first degree murder. Most people consciously or unconsciously recognize capital punishment for what it is: not justice but retaliation. Could Selma's jurors by any stretch of imagination be seen calling for the act of vengeance against their compatriots, however dismayed they might be at the consequences of a rash act?

Given the proper requirements that a verdict of guilty must be rendered only if there be not the slightest shadow of doubt, did anyone expect that doubt would be expellable? The climate also affected the prosecution, however valiantly it may have tried to be objective. To proceed with vigor would be to court the enmity of the entire community. It presented the evidence it could not help presenting; there is no sign of any effort "above and beyond the call of duty" to get more.

To say this is not to discredit the courts, but only to recognize the limits of judicial effectiveness. Murder is not murder except in the community that regards it so. And beyond that, murder is not a self-defining act. That would be true only in a universal community, which exists in principle, perhaps, and in legal theory, but not in social fact. Murder is defined by the margins of community consciousness: it depends less upon a man being killed than who he is. Our frustration with the recent civil rights cases comes out of our assumption that there is a single, organic American community, in which American citizens have been killed for working towards legitimate American aims. From this perspective, the slayings are murders. But that is not the perspective of Haynesville and Selma. From their view, conspiratorial and un-American outsiders have been killed by overzealous and perhaps unwise, but basically decent and patriotic defenders of the true way. The circle of community never included these who died. It is manslaughter—perhaps a sop to larger citizenship—but not murder, not in the sense that calls for outrage and revenge, for the "full measure of the law." In this the South is not structurally different from other self-conscious communities. We have no ground for self-righteousness; we are under the same judgment. It is only that for a moment we can see what is operating in our legal system, because in this instance the alienation and contradiction of community-consciousness is so obvious.

The answer to the dilemma is self-evident. Both the death of James Reeb and all his companions in the civil rights struggle, and the infuriating inability of the Southern courts to grapple with the issue, point to the same problem and the same solution. The insularity of the embattled community must be broken. The resources for a larger community must be uncovered and drawn out. It may be possible to accomplish some of this by further exercise of federal authority, extending protection to civil rights workers, for example, beyond the authority of state governments. But this is not the best answer, a measure to be taken in desperation only. Nor will it directly meet the underlying problem, which is the alienated community.

The only answer is to bring the Selmas and Haynesvilles into the American community at a far deeper level than they have yet been willing to come. And this will be accomplished, it seems to me, less by new legislation, than by the quiet but determined work of individuals and groups, to take advantage of the ground already gained, to undercut devisive anxieties, and prepare the way for the voluntary relinquishing of attitudes that are no longer useful nor attractive.

I say this, not to discourage work towards legislation that may yet be needed, nor demonstrations that may yet bear justified witness to wrongs suffered, but to encourage the constructive work at deeper levels without which further progress seems a vain hope. I look for a shift of emphasis, as a sign of American maturing, with the outcome of creating a genuine community in which the James Reebs will not be slain, and the courts will not have to try the slayers. This, I think, is what he would have worked for, too.

II. The Reeb Murder Trial

(By Daniel B. Bickford, special counsel, Unitarian Universalist Association; partner, Ely, Bartlett, Brown & Proctor, Boston)

THE FIRST DAY

The courtroom was packed with witnesses, jurors, and spectators. There was no trouble gaining admittance to the Court. There were no police or deputies or court officers checking. I had to stand in the rear of the court, along with 50 to 75 others. The seating capacity of the room was in the neighborhood of 350, exclusive of the seating inside the bar enclosure. Inside the latter, there was ample seating capacity for all counsel, defendants, prosecutors, and others. (The Court is well laid out. The Judge sits where he can be seen and can command;

the witnesses are close to the jury; the prosecutor sits directly in front of the witness, and the defendants in front of the Judge.)

The proceedings began with the Judge climbing the few steps to his seat and calling for order. (It took me some time to figure out who the Judge was, as he wore no robe and entered the room without introduction. He carried what appeared to be the docket books. No one stood when he entered the courtroom. There was no indication that he was other than a clerk.) The proceedings began about 9:15 a.m. on Tuesday, December 7, 1965.

The first order was the calling of the State's witnesses, followed by the calling of the defendants' witnesses. The Judge apparently was calling their names from a docket entry which he had in front of him. As the witnesses' names were called, they would step forward to the bar. The State had about 12 witnesses sworn, and the defense must have had about 75. The defense attorney indicated that most of the witnesses he had were character witnesses. The witnesses, with the exception of the character witnesses, were sequestered, that is, they were not allowed to attend the trial.

Next came the qualification of the jurors. This was a process whereby all the jurors stood, were sworn, and then were allowed to sit down while the Judge asked a number of statutory questions. These included: "If anyone was under 21, he was to "inform the Court;" if anyone was not a resident of Dallas County for the last year, "he was to inform the Court;" if anyone had been indicted for a felony in the last year, "he was to inform the Court;" in anyone was convicted of a felony in the last six years, "he was to inform the Court;" if anyone was related to the defendants, "he was to inform the Court;" and if anyone knew he was mentally incompetent, "he was to inform the Court." (The Judge assumed by the silence of all jurors that the answers were negative.)

Questions as to capital punishment were asked; that is, whether or not there were any jurors who did not believe in capital punishment. There were four such jurors. Questions were asked with respect to belief in the use of circumstantial evidence, and one juror spoke up. On "voir dire" by defense counsel, the answer finally was that he could convict on circumstantial evidence.

Lastly, the solicitor was allowed to ask a question which he read after saying that the Alabama Attorney General, Mr. Flower, had asked that the question be asked. He read the question in a slow, almost inaudible tone. The question was lengthy and was, in substance, as follows:

"In the evidence was to show that the victim had dined with 'niggras' and had otherwise socialized with them, and if the evidence were to show that the victim felt that 'niggras' were equal to white, and if the evidence were to show that the victim had come to Selma, Alabama, to assist the 'niggras' in establishing their equality, would that make the victim such a low person as to effect the juror in his consideration of the guilt of the defendants?"

Apparently because the question was read with such lack of enthusiasm and so inaudibly, the Judge asked if the question was in writing. On learning that the answer was in the affirmative, he asked for the question and read it painstakingly to the prospective jurors. (In my opinion, the question was made clear by the Judge, who read it slowly and paused after words to define them where necessary.)

Three jurors jumped to their feet and indicated that it would prejudice their deliberations. Roy D. Maples said, "I am leaning against a man who came down here from Boston when he should have been preaching up there." W. E. Dozier admitted his bias when he said, "I feel Reeb didn't belong down there." L. H. Smitherman said, "I am sick of civil rights. I have a fixed opinion." Again, the defense took the prospective jurors on "voir dire," and two of the three agreed that it would not affect their decision if the evidence was such that the three defendants in fact committed the crime. The third prospective juror indicated that it would, and he was excused. (The other two were eventually excluded by a State's challenge.)

In my opinion it would have been far better to question each juror individually as to his beliefs on this subject. I am sure that experience must show that it is difficult for an individual to volunteer to give a "yes" answer in front of 350 other persons. However, the question was asked to the group, and each juror, by not volunteering, might feel obligated to the Court to exclude, consciously, any consideration connected with the identity of the victim. Would it have not been better to propound the question individually so that a prospective juror would not have to become a volunteer in exposing his prejudice? I would guess

that the prosecution, by lengthy examination of each individual juror, would have been unable to qualify many of them, if the assumption is made that the inhabitants of Selma are hostile to the civil rights worker. As a matter of trial technique, the custom is to examine each juror individually if the attorney wants to eliminate certain people with a bias.

The next procedure was the "striking" of jurors. There were 67 jurors left after the above qualifying procedure. The State was allowed to challenge (eliminate) 13, the defense, 12. (The obvious implication of the procedure needs little comment.) The jurors who were selected, and their occupation, are as follows:

Billy G. Bozzer, Mail carrier.
William E. Barrett, Insurance agent.
Raymond V. Schiffer, Auto sales manager.
Willie C. Ellington, Salesman.
Milton L. Adams, Officer—electric company.
T. Maynard Busby, Grocery manager.
William W. Vaughan, Own company.
M. Woods Culpepper, Logger.
Cecil O. Campbell, Truck driver.
J. Cooper DeRamus, Jr., Cigar store employee.

It should be pointed out that there were four Negroes in the pool, but they were eliminated by the defense.

After the striking of the jurors, the prosecution made its opening statement to the jury. The statement was made by the Circuit Solicitor, Blanchard McLeod, and was very short. The Solicitor said that he would show that the three defendants "did the killing." He then went on to say that, because of a heart attack, his doctors had ordered that he not try a case until after the first of January, and that he was turning the prosecution of this case over to Mr. Virgis Ashworth. Mr. Ashworth is a former state representative; it is my understanding that this is the first case in which he was participating as a prosecutor.

The defense then made an opening statement which in substance outlined their defenses. The defense would be that the wounds that the Rev. Mr. Reeb received was not the wounds which caused his death, and that the wounds were "altered" from the time that he was in Selma to the time that he was seen in Birmingham. The second defense would be that the defendants were not in the area when Reeb was attacked. More specifically, O'Neal Hoggle was in a restaurant and Elmer A. Cook and Stanley Hoggle were at their places of business. There were three witnesses who would testify to these facts. The defense also pointed out that they would show thaat there were three or four other groups of persons in the area at the time of the assault, and that these groups could have and probably did cause the injuries.

The first witness was then called by the State. He was the Rev. Clark Olsen. Mr. Olsen identified himself as a clergyman from California. When asked who his attackers were, Mr. Olsen identified Cook from more than 300 people in the Courtroom, and the identification was made by standing and pointing to that specific defendant. With respect to the other attackers, he was only able to say that the two Hoggle brothers were similar in appearance, but he could not "positively" identify them, and that "they resembled to some degree the men I remember attacking me." He did ask the Judge if the other two defendants would stand, but the Judge said "no."

Mr. Olsen testified that he had had dinner at Walker's Cafe on Washington Street some time between 5:30 p.m. and 6:00 p.m., and that he remained in the Cafe from 1½ to 2 hours. He estimated that it was about 7:30 p.m. when he and the Rev. Orloff Miller and the Rev. James Reeb left the Cafe and turned right on Washington Street and that it was a few moments later that they were attacked near the Silver Moon Cafe at the intersection of Washington Street and Selma Avenue. He testified that as they neared the Silver Moon Cafe, "our attention was attracted by some men who started to come after us from across the street. They shouted at us and came in a threatening manner." He said that there were four or five men, and that the group continued walking for 12 or 15 feet. He testified that one of the attackers was carrying a stick or pipe, "an object of some length." Reeb was walking on the street side, slightly behind him, and Miller was in the middle, whereas he, Olsen, was on the building side. He stated that he saw one of the men swing the stick or

club and hit Reeb on the side of the head. He saw Miller crouch down to avoid a blow, and he himself ran a few steps away from the attackers. One of the attackers, however, came at him. He testified that he was caught after running a few steps and was struck several times and lost his glasses. He testified, "I had an especially good view of the man attacking me. I turned to face him. I raised my arms to protect myself and saw him as he hit me." When the brief attack stopped, he stated that he looked back and saw one or two of the men (attackers) kicking Reeb and Miller. Olsen established the duration of the attack to be about 30 seconds.

After the men had withdrawn, and he did not know in which direction, he returned to the side of Miller and Reeb to see if he could aid them. He described Reeb as being badly hurt and unable to speak coherently immediately after the beating, his words babbling out.

He and Miller assisted Reeb to his feet, had him lean against the building, and when he was able to speak, and appeared to be conscious, they helped him to the Boynton Insurance Agency. As far as he was concerned, Olsen could only observe a small wound. Reeb, however, complained of a terrible headache.

In describing the man who attacked him, Olson again said he had a "very good view of the man who attacked me."

Olsen stated in great detail the subsequent events at the Boynton Insurance Agency, where they finally got an ambulance and took Reeb to the Burwell Infirmary in Selma, where he was treated by Dr. Dinkins, a Negro physician. It was here that Reeb's condition worsened, and he lapsed into unconsciousness. Arrangements were made by Dr. Dinkins for Reeb to be moved to Birmingham for treatment by a neuro-surgeon. On leaving the Burwell Infirmary, for Birmingham, and about four or five miles out of town, the ambulance got a "flat rear tire," and they decided to return to Selma. On returning, they drove to a local radio station where they called for a second ambulance and made a telephone call for police protection. After placing Reeb in the second ambulance, they returned to the Boynton Insurance Agency to pick up a check for $150 which they had learned would be required to have Reeb admitted to the Birmingham Hospital. In the meantime, Dr. Dinkins was obtaining an automobile so that he could follow the ambulance.

Olsen went on to testify in some detail as to the events which took place at the Birmingham Hospital where he said they arrived at about 11:00 p.m. Reeb had still not regained consciousness.

With respect to the cross-examination of Clark Olsen, the defense attorney apparently had use of the FBI report. There was an attempt to show photographs to the witness, as well as earlier statements which had been made to investigators. Olsen testified in cross-examination that he had lost his glasses in the attack. On further cross-examination, the defense brought out that Olsen had arrived in Selma from California less than four hours before Reeb was fatally beaten and that he had come to Selma to join in the demonstrations because he felt that he wanted to come as an individual to lend his assistance. He was asked questions as to whether or not he was a pacifist. He said he was not. He admitted that he had been driven from Montgomery to Selma in a car chauffeured by a Southern Christian Leadership Conference driver. Upon his arrival in Selma, he went to hear the Reverend Martin Luther King, Jr. After that meeting, and subsequent to the march, he went to Walker's Cafe. (Walker's Cafe is apparently a well-known Negro restaurant in Selma. Attempts were made to point out this fact by asking questions such as, "Who was in the Cafe?" etc.)

The trial recessed at 4:30 p.m., with Olsen still on the stand.

THE SECOND DAY

Olsen was on the stand at the beginning of the second day. Under cross-examination, he testified that, in his opinion, Cook was not the man who struck Reeb, but he was positive that Cook was the man who struck him.

The second witness called was the Rev. Orloff Miller, who identified himself as a Unitarian Universalist clergyman from Hingham, Massachusetts. Miller testified that he was able to identify Cook as the leader of the group which attacked Olsen, Reeb, and himself. He further testified that since the other men's lives were at stake, he could not be positive, but they definitely were men he had seen on that day.

Miller testified that he had been in Walker's Cafe, but had left about five minutes before the others to go outside for a cigar, and that the others, Reeb and Olsen, joined him outside and started to walk toward the intersection of Washington Street and Selma Avenue, where they planned to turn right and proceed to the Boynton Insurance Agency. As they were walking, four or five white men came from between parked cars, one shouting, "Hey, you niggers." They thereupon quickened their pace, the men approached from behind and to the left. Miller testified that "Jim was struck to the pavement. I heard the blow." He further testified that he immediately turned around, dropped to the pavement in a crouched position, as he had been taught to do, and was attacked or kicked on the forehead and on the arm. He described the attack as "'an eternity, but was probably about 30 seconds." He testified that he saw the attackers and that he could identify them, whereupon he rose and identified Cook and stated that he was in the lead of the attackers that night. He went on to describe what subsequently happened after the attackers left, and the problems which they had in getting Reeb to Birmingham. Miller told about going to the Boynton Insurance Agency, getting an ambulance from the funeral home, going to Burwell Infirmary, proceeding out of town, proceeding to the radio station, getting a second ambulance, getting the money, and starting off for Birmingham with Dr. Dinkins following. In answer to a question by the prosecutor, Miller said that he had kept notes and stated that they arrived in Birmingham at about 11:00 p.m.

In cross-examination, Miller was asked to designate the position that he took during the attack, and he did this. He then agreed that he saw little after the attack began. He recalled that it was not dark, but that he street lights had come on while he was outside smoking his cigar. He did not see the instrument that hit Reeb, but he did reaffirm that he got a good look at the lead man.

Miller described in great detail the ambulance trip, and it was brought out that the injured man was not lying on his stomach, that there was no emergency equipment, such as oxygen tanks and respirators used to keep the circulatory passages open. Miller described Reeb as being unconscious, and in great pain. He further testified that he did nothing because he knew of nothing to do.

The prosecutor went into great pains to inquire of Miller whether or not the wound which Reeb suffered was a "compound, communated multiple skull fracture." There was no objection raised by the prosecution to these questions, but Miller said that he was not familiar with this terminology.

The prosecution did suggest that the defense describe such a wound, which the defense did, and that the skull "would be crushed like an egg shell with fragments of bone penetrating through the skin." With this description, Miller asked whether or not such a condition would go unnoticed immediately after an injury, but would develop as pressure increased from swelling.

Miller further testified that on the ambulance trip to the Birmingham Hospital, the stretcher did not fit the ambulance and had to be kept up against the side by him. He said that it had a tendency to roll.

A waitress, Ouida Larson, who worked at the Silver Moon Cafe, testified that she saw Cook and the two Hoggles together in the Cafe some time between 6:30 p.m. and 8:00 p.m. On cross-examination, she was unable to pinpoint the time, and she said that she heard nothing about the beating until the next day.

The remainder of the day was taken up with the qualifying of an "incompetent" witness, Edgar W. Stipling. The Public Safety Director of Selma, Wilson Baker, and Peter Lackeos, testified, as well as Dr. DeBardeleben.

Wilson Baker testified that he had noticed Stripling, who was a part-time employee at the Silver Moon Cafe, shadowboxing with parking meters, and, on occasion, talking with his coffee cup and saucer. Mr. Baker was put on by the defense with the intention of giving evidence to disqualify the State's proposed witness. Stripling had already been sworn and had answered questions with respect to his being able to tell the difference between truth and fantasy. He had then been excused so that the defense could put on some witnesses.

Following Wilson Baker to the stand, Peter Lackeos (who spoke with a foreign accent and was difficult to understand) identified himself as the owner of the Silver Moon Cafe, and as the employer and friend of Stripling for a

great many years. He testified that Stripling had told him of fights which he claimed had taken place at the Cafe during his absence, and which he knew had not taken place.

Dr. DeBardeleben was called to the stand by the defense and testified that he specialized in internal medicine and that he was a general practitioner in Selma. He read extensively from Veterans' Administration records which indicated that Stripling had been in and out of Veterans' hospitals on a number of occasions. The last time was in 1959, and indicated that Stripling was a residual schizophrenic. The doctor said that certain types of this illness make it impossible for a patient to distinguish between fact and fantasy at times. He further testified that he did not know Stripling and had never examined him, and that the only information he had was obtained from the records of the Veterans' Administration.

At this time it should be noted that the State made no attempt medically to qualify this witness, nor did it object to the tesimony of a general practitioner. On the other hand, however, when the doctor was testifying as to his qualifications, the State admitted that he was a qualified doctor. There is no indication on the record as to the qualifications of the defense's expert on mental illness. The evidence is quite strong to the contrary, in that the doctor is a general practitioner, had made no examination of the proposed witness, and was basing his so-called opinion testimony solely on the basis of records, the last entry in which was made six years prior to his testimony. At the most, he testified that it would be difficult for the proposed witness to determine the difference between truth and fantasy. Alabama has a statute which permits a Judge to disqualify a witness if the witness, at the time of his testimony, does not understand the oath which is being administered.* There certainly was no testimony that this witness did not understand the oath at the time it was being administered.

The Judge found that the witness was disqualified and stated: "I realize that it is a serious thing to determine whether a man is competent to testify. He might be able to tell the truth or he might not, I do not know. But I feel it would not be right to lay this witness before the jury in the face of his medical record and ask them to take credence in what he has to say."

THE THIRD DAY

The next witness to be called by the State was Mr. R. B. Kelley. (Kelley was arrested with the three defendants, but was never indicted.) The defense objected to Kelley's testifying, and represented to the Court that there were Federal conspiracy charges still being considered which would involve the same matters which this witness would be required to testify to and that the witness had availed himself of the Fifth Amentment privilege. The State argued that it should be allowed to ask Kelley questions and that, as to those questions which he felt would incriminate him, he could avail himself of the Fifth Amendment. The Judge would not allow this and stated in effect that he could not imagine any question which would not also be involved in the conspiracy case and, therefore, he would not require the witness to testify. (The State made no effort to argue that the witness might well be granted immunity, if he was forced to testify, although this is a debatable point because immunity may not be effective to forestall a Federal Court proceeding.) What is not clear with respect to Kelley is whether he had ever given any statements before the Grand Jury or whether he had otherwise waived his privilege through prior testimony.

Dr. Dinkins was called by the prosecution and said that he examined Reeb around 8:30 p.m. at the Burwell Infirmary. His initial examination indicated that Reeb suffered a laceration and contusion of the left temple, and he ordered an X-ray taken, but it was not good enough to read. In the meantime, he reported that the condition of the injured man worsened and the symptoms showed that he had sustained an injury of a type that required additional study and treatment. Dr. Dinkins thereupon made arrangements for Reeb to enter University Hospital in Birmingham. He testified that there were no neuro-surgeons in Selma. On cross-examination, he testified that he was not able to determine whether Reeb had a skull fracture, and there was no indication on his first

*The Statute reads: "Persons who have not the use of reason, as idiots, lunatics during lunacy, and children who do not understand the nature of an oath, are incompetent witnesses."

examination that there was pressure on the brain, but that within 10 minutes he did note pupillary reflexes which would indicate that pressure was being exerted on the brain.

He testified that, on the trip to Birmingham, the first ambulance threw a recap, and it became necessary to return to Selma and that they called for a second ambulance from a radio station. While that was coming, he said that he returned to pick up his own car.

He testified that Reeb received no treatment prior to his arrival in Birmingham, and that there were no respirators, tubes, or oxygen used to keep the air passages clear and that he gave no instructions to the ministers who rode with the victim. He further testified that, on the trip to Birmingham, there was a 10 to 15 minute delay while he got his car, and that the reason for his getting his automobile was that they were unable to get assistance from law enforcement officials. They left Selma for Birmingham at 9:30 p.m.

(I wonder why the prosecution called Dr. Dinkins, in that he really added nothing to the State's case. On the contrary, his testimony was not only embarrassing for him, but indicated that he was probably ill-equipped to handle this type of injury.)

Dr. Dinkins was asked, on cross-examination, why he did not take the patient to a Selma hospital, and pictures were introduced to show that the hospital in Selma was a rather modern facility. He stated that he had never been asked to step foot in the hospital.

Following Dr. Dinkins' testimony, the depositions of four Birmingham doctors were introduced by the State, although they had been taken by counsel for the defendants. The procedure which followed was for the defense counsel, Mr. Pilcher, to read the questions, and for one of his assistants, Mr. Radford, to read the answers.

Dr. Thomas H. Allen testified by way of deposition that he had administered to the patient by performing a tracheotomy and assisting in surgery to relieve the pressure on the brain. It was his opinion that Reeb died as a direct result of the head injuries.

Dr. James Argires, the neuro-surgeon at the University Hospital, outlined in detail the emergency operation performed. He testified that it was his opinion that Reeb died because of irreversible brain damage, and that the severe cranial head injury "would have led to death" in any patient.

Dr. Stanley Graham, another neuro-surgeon, testified that he had seen Reeb in the operating room and that it was his opinion that the fact that none of the usual procedures for dealing with vomiting were employed and the respiratory passages were not kept clear might have contributed to Reeb's death. This doctor also said the delay in getting Reeb to the hospital played a significant part and that, if Reeb had arrived one hour earlier, there would have been a greater chance of survival, and that the delay "seriously impaired" Reeb's chances for survival.

The final deposition was that of Dr. Ernest S. Tucker, a pathologist at the University Hospital, and it was through this deposition that 13 autopsy pictures were introduced. The autopsy disclosed that pneumonia contributed to some extent to the death of the patient, but that death came as a direct result of complications following one or more blows to the head.

The last witness to be called that day was Dr. Robert G. Johnson, a state toxicologist, who observed the autopsy. It was his opinion that Reeb died as a result of brain damage and pneumonia, both of which were direct and indirect results of the blow. He described the fracture resulting from the blow or blows as severe in the sense that it was severe compatible with life, but not severe to the extent of what one would expect to see if a person had been hit by a railroad train. He further testified that such an injury would result in almost certain death, if untreated. In cross-examination, he stated that, in his opinion, if competent continuing treatment had been given immediately, the survival rate would be something like one out of two or one out of three.

THE FOURTH DAY

At the opening of the session, the State said that it had one material witness which it was trying to convince to come to Selma from Mississippi, Billey Edwards, of Greenville, Mississippi. Mr. Ashworth stated that he had talked with Edwards on the telephone and that Edwards had indicated that he would come to Selma on the first available plane. The Court recessed for 45 minutes, and

Ashworth made another call. He said that he called the man's employer, and that Edwards had gone to work and was making no effort to return to Selma. Ashworth also said that Edwards had been a resident of Selma on March ninth. (There is no indication that the prosecution had exhausted all efforts in trying to obtain the testimony of this witness, and there is a Federal fugitive statute which makes it a Federal offense for a material witness to flee from the jurisdiction of a state in order to avoid giving testimony. In any event, the subject of this testimony is not known.)

This ended the State's case. The defense moved for a directed verdict as to the Hoggle brothers, and the Judge denied this request.

The defense then made its opening statement, and indicated that it would show that the defendants were not present, that there were intervening events which caused Reeb's death, and that, in fact, the death was caused by a fourth person. The first witness called by the defense was Selma Public Safety Director, Wilson Baker.

Mr. Baker testified that there was a great deal of tension in Selma on the day of the fatal attack, but was prohibited from testifying by the Court as to what caused the tension. The questions indicated that the defense was trying to show that it was caused by the Reverend Martin Luther King, Jr., and the civil rights workers who were in town. The defense attorney, in a speech after the judge excluded the statements, charged that the civil rights workers needed a "martyr," and that these groups were willing to let him die. He said, "I propose to show (by the questions) that there was motivation on the part of other persons to injure Rev. Reeb or willfully permit him to die . . . There was motivation on the part of certain civil rights groups to have a martyr . . ." Baker admitted that his department received the first call on the assault from a nurse at Burwell Infirmary, and placed the time around 7:50 p.m. He said that he sent patrol No. 22. He testified that he was unable to afford protection to all of the people in town on that day. Baker further testified that he had been looking for Floyd Grooms since that day in connection with the attack.

Following Baker, F. J. Ellison, a Selma policeman who was in Car 22, the car sent to the Burwell Infirmary, said that he interviewed both Miller and Olsen at the infirmary with respect to being able to identify the individuals who attacked them. They said that they were unable to identify the individuals. On cross-examination, it was learned, however, that what the policeman meant by identification was ability to swear out a warrant and identify the attackers by name.

Following Ellison's testimony, General MacArthur Brown testified that he was in the restaurant, but had not eaten there. He testified that it was approximately 7:00 p.m. when he followed three ministers out the restaurant and followed them down Washington Street to Selma Avenue and saw nothing happen. He did say, however, that he saw Cook standing in the doorway of his store when he left. He placed the time around 7:00 p.m. He further testified, on cross-examination, that he was a friend of Cook and that he did not know whether or not the three men that he followed were the three men who were later attacked. He testified that there were other white men in the Cafe that night, and the three could have been others. He denied that he had told the FBI agents that Stanley Hoggle stood and looked into the window of the Cafe while he was inside.

The next witness was Mr. George Hamm, a retired Baptist minister working as a janitor in a local factory. He appeared to be a rather reluctant witness. He testified that he had gone into the Silver Moon Cafe to try to make a telephone call between 7:00 p.m. and 7:30 p.m. When the phones were busy, he decided to telephone from outside, on Washington Street. He placed the time of his call at around 7:30 p.m. Hamm testified that he noticed an assault on the other side of Washington Street and it looked like somebody running together. He said that it wasn't light and it wasn't dark. After the assault, he went into the Coffee Pot Cafe where he saw Edgar B. Vardaman, who was standing at a counter. He was unable to identify any other individual in the Cafe. He was unable to identify the attackers, as they "just flushed out like birds." He did see an individual drop to his knees or all the way to the pavement.

The next witness to take the stand was Edgar B. Vardaman, who stated that he went into the Coffee Pot Cafe with O'Neal Hoggle, and that he (Hoggle) was making a telephone call when Hamm came into the Cafe and mentioned the incident. Vardaman, however, testified that he was sitting down when he spoke to Hamm.

Vardaman then identified three sets of clothing which he remembered were the exact clothes which the three defendants wore that day. One was a blue service station uniform, worn by O'Neal Hoggle, another was a suit worn by Cook, and the third was a port jacket worn by Stanley Hoggle. Needless to say, on cross-examination. Vardaman admitted that he wasn't sure that they were the same clothes. He further testified that he was a business associate of O'Neal Hoggle. (This witness is the brother of one of the jurors, and it should be pointed out that the State should have known of the relationship prior to the time the jury was selected, because the defense had listed their prospective witnesses and had had them sequestered. Also, the witness himself probably should have known that he was to be called because the nature of his testimony was that of an alibi witness which means that he must have gone over it with the defense. In any event, it is apparent that the prosecution should have moved for a mistrial because of the relationship between the witness and the juror, It would be difficult for a juror to disbelieve his own brother's testimony.)

Following Vardaman to the stand, the manager of the Coffee Pot Cafe, Mrs. Frances Bowden, testified that O'Neal Hoggle was there about 7:30 p.m. She further testified that she left with Vardaman to go to supper at the Bamboo Club.

Following Mrs. Bowden's testimony, Paul Woodson, one of the owners of the Bamboo Club, testified that he saw all of the defendants at the Club between 8:00 p.m. and 9:00 p.m. on the night of March ninth.

On cross-examination, Woodson testified that he could not remember any other person at the Club that night, and he did not remember Mrs. Bowden and Mr. Vardaman. Following Woodson's testimony, the other owner of the Bamboo Club testified that he was at the bar and that the only person he recognized in the Club that night was Cook. He did not see the other defendants, nor could he remember the names of any other persons in the Club, even though he was familiar with both Vardaman and Mrs. Bowden.

The next witness to testify was J. South, a bread man, testifying that he was at Buchanan's Service Station with Charles Buchanan. He saw the ambulance go by, hearing toward Birmingham, and decided to follow that ambulance, since it was going in the direction of his home. The ambulance turned around, and he followed it back to the radio station where it stopped. He said that it was traveling at a slow rate of speed on the way back. He examined the ambulance and found nothing wrong with it, but another ambulance came along with a faulty signal light which he fixed. He further testified that he left the radio station briefly to get Mr. Buchanan to have him call the police, as he felt that something funny was going on. South testified that it was some 30 to 50 minutes before the ambulance departed, and that no one was doing anything for the patient during that time. On cross-examination, South admitted that he was making it his business to find out what was going on. (The implication was that he was a trouble maker.)

Following South's testimony, Charles Buchanan, the owner of the service station, testified that he saw the ambulance go by his station as he was closing up, and that he later had a chance to examine the ambulance at the radio station and found that there was nothing wrong with the tires.

The next witness to be called was Paul Bodiford, an auto repairman. He testified that he arrived at the Silver Moon Cafe at about 6:30 p.m., after observing the rally at Brown's Chapel and the march on Water Street. He said that he drank beer inside the Cafe for 30 or 40 minutes and then went outside, and that he saw nothing happen until he left at about 8:00 p.m. He testified that he was standing outside for most of the time between 7:00 p.m. and 8:00 p.m., except when he went to get a bottle of wine. He said that he was standing with Floyd Grooms, and that Grooms had been talking and was telling him about a fight with a group of civil rights workers and of Grooms' attempt to upset a station wagon. Bodiford said that he had not seen Grooms since. He said that another man, Winston Smith, was standing outside with him. With this testimony, the defense rested its case. The time was about 11:20 a.m.

Before lunch the prosecution made a brief argument. Mr. Ashworth told the jury that he expected that they would do their duty as jurors; that they would find a true verdict according to their consciences. He told the jury that he was not "sticking up" for the civil rights workers, but that the system of justice was on trial. He told them it was an important case and they must do their duty, "as he knew they would."

After the brief opening (about five minutes), the jury went to lunch. After lunch, the defense argued and reviewed the evidence. The defense rested heavily on the lack of identification implicating the two Hoggles. Very little was said about the defendant Cook, except that he did not deliver the blow. Argument was made concerning the injuries not being the same and that the treatment which Rev. Reeb received was "grossly negligent."

Following the defense's argument, the prosecution closed by pointing out that the Judge would charge that the defendant Cook need not be identified as being the person delivering the blow, as long as he was a member of a group, one of which did deliver the blow.

The Judge's charge to the jury was very good, in my opinion. He charged with respect to each and every element of manslaughter in the first and second degree and murder in the first and second degree, and said that they could find each and every defendant guilty of any one of these offenses. He also charged that it was not necessary to identify the defendant who struck the blow; that it was only necessary to find one or all of the defendants were part of a group that contained an individual who struck the fatal blow. (The law of Alabama, much like that of the Federal Government, has abolished the distinction between accessories before and after the fact, as well as principals in the first and second degree.) The Judge continually used Cook as an example in the charge, but at all times, he made it clear that what he was saying applied to the Hoggle brothers, as well.

The jury returned a verdict of "not guilty" as to all defendants in 97 minutes after they began deliberations, a most unusual occurrence.

There was no real defense offered for the defendant Cook, except that during the day he was wearing a dark suit, as compared to what Mr. Miller and Mr. Olsen described as a light suit. The defense's own witnesses clearly put Elmer Cook at the scene, and the State's witnesses made him one of the attackers. The Judge charged that this would be enough to convict. The jury took only a limited hour and one-half to determine otherwise. In my opinion, the case involving Cook should have taken a great deal longer to consider. This belief is bolstered by the reported fact (although inadmissable as evidence) that Elmer Cook had been arrested 25 times and charged with assault and battery on 17 occasions.

The Reeb Murder Trial in Selma

The acquittal of the three defendants in the trial relating to the murder of our colleague, the Rev. Mr. James J. Reeb, was held in Selma early in December. Rev. Orloff Miller and Rev. Clark Olsen, who were with Reeb on the night of the fatal attack, were witnesses. Also present in the courtroom was Daniel B. Bickford, special counsel to the Unitarian Universalist Association and a Boston attorney, and the Rev. Mr. Walter Royal Jones, chairman of the Unitarian Universalist Commission on Religion and Race. The presence of all four was made possible through grants from the Unitarian Universalist Freedom Fund.

The day after the verdict was announced, a press conference was held at 25 Beacon Street involving Dr. Dana McLean Greeley and Mr. Bickford. Their prepared statements are given below. The Commission on Religion and Race is making available longer statements by Mr. Bickford and by Mr. Jones and these may be obtained gratis from the Commission at 25 Beacon Street, Boston, MA 02108.

One method of protesting the acquittal of the men accused of James Reeb's murder is to work for new federal legislation to strengthen the judicial process in the South. The Board of Trustees of the Unitarian Universalist Association adopted a resolution on protection against racial assault in their meeting on October 12, 1965. The Washington Office of the denomination is now working closely with the Leadership Conference on Civil Rights for the enactment of such legislation early in the next session of Congress. Further information will be available in the SR Newsletter.—H.A.J.

Dr. Dana M'Lean Greeley's Statement

The martyrdom of James J. Reeb is of deep and immeasurable concern to our denomination and, of course, to the entire nation. I found people this past summer in South Vietnam, in Europe, and even in Eastern Europe identifying James

Reeb with the best in our American democratic heritage. Therefore I fear what will be the worldwide reaction to this failure of justice in Selma yesterday.

We are dismayed to learn that the trial of the men accused of murdering the Rev. James Reeb and injuring two of our other ministers, the Rev. Orloff W. Miller and the Rev. Clark B. Olsen, has ended with what seems to be much less than justice.

Of course, revenge is not what anyone seeks. Jim Reeb is dead, and his ministry and life are now part of history.

On the other hand, rapid acquittal by the Selma, Ala., jury suggests that there is little protection under Southern justice from the violence perpetrated upon members of minority groups and upon persons trying to assist those minority groups to secure their legitimate rights.

This is one of the great unresolved problems involving civil rights in this country, and it is extremely disappointing to me that once again it appears that a Southern jury has refused to come to grips with this problem.

The rapid acquittal suggests that the jury did not take seriously the testimony of our two ministers who survived the attack last March ninth. It seems clear to us upon reading the testimony that one of the defendants should have been found guilty after being definitely identified.

All Americans should be aroused by the Selma acquittals, which leave unresolved the murder of James Reeb. Those guilty of the bombings, the beatings, the killings, and the snipings in the dark cannot remain unconfronted. The violence has to be checked.

We feel that the state of Alabama did not press hard enough for conviction of these men, but we understand that the Department of Justice has this case under consideration and intends to present evidence to the Federal Grand Jury.

We earnestly hope for the democratic accomplishment of justice in this and all comparable situations and urge again such federal legislation as in the future will strengthen the judicial process.

Our special counsel, Mr. Daniel B. Bickford, of Ely, Bartlett, Brown and Proctor and former U.S. Attorney, who observed the conduct of the trial, will discuss this trial in greater detail.

MR. DANIEL B. BICKFORD'S STATEMENT

The following questions arise from observing the trial of the defendants in the so-called Reeb murder trial.

Having in mind that the Circuit Solicitor or prosecutor, Blanchard McLeod, had told newsmen in an interview prior to the trial that "I don't have a very strong case," the question must be asked as to what efforts the Solicitor employed to obtain witnesses to this fatal attack. One witness described as a "material witness" did not appear, apparently having moved to Mississippi. Another apparent witness to the fatal attack was disqualified by the Judge as mentally incompetent, without any indication what the testimony was on the basis of a Selma physician's testimony from a reading of the man's medical records, the last entry being made in 1959. No effort was made by the Solicitor to qualify this witness. This would not have been difficult in view of the fact that the witness had testified that he understood the oath and he knew the difference between truth and fantasy. His credibility may have been questioned, but should not his testimony have been heard?

Another question must be asked regarding the impaneling of a juror who was a brother of one of the defenders' key witnesses. The witness was known to be a defense witness prior to the impaneling of the jury. Should not the relationship of the juror to the prospective witness have been brought to the attention of the court either by the defendant's counsel or by the juror himself? Should not the Solicitor have moved for a mis-trial when he heard of the relationship after the testimony of the witness?

The question of the propriety of the Sheriff appearing in the jury room during the deliberation and vote is a question which must be resolved.

The most difficult problem facing the Solicitor in this case was the empaneling of a jury which would receive the evidence in a murder trial involving a civil rights worker. The Solicitor did propound one question to the prospective jurors regarding their prejudice to hear the evidence. However, the question was propounded to the jury as a group. Although three jurors did respond that it would affect their deliberations, the other jurors stood mute. The court determined, and the Solicitor accepted, the findings that silence was tantamount to a negative

answer. The question now should be asked as to whether a juror should have been asked to volunteer that he was prejudiced or whether the Solicitor should have examined each juror individually with respect to each juror's prejudices in respect to civil rights workers?

PROTECTION AGAINST RACIAL ASSAULT

Whereas, enactment of the Civil Rights Act of 1964 and of the Voting Rights Act of 1965 has made possible great advances toward equality of rights and opportunity for all Americans in the areas of education, public accommodations and facilities, employment, Federal-aid programs, and the exercise of the franchise; and

Whereas, the full and free exercise of these new rights and opportunities is dependent on the safety of the individual from intimidation, coercion, and bodily harms, or threats of bodily harm; and

Whereas, many brave men and women, including ministers of this free faith, working to secure these rights and opportunities for themselves and their fellow men, have suffered bodily harm and even death in the effort; and

Whereas, the Board of Trustees of the Unitarian Universalist Association is mindful of its responsibility to those of its own ministers and laymen who are risking their lives in the cause of racial justice and brotherhood, and is mindful of its concern for the safety and well-being of all those engaged in the movement for equal rights and opportunities;

Be it therefore resolved that the Board of Trustees of the Unitarian Universalist Association urges the Justice Department to press with renewed vigor the prosecution under existing law, of those guilty of the beatings, the shootings, the bombings and the killings; and

Further resolves that the Board of Trustees of the Unitarian Universalist Association urges the President to recommend and the Congress to enact new Federal legislation at the earliest moment to protect the security of the individual from assault or threatened assault upon his person or property, where that assault has a racial purpose or effect; and to provide civil damages for the victim of such assault.

Adopted October 12, 1965.

[From the New York Times, Dec. 14, 1965]

MURDER UNPUNISHED

The name of the Rev. James J. Reeb can now be added to a sad, strange honor roll. Other names on that roll read: Andrew Goodman, Michael Shwerner, James Chaney, Mrs. Viola Liuzzo, Medgar Evers, Jimmy Lee Jackson and Jonathan Daniels. Negro and white, cleric and layman, man and woman, they share the common fate that they died in the South for their civil rights convictions—and that their murders go unpunished.

The trial of the three men accused of Mr. Reeb's murder that ended the other day in an acquittal in Selma, Ala., was not an isolated event. It featured testimony by two eyewitnesses positively identifying one of the defendants as the leader of the gang that attacked the dead man. But their words carried no weight with a local jury apparently determined not to convict. Two months ago another jury in Haynesville, Ala., ignored equally compelling evidence in the murder of Jonathan Daniels, a New Hampshire seminarian.

Such verdicts have to be "expected from time to time. They are the price you have to pay for the jury system." That was the comment of Attorney General Nicholas Katzenbach after the Hayneville fiasco. It seemed an inadequate response to the problem then; it is even more defective now.

The need is clear—as we have noted here before—for a law making it a Federal crime to commit an act of violence or to threaten violence with racial purpose or effect against any person. The United States Commission on Civil Rights recommended such a law last month; bills to this effect have been introduced in Congress by members of both parties but have not been acted upon because of Justice Department opposition.

One reason for that opposition is the reluctance of the Federal Bureau of Investigation to become, in effect, a local police agency trying to solve local murders. The F.B.I.'s concern is understandable but exaggerated. The violence

in the South is not likely to persist. It is the last spasm of a dying social order founded upon racial inequality and intimidation. If the Federal Government makes it plain that it will not permit violence to go unpunished, these murders will dwindle, for the men who commit them are as cowardly as they are despicable.

The fact that the three men who were accused of the murder of Mrs. Liuzzo and acquitted in a state court were subsequently convicted in a Federal court of conspiracy to deprive the dead woman of her civil rights is not a sufficient answer to the problem. A conspiracy statute is an awkward device with which to prosecute a capital offense, and the penalties possible under it are incommensurate with the gravity of the crime. A Federal law facing up to the full range and seriousness of these crimes is necessary. Murder can no longer go unpunished.

[From the Boston Globe, Dec. 11, 1965]

WHAT COULD WE EXPECT?

The trial of three men in Selma, Ala., for the murder of the Rev. James J. Reeb of Boston has ended with the acquittal of all three. The jury's verdict was what had been expected.

Fifteen white spectators in the courtroom applauded, and 100 Negroes groaned.

This is not to say that the verdict was not necessarily in accordance with what evidence was presented. Perhaps it was. But when the defense counsel called it "a tribute to the jury system," he should have said, "Southern jury system," which allows the brother of a witness to be a juror.

The Reeb case, in any event, is not ended any more than the quest for justice is. Other recent cases in the South have shown that the Federal Government can invoke the new Civil Rights Act against acquitted defendants. It should do so now.

MISCELLANEOUS PUBLICATIONS

Conscientious Objectors Packet. A wide selection of material, including the 110-page "Handbook for C.O.'s," prepared for young men contemplating alternative service $1.00

To Bear Witness: Unitarian Universalist Selma to Montgomery. Picture Book. Published by Dept. of Adult Programs for Freedom Fund. Softcover, 75¢ each; hardcover, $2.50. 13 softcover plus 1 bound for $10; 99 softcover plus 1 bound for $50 ..... .75

Order all publications from the Distribution Center, 25 Beacon Street, Boston, Massachusetts 02108. Enclose check with order payable to Unitarian Universalist Association.

Reverend JONES. One of these observers was Mr. Daniel B. Bickford, a former prosecuting attorney in the Boston area, and special counsel for the Unitarian Universalist Association. I was the other.

I would like to take up each title of the bill, in order, and comment on each.

TITLES I AND II.—FEDERAL AND STATE JURIES

We are in general accord with the provisions of titles I and II relating to insuring fair representation of a cross section of the community on grand and petit juries in Federal and State jurisdictions. However, we wonder if too much reliance is placed on the defendants or litigants to initiate action on discrimination in selection of jurors.

We suggest consideration be given an automatic triggering device similar to that enacted in the Voting Rights Act of 1965 where, as you know, Federal examiners, or registrars, are authorized to be sent into any State where that State's voter registration or total vote in the 1964 presidential election was less than 50 percent of the voting-age population. This has proven to be a most effective way of getting the desired goal achieved, as witness the registration of thousands of new Negro voters in the Deep South.

Federal action to insure representative juries should be triggered upon a finding that, over a certain period of time, the jury selection failed to adequately reflect a cross section of the population of the district.

An acceptable formula is found in the Douglas-Case bill, S. 2923, providing Federal action "whenever it is shown that over a period of two years the ratio which the number of persons of any race or color within the county or other political subdivision bears to the total population of said county or other political subdivision exceeds by one-third or more the ratio which the number of persons of that race or color serving on grand and petit juries bears to the total number of persons serving on such juries, or the ratio which the number of persons of that race or color registered to vote bears to the total number of persons registered to vote * * *."

TITLE III.—NONDISCRIMINATION IN PUBLIC EDUCATION AND OTHER PUBLIC FACILITIES

We are delighted that the administration is providing better enforcement tools for achieving desegregation of public schools and public facilities by giving the Attorney General power to institute civil actions in these cases. It was placing too heavy a burden on

individual persons, subject to extreme community pressures and intimidation, to take the initiative by written complaint as provided in the 1964 act. And it was a needless timewaster to require the Attorney General to sue only if he determines that the aggrieved person or other interested groups are unable to afford the burden of litigation themselves.

Adoption of title III should speed up the process of desegregation of the public schools and other public facilities. It is now 12 years since the Brown decision and, according to the U.S. Office of Education, only 7.5 percent of the Negro students in the 11 States of the Deep South are enrolled in school this year with white pupils. This is still tokenism and unfair to a generation of children.

TITLE IV.—PREVENTION OF DISCRIMINATION IN THE SALE OR RENTAL OF HOUSING

President Johnson has thrown down a challenge to all of us to break the vicious circle of discrimination and segregation by attacking head on the problem of the ghettoizing of the Negro and other minority groups. This is a problem of increasing severity in our northern cities and metropolitan areas.

The Negro, the Puerto Rican, the Mexican-American has not, generally, been able to participate in the great post-World War II move to the suburbs of his white brother. The move outward from the core city, with its decaying slums and drab neighborhoods into the suburbs with their new homes and with new well-equipped and staffed schools to serve their children, has meant a liberation for many millions of our people. The members of minority groups have not shared in this liberation and instead have been kept confined to the least desirable neighborhoods by a "white noose" around the core cities.

If I may depart from my text for a moment I would like to cite a little personal experience here because in my local community I serve as the chairman of the real estate subcommittee on the fair housing committee in Charlottesville and Albemarle. For the past year we have been trying to find homes for Negro families outside of the ghetto area. These families range in economic status from a postal employee at one end of the scale to an executive of the Department of Health, Education, and Welfare at the other. These persons by any fair standards would make good neighbors in any community. And yet we have been rebuffed place after place, not only by private owners, but by realtors.

I may say also that the persons coming to us for relief or help in this respect have in many cases long since exhausted all efforts to obtain housing through the realtors in the community. It is not that all realtors are unsympathetic. Several of them are sympathetic. But under the present circumstances they are unable economically to take the risk even of showing houses to these persons, although they are personally qualified as neighbors by any other standard.

I think that the passage of a law of this kind would remove the onus from these willing realtors, and open the door for a freer movement out of the ghetto into the suburbs where they would be perfectly good neighbors by any normal standards.

We are impressed with the broad coverage of this title and we think it extremely important that the Congress make manifest, as in section 401, that:

> It is the policy of the United States to prevent, and the right of every person to be protected against, discrimination on account of race, color, religion, or national origin in the purchase, rental, lease, financing, use and occupancy of housing throughout the nation.

We are disappointed that the President did not see fit to do by executive means what he is now asking by legislative means. We would rather have had him extend President Kennedy's Executive Order No. 11063 on Equal Opportunity in Housing to include all mortgage loans made by financing institutions which are regulated or supervised by the Federal Government and to broaden coverage of the order to include all federally assisted housing, not just that built after November 20, 1962.

Also, we feel the housing title may have the same defect which is found in the equal employment opportunity title of the Civil Rights Act of 1964; namely, that reliance for enforcement is placed on the courts and no administrative remedy is possible. This title would be greatly strengthened if an administrative agency—a commission on equal opportunity in housing, for example—were empowered to issue cease and desist orders when it finds cases of discrimination in housing. Of course, to safeguard rights of all parties, judicial review of administrative actions should be provided.

TITLE V.—INTERFERENCE WITH RIGHTS

This title is, perhaps, the most urgently needed civil rights reform at this time.

Tragically, as the advances in civil rights and equality under the law have been made, certain persons, feeling they can no longer preserve the old ways of segregation and subjugation by legal means, have resorted to terror and violence. The night rider and the bomber and sniper have made their reappearance in American life.

Striking in the nighttime on a lonely road, or even in broad daylight on a peaceful Sunday morning, these terrorists have sought to cow the Negro into acceptance of the second-class station in life which has been his for so long. And the white person who tries to aid the Negro in his cause finds that he, too, is in danger of life and limb from these same cowardly terrorist elements.

The list of the victims of terror is long and it is interracial—the four little Sunday school girls in Birmingham—Addie Mae Collins, Denise McNair, Carol Robertson, Cynthia Diane Wesley; the three civil rights workers, two white, one Negro, killed in Philadelphia, Miss.—Michael Schwerner, Andrew Goodman, and James Chaney; Medgar Evers, shot and killed in front of his Jackson, Miss., home; Lemuel Penn, gunned down on a Georgia highway, and last spring, in fast succession, Jimmie Lee Jackson, fatally wounded by police in Marion, Ala., the Reverend James Reeb mortally clubbed in the streets of Selma, and Mrs. Viola Greeg Liuzzo, shot to death on Highway 50 following the Selma-Montgomery march, and last summer the Reverend Jonathan Daniels shot and killed by a deputy sheriff in Hayneville, Ala.

Many more killings, physical assaults, and bombings could be listed. Most of these crimes are unsolved, and the killers and assailants have gone unpunished. It goes without saying that much of the violence has taken place because the perpetrators thought they could commit these crimes with impunity—they knew that southern white juries would acquit regardless of evidence and they knew there is no Federal crime for murder, and penalties under the old Reconstruction statutes are light.

Some 93 deaths attributable to race or civil rights activity have been documented by the Southern Regional Council from May 1957 to September 1965. Birmingham has had at least 29 bombings since 1957. Some 35 churches were burned and 31 homes and other buildings bombed or burned in Mississippi in a 4-month period of 1964.

This terror hit home to those of us of the Unitarian Universalist movement in the past year. James J. Reeb, a dedicated young man, a member of our Commission on Religion and Race, who worked hard in this city and in Boston to help the poor and defenseless and to bring the races together, was one of our ministers.

Donald A. Thompson, minister of our church in Jackson, Miss., active in the Mississippi Council on Human Relations, was struck down in a shotgun ambush last summer within a few days of the Jonathan Daniels slaying. Luckily, Mr. Thompson survived this unsolved shooting.

And, of course, we are all very well aware of the recent shooting of Mr. James Meredith.

Title V will do much to strengthen the defects found in both sections 241 and 242 of the U.S. Criminal Code, in that it specifies the rights protected by the Constitution and the 14th amendment.

Furthermore, it makes violations of these rights punishable by penalties that fit the crime. Whereas, sections 241 and 242 carry maximum sentences of 10 years and 1 year, respectively, this new title will carry a maximum sentence of life imprisonment for taking a life.

Here again I would like to make a parenthetical comment.

As a longtime opponent of capital punishment, I am very happy that this was made the supreme punishment for taking a life. It is my belief that State laws which prescribe capital punishment for these crimes actually work against the bringing in of verdicts against white persons accused of killing other persons in racial strife.

I am sure—I cannot prove this, I feel this—that in the case of the accused slayers of James Reeb, this was a factor in the background of the jury's mind. There were other factors there which played a part in arriving at their verdict.

Again, I can only speak of my own opinion. I felt that the court tried very hard to execute the law justly, but there were some odd things. Although there were numerous Negroes in the original panel, none of them appeared on the final jury. One of the jurists turned out to be a brother of the defense star witness, and there were other peculiarities.

The whole climate of Selma argued against bringing in a verdict even if the evidence had been strong, which I must admit as a layman it did not seem to me to be very strong, although I felt (again as a layman) that the positive identification of one of the assailants had never been successfully shaken.

To introduce the Federal power and the Federal authority into this area by making a crime such as that committed against James Reeb a Federal crime in addition to being a State crime would bring the resources of the Federal agencies of investigation to the process of acquiring evidence and presenting the cast. It would have brought a different jury to be paneled with respect to it. I think there might very well have been a different verdict under those circumstances.

But I am advised by Mr. John Doar of the Justice Department that it is not anticipated at this time that a case against these particular defendants will be brought by the Federal Government, partly because the crime does not technically come under the 1870 statute. It was not committed under the color of law although it was committed in a climate which had been covered in part by a Federal injunction. Nevertheless, these technicalities impede what seems to me to be a carrying out of justice in this case.

Coupled with the jury reforms in this bill, these new penalties ought to serve as strong deterrent to the terrorists, and go far toward protecting the rights of Negroes, workers for civil rights, and peaceful demonstrators.

We would ask, additionally, that there ought to be provision made for civil indemnification of the victims or survivors of victims of racial assault. Insofar as it is proved in proper hearings that the injury or death resulted in whole or in part from action taken under color of law, the political subdivision and/or the State under whose authority such action was taken should be held liable along with the person or persons committing the act of assault.

EQUAL EMPLOYMENT OPPORTUNITY

We believe an additional title ought to be created in this bill, to correct deficiencies in title VII of the Civil Rights Act of 1964, dealing with equal employment opportunity.

As mentioned earlier, one of the great defects in the employment title of the 1964 act was that it did not provide the administrative agency, in this case the Equal Employment Opportunity Commission, the power to issue cease-and-desist orders upon making a finding of an unfair employment practice. Instead, the 1964 law, on the one hand, relies heavily on medication and conciliation (certainly important first steps) and, on the other hand, upon bringing suits into court as a last resort.

The Commission should have administrative enforcement powers as other Federal regulatory agencies and as already exist in 27 State fair employment agencies.

Also, it would be desirable for the equal employment opportunity title to cover public employees on State, county, and municipal levels. Federal employees are covered presently by Executive order but the administration of justice in many parts of our land is distorted by white officials and personnel in State and county courthouses and police forces.

We therefore recommend that a new title VI incorporate the excellent provisions of H.R. 10065 (Hawkins bill) which passed the House on April 27 by overwhelming vote and that these provisions be amended to cover State and local public employees.

I think President Johnson expressed it well in summing up his civil rights message to Congress of April 28 when he said:

> We are engaged in a great adventure—as great as that of the last century, when our fathers marched to the western frontier. Our frontier today is of human beings, not of land.
>
> If we are able to open that frontier, to free each child to become the best that is in him to become, our reward—both spiritual and material—will exceed any that we gained a century ago through territorial expansion.

The Unitarian Universalist Association strongly supports the Civil Rights Act of 1966, with strengthening amendments, and urges this committee and the Congress to speedily enact it into law.

We thank you very much.

Senator JAVITS. Thank you very much, Reverend Jones.

The consensus on racial justice which you have attached to your statement will be made a part of the record without objection.

(The document referred to follows:)

UNITARIAN UNIVERSALIST STATEMENT OF CONSENSUS ON RACIAL JUSTICE

Inasmuch as one of the purposes and objectives of the Unitarian Universalist Association, as stated in Article II, Section 2 of the Constitution, is "To affirm, defend and promote the supreme worth of every human personality, the dignity of man, and the use of the democratic method in human relationships"; and

Inasmuch as the General Assembly of the Unitarian Universalist Association of 1962 affirmed that segregation and discrimination, wherever practiced, continue to be a matter of major national and international concern and reflect attitudes contrary to moral, religious and ethical commitments;

Unitarian Universalists pledge themselves to:

Work to eliminate all vestiges of discrimination and segregation in their churches and fellowships and to encourage the integration of congregations and of the Unitarian Universalist ministry, and

Work for integration in all phases of life in the community.

SEGREGATION AND DISCRIMINATION

The 1962 General Assembly's resolution also continues "Such discrimination is economically wasteful and psychologically destructive to members both of majority and minority groups. The treatment of a large part of our population as second-class citizens and the indignities to which they are subjected destroy confidence in the moral leadership of the United States.

In spite of the passage of Civil Rights Acts in 1957 and 1960, the comprehensive Civil Rights Acts of 1964, and the Voting Rights Act of 1965, inequalities of treatment and opportunity continue to exist in American society. While these inequalities affect members of all minority groups, attention has been focussed on the special problems of the Negro minority in the United States. Negro citizens and other persons engaged in the civil rights movement find themselves at the mercy of individuals who hope to prevent progress toward full equality of the races by resorting to physical violence and acts of terrorism, and the victims are often denied justice when they face all-white courts and juries.

A double standard of justice exists in some communities and states. All-white police forces, court officials, judges and juries, and segregated courtrooms and jails have operated to deprive minority group persons of the equal protection of the laws in violation of the United States Constitution. In everyday terms this means, at the least, harrassment and discourtesy from law officers and, at the most, summary trials without adequate counsel, and severe and unreasonable sentences or fines meted out, especially where the offense may be committed against a white man. Conversely, whites accused of crimes of violence against minority group persons or civil rights workers of any race, are acquitted by prejudiced juries or otherwise treated leniently, especially in the South.

Members of the minority races and ethnic groups find much public school education still segregated in defiance of the landmark 1954 Supreme Court decl-

sion. They find doors to fair employment opportunities still closed in many places, face uneven compliance with the public accommodations part of the 1964 Civil Rights Act, and see authorities in some places closing rather than opening public facilities to all groups.

Probably the most difficult hurdle, aside from jobs and education, continues to be housing where the Northern Negro especially finds himself confined to the decaying neighborhoods of the central city and the avenues of escape to the white suburbs effectively blocked by restrictive real estate practices. The Federal Government, though possessing the power under the Civil Rights Act of 1964 to cut off the flow of Federal funds to programs and activities in the states which are administered in a discriminatory manner, has not chosen to exercise this power to any significant extent.

A whole private area of American life, including club associations, fraternal memberships, and, shamefully, church membership, remains almost totally segregated. Several states maintain laws forbidding racial intermarriage, thus arbitrarily interfering in the most sacred of human relationships.

Much remains to be done to implement the concern of Unitarian Universalists for the supreme worth of every human personality and the dignity of man.

RACIAL VIOLENCE AND THE ADMINISTRATION OF JUSTICE

The rise of violence in the political and social conflicts of American life endangers freedom of speech and assembly essential to democratic society. These freedoms and, in general, life, liberty, and the pursuit of happiness are, and have been, Federal rights of all citizens since the founding of the Republic. To secure these freedoms, the President should appoint a commission to investigate the collapse of law in such acts of terrorism and make remedial recommendations wherever constitutional rights are denied. The local police should invite the assistance of the FBI in cases of terrorism.

The Justice Department should press with renewed vigor the prosecution under existing law of those guilty of the beatings, the shootings, the bombings and the killings. The President is urged to recommend and the Congress to enact new Federal legislation at the earliest moment to protect the security of the individual from assault or threatened assault upon his person or property, where that assault has a racial purpose or effect, and to provide civil damages for the victim of such assault.

State and local officials are urged to curb police brutality, to institute human relations programs in local and state police departments, and to end the use of unwarranted curfews wherever they exist. Support is also urged for Federal legislation to protect individuals against unreasonable use of force by law enforcement officers and to make such law enforcement officers and their civilian superiors liable for civil damage suits for unnecessary and unreasonable use of force resulting in physical injury. Enforcement officers formally charged with unlawful violation of the rights of persons should be suspended from their duties pending trial. Local civilian review boards to hear complaints of police brutality should be established.

The Department of Justice should enforce existing laws such as the 1875 statute making jury discrimination punishable by fine of up to $5,000, and seek new legislation making for a uniform system of choosing jurors which will fairly reflect the racial composition of the court's jurisdiction. Also, legislation forbidding discrimination in appointment of court officers and police is needed.

The Justice Department and Federal Bureau of Investigation should make on-the-spot arrests where constitutional rights are being violated by local law enforcement officers or other persons, as they are empowered to do under existing law.

The President of the United States should appoint men to the Federal judiciary who are free of racial prejudice and who do not owe their political careers to the system of white supremacy.

Other needed reforms to assure equal protection of the law include support for public defenders for the indigent, installment paying of fines, and limits on excessive bail.

THE FRANCHISE

The right to vote is elemental in our American society. Efforts by the Federal Government to implement the provisions of the Voting Rights Act of 1965 should be supported so that all obstacles to the right to vote may be removed in localities where they still exist.

The efforts of private citizens in voter-registration campaigns should be supported and the Department of Justice should be vigilant to extend the protection of the law to these workers so that intimidation of any kind will not delay, hamper, impede, or pervert the exercise of the franchise.

Federal voting examiners should be used in every county in which discrimination still exists. Federal authorities should also observe voting subsequent to registration to make sure that once registered, persons are not prevented by any device from voting, and that their votes, once cast, shall be accurately tallied.

EDUCATION

Denial of equal opportunities for education on account of race or color continues to be widespread though several years have intervened since the historic Supreme Court declaration of 1954 that the United States Constitution forbids it. Such disregard for the supreme law of the land presents a moral crisis no less than that resulting from the violation of the human rights involved. Public schools should be promptly integrated at all levels.

Since passage of the Civil Rights Act of 1964, it is no longer necessary for the Executive Branch to rely on the Federal Courts for implementation. Therefore, the Office of Education should move speedily to require desegregation and integration of the nation's public schools, North and South, and to use the powers granted under Title VI of the Civil Rights Act of 1964 to withhold Federal-aid funds from school districts which continue to segregate white from minority group pupils. "Freedom of choice" plans achieve only token integration and leave minority group parents who exercise "free choice" exposed, in many localities, to intimidation and reprisals.

De facto segregation of schools is an unconscionable and harmful as formal segregation is unconstitutional. Citizens and government on all levels should work to correct discriminatory racial imbalance and improve the quality of education in the public schools.

We urge adequate preparation of teachers in the field of human relations so that they may give meaningful instruction in human relations and we encourage federal and state authorities to work towards that end.

Preschool education for socially disadvantaged and culturally deprived children should be a necessary preparation for school integration.

HOUSING

Comprehensive open-occupancy legislation should be enacted at all levels and such legislation should embody firm and unambiguous enforcement procedures. The President of the United States should be encouraged to extend the President's Executive Order No. 11063 on Equal Opportunity in Housing to include all mortgage loans made by financing institutions which are regulated or supervised by the Federal Government and that the Order cover federally-assisted housing, not just that built after November 20, 1962; and that more adequate funds be appropriated for the vigorous enforcement of the Executive Order.

Furthermore, members of our churches and fellowships should support such legislation at the state and municipal levels. In order to make such legislation effective, individual Unitarian Universalists should introduce into every phase of the acquisition, purchase, building, financing, and occupancy of real property the banning of discrimination due to race, religion, or nationality. Legislation should be encouraged, consistent with the objectives of open occupancy, to curb panic selling or blockbusting.

Our churches and fellowships and individual members should undertake active efforts with others in their own communities for the integration of their own neighborhoods and our members should scrutinize off-campus or sorority and fraternity housing in colleges and universities as it affects minority students or foreign students and other students and seek to eliminate discrimination.

Our churches and fellowships should call upon their individual members to make all housing, urban and suburban, new or old, which they control as owners, dealers, brokers, builders, or mortgagors, available to any qualified person, without regard to race, color, creed, or national origin; and should call upon all real estate dealers, brokers, and mortgagors, to do the same. Educational programs and other activities should be encouraged to promote equality of opportunity in housing.

Churches and fellowships should take the initiative in their communities to use funds provided in Section 221(d)(3) of the Federal Housing Act. This enables non profit groups, including churches and fellowships, either to build low-cost housing open to all groups or to renovate slum dwellings.

There is promise in the proposal of some urban authorities to slow down the building of mass low-cost public housing in or adjacent to racial ghettoes, thus reinforcing patterns of de facto segregation, and instead to scatter new low-cost housing in upper and middle-income white residential areas, thus integrating both neighborhoods and schools. To be commended also is the new federal program to subsidize the purchase and rental of a percentage of publicly subsidized middle-income housing for low-income families. Plans for the renewal of present ghetto areas should ultimately include provision for their integration. Unitarian Universalists should be involved in helping to win acceptance and support of such programs.

EMPLOYMENT

Discrimination in employment stifles individual initiative and wastes valuable human resources. Government at all levels should enact strong legislation to assure equal opportunity in employment in the conditions of labor and in hiring and firing procedures and in training and apprenticeship programs. Compensation should be nondiscriminatory. No person should be discriminated against on the basis of race, religion, national origin, or sex.

The Federal Equal Employment Opportunity Commission, activated in July 1965, should be given the power to issue cease and desist orders against employers who practice job discrimination. In the meantime, the Department of Justice should move to use its power under the Civil Rights Act of 1964 of filing suits to secure equal opportunity, where it finds a pattern or practice of discrimination. The Department of Defense and other government agencies should be urged to use, whenever necessary, the powers granted under Title VI of the Civil Rights Act of 1964, to bar bidding on contracts, or otherwise withhold funds, from those who practice racial discrimination in employment.

Unitarian Universalists as employers, should practice equality of opportunity, both in private enterprise and in public positions they may hold; and churches and fellowships are encouraged to hire members of minority races or nationalities in their institutions.

PUBLIC ACCOMMODATIONS AND FACILITIES

Freedom of access to places of public accommodation and public facilities is an essential condition to fulfillment of the ideal of human dignity. The individual must be free to seek food, drink, and lodging, to enjoy equal access to the marketplace, and to find recreation and nourishment.

Members of Unitarian Universalist churches are urged to use their personal influence in their local communities to secure service without discrimination in all places of public accommodation.

Progress has been made since the first student sit-ins of 1960 and since passage of the Civil Rights Act of 1964, in generally opening to all races, hotels, motels, restaurants and lunch counters, public libraries, museums, hospitals, parks, sports arenas, and theatres. However, in the 1964, Act, retail businesses, as such, are exempt from coverage, unless they have eating facilities, and clothing stores and barbershops are exempt unless they are part of a hotel facility. Spectator sports are covered, but consumer sports such as bowling lanes, swimming pools, tennis courts, golf courses, and golf ranges, privately owned but open to the public for profit, are also not covered. Legislation should be enacted at all levels of government to correct these weaknesses in the federal law.

FEDERAL-AID PROGRAMS

The Federal Government, which has been moving steadily forward in advancing the rights of its citizens, through a series of legislative acts and court decisions, should not continue to subsidize segregation and discrimination through its Federal-aid programs.

A powerful weapon for enforcement of civil rights is Title VI of the Civil Rights Act of 1964 which prohibits discrimination in all Federally-assisted programs. This section should be used less timidly and sparingly. Unnecessary delays in compliance are countenanced by the regulations issued by a number

of departments and agencies. This part of the Civil Rights Act should be revitalized.

The use of Executive Orders to direct all federal agencies to administer federal programs without discrimination should be extended; the Federal Government should withhold the expenditure of federal funds from such state or local programs and agencies which discriminate against persons on the basis of race or religion in the granting or disbursement of their facilities, property, finances, or services.

Federal hospital and nursing home construction funds provided under the Hill-Burton Act should be withdrawn from institutions that practice discrimination against minority group persons.

DEMONSTRATIONS AND CIVIL DISOBEDIENCE

The people have the constitutional right peacefully to assembly to petition for redress of grievances. Every protection of the law should be extended to secure this right for civil rights demonstrators and to protect them against individual, mob, or police violence. Injunctive power should be granted to the Attorney General to protect the constitutional rights of petition and assembly.

Individuals should be defended in their right to engage in nonviolent demonstrations and should be supported in the exercise of their moral choice to engage in responsible civil disobedience for greater racial justice.

INTERRACIAL MARRIAGE AND ADOPTION

Marriage between two persons is a sacred human institution. Persons who enter into the marriage bond should be able to do so with complete freedom of choice, since the choice of a marriage partner is a personal, not a public, decision. All laws which prohibit, inhibit or hamper marriage or cohabitation between persons because of different races, religions, or national origins should be nullified or repealed.

Adoption agencies are evidencing a more open attitude regarding the adoption of children of races other than that of the adoptive parents. This new attitude is commendable, especially in view of the pressing need of adoptive homes for children of mixed or minority races.

PERSONAL ASSOCIATIONS

All Unitarian Universalists should refrain wherever possible from joining any and all organizations which discriminate on the basis of race, creed, and national origin and all individuals should work for the elimination of discrimination in any organization of which they are already members.

Individuals should work in human relations councils and similar groups formed to further better understanding among people and should improve their practices in all areas of human relationships.

INTEGRATION OF THE CHURCHES AND MINISTRY

The Commission on Religion and Race is reaffirmed and its duty shall continue to be to explore, develop, stimulate, and implement programs and actions to promote the complete integration of Negroes and other minority persons into our congregations, denominational life and ministry and into the community.

The Unitarian Universalist ministry should become integrated as rapidly as possible. This goal is essential for the denomination as a whole, for the individual churches, and for individual laymen as well as for the clergymen involved. This goal can be reached through special efforts in the recruitment, training, and settlement of Negroes and members of other minority groups. The denomination—its departments, churches, and agencies—should give this goal a high priority. The denomination needs the services of trained Negro ministers as much as, and probably more than, these ministers need opportunities within the denomination.

Integration of our congregations is a continuing goal. Efforts beyond the mere declaration of open membership may be necessary if congregations are to become truly inclusive: use of the communications media, including the ethnic press, personal invitations to friends to attend services and meetings, and most importantly, the active involvement of the congregation and minister in the human rights movement.

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The sincerity of our commitment to racial justice will be proven by our response, as a denomination and as members of churches and fellowships, to a variety of tests. Congregations are urged to include members of ethnic minorities in leadership positions on church boards, committees, religious education and youth programs, and other church activities. The content of programs for youth and adults should reflect our concern for human brotherhood. Particular attention should be paid to the religious education curriculum so that textbooks and instruction promote the goal of integration. Exchange programs with Negro churches, groups, and individuals should be encouraged. Employment of staff, purchase of supplies, contracting for building, purchase, sale, rental, or use of property, should all be done with the church or fellowship always making the stipulation that it practices integration and that it does business only with firms which practice integration in their hiring and other policies. Each church or fellowship should examine its investments and loans and do business only with firms which are non-discriminatory and integrationist in their employment practices. Churches and fellowships should patronize places of public accommodation which are open to all.

This consensus is adopted by the 1966 General Assembly of the Unitarian Universalist Association, consisting of a broadly representative group of laymen and ministers. This consensus reflects a substantial preponderance of opinion, although not necessarily unanimity on all points, of the majority of individuals present at the General Assembly and presumably of a substantial majority of members of our local churches and fellowships. Since this denomination cherishes and recognizes the freedom of individual members, this consensus does not presume to speak for all delegates to the General Assembly or all members of our Unitarian Universalist churches and fellowships. We recognize that strong differences of opinion may exist on specific questions among sincere and thoughtful Unitarian Universalists notwithstanding their common religious affiliation.

As adopted by the fifth general assembly of the Unitarian Universalist Association at Hollywood, Florida, May 20, 1966. The vote to adopt was virtually unanimous.

Senator JAVITS. May I say, Reverend Jones, that you have given me an opportunity which I value very much to comment briefly on the role of the religious organizations in the civil rights struggle.

I think it has been most creditable to the Protestant, Catholic, and Jewish faiths of the country that many ministers have participated in civil rights marches and have taken an active part in the civil rights movement. As you have just said, there are many martyrs in this field, including the Reverend Reeb, whose killing was a tragic and direct martyrdom for the civil rights cause.

What you have done is to identify this cause with the morality of the country: and it is a moral cause. You have also identified it with the meek capacity of religious faith to express indignation. You have rather quietly and in a gentlemanly way spoken of the murders and the burnings, and to this may be added at the very least hundreds of beatings and other incidents which do not qualify as heinous crimes comparable to those you have specifically mentioned.

That this should occur in our country, citizens are denied their constitutional rights in 1965 and 1966 is almost beyond belief. We should be much more indignant than we are, and indignance is an extremely desirable quality which religion brings to this cause. We should not tolerate denial of a citizen's constitutional rights for a moment.

Many of the things to which you have testified I have already covered by amendments to this bill and to the bill on discrimination in employment, which is in the Committee on Labor and Public Welfare, on which I am the ranking member. However, to have introduced the

amendments is a long way from getting the law enacted, and the law enacted is a long way from enforcement, as you have shown yourself by the figure of 7½ percent of the South's Negro children who are even now in integrated conditions in schools.

It is not always those who are against us who have a tendency to go a little slowly or not to do what is right, and I could not agree with you more about the President and the Executive order on housing.

I think the President is sincerely devoted to civil rights. But I think the President has made a very serious error in assuming that he is going to get as much from the Congress on the housing section as he could get by the stroke of the pen which would take in four-fifths of all housing; here it is going to be a big issue and may very well be very seriously damaged. What his reasons are I cannot fathom, but certainly the result is a very bad one as far as the cause is concerned.

I hope very much that you will keep up your work so that ministers like the Reverend Reeb may be honored as the leaders and saints that they are, and I can assure you that people like myself in the Congress will certainly move heaven and earth to be worthy of the cause which has such exalted support.

May I ask you just the one question. I was very impressed with the other things that you have answered or which are answered by the amendments already introduced.

I would like to ask you about your observations at the trial of those charged with the killing of Reverend Reeb.

I understand that there were only 13 Negroes on the jury panel of 131.

Reverend JONES. There were originally, according to the newspaper reports, 13. I only observed three or four and none of those were selected.

Senator JAVITS. And so it was an all-white jury?

Reverend JONES. Yes.

Senator JAVITS. And the atmosphere, as you have already said, was hardly conducive to——

Reverend JONES. The climate of the community was so abundantly plain that when we first arrived there, the courtroom was filled with 75 or more persons as character witnesses for the accused men. They were recorded by the court and excused, but this was just a temper, an index of the general temper of the community with respect to these particular men.

Senator JAVITS. How do you explain, Mr. Jones, that a religious people—and the people in the South are very largely religious, with much more church attendance than in many other parts of the country—how do you account for the moral justification in terms of religious faith of a whole community like the one that you saw?

Reverend JONES. I am sure that they have a very strong sense of community solidarity, and that their feelings of moral responsibility tend to be limited to that rather visible and close community. I am sure they regarded not only James Reeb but all of those who went to Selma at that time, as intruders with no real justification for being there, as creators of disturbance and therefore a challenge to law and order in the community. This was the view that they had.

I know that almost all communities tend to draw lines somewhere, respecting the people they include in their feeling of moral respon-

sibility toward and those they do not. We always have the "we" and the "they," and we protect the lives of the people who are in the circle that we endorse. The people that are outside the circle we either are callous about, or possibly even hostile.

My feeling is that these people feel there is no compromise with their religious views, that they are defending the sanctity of the community which embodies these views. This is the way in which I am sure they justify it to themselves.

Senator JAVITS. Reverend Jones, do you feel that acts of this character against a human being indicate a bankruptcy of religious teaching or religious leadership in a community?

Reverend JONES. I think that an essential burden of religion, particularly in the Judea-Christian tradition has been the potential universal community which embodies all persons. Therefore all people come under the same moral laws and need to be respected in the same way. Ancient Israel had a law respecting the sojourner and the stranger in the land handed down by Moses. I am sure that some of the Hebrew people at that time must have had the same feelings of an exclusive community. But the law for them was that you shall treat the sojourner and the stranger by the same law as you treat yourself, because you once were strangers and sojourners in a foreign land. And there is this implicit universality which is a part of our Western heritage I think has been ineffectively or inadequately presented in the religion of some of these people.

Senator JAVITS. Have the organized religious groups had a sufficient impact upon each other so that this kind of inspiration would be communicated to ministers in other areas of the country where there is this deficiency in religious understanding?

In other words, they may be just as heroic as you gentlemen have been in the actual struggle. Has there been any real effort to inspire each other to call forth higher standards on the part of those who represent the faiths in these communities?

Reverend JONES. I am sure that the record will show that all of the major denominations have taken forward stands in this respect, and called upon their congregations and ministers to be sensitive to this issue, and to promote it in their own way in their own communities. I cannot cite chapter and verse on this, but I know, for example, that the Presbyterian Church has just recently taken a very advanced position with, I believe, disciplinary measures respecting their congregations and clergy in this matter. But there is a rising tide of consensus among people of all churches and denominations, Protestants, Catholic, Jewish, all kinds. To the level, to the extent to which we are able to have good communication throughout the length and breadth of the land in our denominations, this morality is being born.

Senator JAVITS. May I say that I am glad to hear what you have said about discipline, because it seems to me that silence on these matters is as much of a dereliction in one who is a spiritual leader as speaking out and preaching a false doctrine.

I do not think there is any refuge in just being silent because the community is known to feel a certain way on race relations.

Reverend JONES. In addition to pronouncements, many denominations cooperate in local projects. We have what we call the Selma presence, for example, which is jointly sponsored by the National

Catholic Welfare Conference, the American Association of Jewish Congregations, the American Unitarian Association, I believe the National Council of Churches has something in there, to maintain lines of communication in the Selma community, attempting to build some bridges between the Negro and the white segments of the community, and to, as much as it is possible for us to, reshape the climate.

Senator JAVITS. May I say, Reverend Jones, and I am sure you feel as I do, that one does not condemn every person in a community.

Reverend JONES. By no means.

Senator JAVITS. There are many very enlightened people who have suffered probably as much as any of us in these very communities, and I do not exculpate them if they do not fight and speak up, but I think it is the climate we are talking about; is that not correct?

Reverend JONES. That is right.

Senator JAVITS. Rather than individuals.

Reverend JONES. That is correct.

Senator JAVITS. And also, I am sure that you feel as I do about the jury system. We value the jury system. We do not want to impair it. I have been very careful myself as a lawyer not to impugn the jury even in the case you described, because the system is more important than any of us or any case. This is all the more reason for endeavoring to purify the system by a bill like this one. You would agree with that?

Reverend JONES. Yes, indeed.

Senator JAVITS. And that is the basis for your advocacy of the automatic triggering device?

Reverend JONES. That is correct.

Senator JAVITS. With which I thoroughly agree.

Does counsel to the committee have any questions?

Mr. AUTRY. Just three brief questions, Mr. Chairman.

Reverend Jones, on page 2 of your statement, under the subtitle "Federal and State Juries," the second paragraph you "suggest consideration of an automatic triggering device similar to that enacted in the Voting Rights Act of 1965."

Do you feel that this is needed in both titles I and II, or is this recommendation limited to title II and the State jury system?

Reverend JONES. I would like Mr. Jones to answer this.

Mr. AUTRY. I just did not think it was clear from your statement.

Mr. JONES. I think we feel this is most vital in terms of the State juries, and that it would not apply to the Federal.

Mr. AUTRY. Thank you.

On page 3 you give the percentages of the Office of Education to the effect that 7.5 percent of the Negro students in the 11 States of the Deep South are enrolled with white pupils.

You do not happen to have similar statistics for the record for States outside the South, do you?

Reverend JONES. No, I do not.

Mr. AUTRY. On page 7, and this is the last question, you endorse amendments and proposals before the committee to indemnify the victims of civil rights crimes and racial assaults.

Reverend JONES. Yes.

Mr. AUTRY. Would you limit it to these crimes or would you have it include the victims of all crimes or assaults?

Reverend JONES. We are dealing here with efforts of people to attain their rights which are guaranteed by the Constitution of the United States. This seems to me to be a limited area. People who have been victimized in a legitimate constitutional effort deserve this indemnification under this law, I think.

Mr. AUTRY. Thank you.

That is all, Mr. Chairman.

Senator JAVITS. On the issue of indemnification, I have an amendment to provide a $10 million fund for the purpose, and as I see its justification, it is because we are harvesting violence by our failure over the past 100 years to do all we could to enforce our laws. The same cannot be said of the criminal laws.

Reverend JONES. That is right.

Senator JAVITS. With the criminal laws, we have done all we could. Here we did not, and the neglect is what in my judgment makes an equitable case for compensation.

Thank you very much, gentlemen.

Reverend JONES. Thank you, Senator.

Senator JAVITS. The subcommittee has one other witnesse, J. D. Sawyer of Middletown, Ohio.

Is Mr. Sawyer here?

Mr. Sawyer, would you come forward. I would like to give you your choice. I am the only one here who is able to preside. I have 10 minutes. I have no more because I have other appointments. Or we can lay the hearing over until 2 o'clock, which ever you prefer.

Mr. SAWYER. Senator, I think we would prefer to lay it over, with your kind permission.

Senator JAVITS. Until 2 o'clock?

Mr. SAWYER. Yes, sir.

Senator JAVITS. Would that seriously inconvenience you?

Mr. SAWYER. No, sir. We can appear at 2.

Senator JAVITS. All right, the committee will stand in recess until 2 p.m.

(Whereupon, at 12:30 p.m., the committee recessed, to reconvene at 2 p.m., the same day.)

AFTERNOON SESSION

Senator JAVITS. The committee will come to order.

Our witness this afternoon is J. D. Sawyer, appearing for the Ohio Association of Real Estate Boards. Mr. Sawyer, would you identify for the record the gentleman with you?

STATEMENT OF J. D. SAWYER, CHAIRMAN, REALTOR'S OHIO COMMITTEE, LEGISLATIVE AND GOVERNMENTAL AFFAIRS COMMITTEE, OHIO ASSOCIATION OF REAL ESTATE BOARDS, COLUMBUS, OHIO; ACCOMPANIED BY PHIL FOLK, LEGAL COUNSEL AND GEORGE MOORE, PRESIDENT

Mr. SAWYER. Thank you, sir. On my left Mr. Phillip K. Folk, the counsel for the Ohio Association of Real Estate Boards of Columbus, Ohio. Additionally in the room is the president of the Ohio Association, Mr. George Moore of Toledo, and several other officers of the association.

Senator JAVITS. Would you like to bring Mr. Moore forward and have him sit with you?

Mr. SAWYER. I would be delighted to. Mr. Moore, will you join me, please.

Senator JAVITS. Will you proceed.

Mr. SAWYER. Mr. Chairman and members of the subcommittee, I am J. D. Sawyer, a realtor of Middletown, Ohio, appearing here today as chairman of the Realtors Ohio Committee, which is the legislative and governmental affairs committee of the Ohio Association of Real Estate Boards. We wish to testify in opposition to title IV of S. 3296.

The Ohio Association of Real Estate Boards is an organization of over 12,000 members in all facets of the real estate industry.

The Ohio association is a part of the National Association of Real Estate Boards which came into being 59 years ago to elevate the standards and ethics of the real estate business throughout the Nation and to otherwise promote and protect the ownership of real property.

The Ohio association is governed by a board of trustees elected from each of its 76 constituent boards of realtors.

In the January 1966 meeting of the board of trustees, the matter of discrimination in housing accommodations was discussed at length. By unanimous vote the trustees adopted the following policy:

> We assert the right of equal opportunity of any person to acquire any parcel of real property, and the right of every property owner to determine the disposition of his property.
>
> We hold steadfastly to the principle that the right to own, rent, and dispose of real property, and the right to use it freely within the limits of necessary measures to protect the public health and safety, are inherent in a free society, traditional in our nation, constitutionally protected, and indispensable to the preservation of individual freedom.
>
> Government should not deny, limit or abridge, directly or indirectly, the fundamental right of every person to sell, lease, or rent such real property.

Basically, we believe that there is serious doubt as to the constitutionality of title IV of the bill; however, we would first like to direct your attention to other compelling reasons why we believe the Senate should reject title IV.

Traditionally the Ohio association does not promote but indeed condemns discrimination in matters of housing.

In testimony before the Ohio Legislature the association is on record as follows:

> Most certainly if laws were ever passed prohibiting sales of real property to any member of a certain race, color, religion, national origin or ancestry, the Association would oppose with just as much vigor.

Conversely, our association, as previously stated, steadfastly defends the right of every individual to deal freely in a free market with personally owned real property.

To summarize our basic policy, we abhor racial discrimination in matters concerning real property. We are convinced that in the absence of such discrimination all of the people would proceed in an orderly manner to aline themselves in neighborhoods of similar financial status, cultural standards, and personal preference. Then individual discrimination, not racial discrimination, would prevail in the best precepts of our free American society.

We further urge you to reject title IV of the bill because it is overly broad and encompassing. It is permeated with ambiguity and lack of

definition which would be extremely difficult if not impossible equitably to enforce.

The lack of definitive standards establishing criteria for a court interpretation raises a serious question as to whether or not section 406 of title I is constitutionally void for vagueness. Specifically, there is an inordinate repetition of the permissive word "may." For instance: The court "may" appoint an attorney for plaintiff. The court "may" dispense with fees, costs, or security. The court "may" grant "appropriate" relief. The court "may" grant an injunction. The court "may" grant "other relief." The court "may" grant damages without limitation. The court "may" allow reasonable attorneys fees for plaintiff. The court "may" allow punitive damages up to $500. Thus we see that the practical effect of section 406 is to create almost unlimited discretion, not only in the Attorney General but in the judiciary as well. This, of course, can widely vary not only from court to court but from judge to judge. This, then, creates a new and unacceptable condition of judgment by man rather than by law. This situation again emphasizes the question of unconstitutionality due to vagueness. Section 406 also raises the question as to whether the section was designed as a vehicle for harrassment rather than for resolution of an unhappy social problem.

Section 407 of title IV, providing for enforcement by the Attorney General, is likewise replete with generalization and lack of definitive standards. For example, section 407 provides in part: "Whenever the Attorney General has reasonable cause to believe * * *." What is the definition of "reasonable," what is "cause"? What standards are set forth to make determinations from these undefined general statements? The subjectivity of these words is obvious as well as dangerous. What one man may honestly "believe," another may not. Even then, if the Attorney General does find "reasonable cause to believe," no duty is imposed upon him to act; he simply 'may" bring a civil action.

What is the definition of a "pattern or practice of resistance"? How will the Attorney General recognize these circumstances? What standards of definition are set? We find none. Are we to have government by discretion of man or by the law?

We certainly do not attribute any improper or malicious intent to our Attorney General; however, realism compels us to consider what a potentially dangerous and political weapon of harassment section 407 creates.

In section 403 we find the following language:

> It shall be unlawful for the owner, lessee, sublessee, assignee or manager of, or any other person having the authority to sell, rent, lease, or manage a dwelling * * *.

The bill, as proposed, does not even require the house to be offered for rent or for sale, etc., in order to make the prohibition operative. To illustrate, a homeowner with authority to sell, who does not intend or wish to sell, nevertheless under strict interpretation of this section could be found to be in violation. We are certain the Congress does not wish to leave even a possibility of such interpretation of the law.

In summary we consider title IV ill-conceived, badly drafted, inappropriate, and ineffective to cure the ills of social discrimination.

We respectfully submit that title IV, if passed, would only foster confusion and gross inequities. We sincerely believe that it would

prove ineffective to remedy the ills of racial discrimination in housing as asserted by the Attorney General and other proponents. Compulsion, contention, and litigation in this area would prove no boon to the solution of the problem. Only education and understanding will make significant contributions. Acts of overt compulsion forced against all property owners will mitigate against the significant progress already accomplished by sincere men of good will.

The enforcement provisions provide a vehicle for political and discriminatory enforcement.

It is exceedingly important to note here today that much of the Nation's press and other communications media are raising questions as to the propriety, constitutionality, and advisability of the Federal Government's effort to enact compulsory legislation in the field of individually owned homes.

The press generally has championed the cause of civil legislation in the fields of public accommodation, voting, education, and equal employment. It seems now, however, that in the issues raised in title IV even they have paused to consider the gravity of the implications of this proposed legislation.

We believe the editorial thinking of the press clearly reflects the adverse views of the majority of our citizens. The extension of Government control compelling private, intrastate contractual dealings in individually owned real property is quite properly frowned upon.

I quote in part several editorial views, to demonstrate this attitude. The Post and Times-Star of Cincinnati, Ohio, in an editorial on April 30, 1966, said:

> The fair housing proposal, however, goes to the question of a homeowning citizen's rights in using or disposing of his private property—a much more delicate matter that will arouse the antagonism even of many who disapprove of housing discrimination * * *
>
> Also, the remedy provided by the bill—State or Federal court suits brought either by individuals or the Attorney General—would seem to be less effective and certainly more abrasive than alternative techniques.

The Cleveland Plain Dealer said editorially on May 7, 1966:

> But "all housing" and all homesites? That is a great deal to cover with Federal law. Such a wide sweeping proposal raises serious questions. This huge Federal law, if passed, would knock out of existence many State and local fair housing laws. It would brush Ohio's new fair housing law aside and take over in its place.

The June 2, 1966, Columbus Dispatch said:

> If the day comes when the rightful will of the majority of the American people is trampled under one party's heedless pursuit of political opportunity, the future of popular government as we have known it, will be seriously endangered * * * if we abandon the concept of majority rule which has given us our strength, we abandon the rights of all—of minorities along with those of the majority.

On May 13, the Wall Street Journal said in part:

> Government authorities, we have frequently said, have an obligation to do what they can to insure that Negroes enjoy the same rights as all other citizens. They have no right to discriminate against the majority. And when they try to legislate personal decisions they do wholesale injury to a free society.

Further evidence that the citizens as a whole do not support the governmental intrusion into the sale or rental of private property is evidenced by the action in California and other States where the issue has

been subjected to popular vote. The electorate in California voted by over a 2 million majority to nullify its fair housing statute enacted by their legislature.

The Wall Street Journal commented editorially on the California vote as follows:

> The point is that the amendment was originally approved 2 to 1 by California voters, and the reason for the large margin is that it expressed what the United States has always, until recent years, regarded as a fundamental human right.

In Akron, Ohio, the city council passed a fair housing ordinance in 1964. A Committee for Home Owners' Rights was formed and 20,000 signatures for a referendum on the ordinance were obtained in less than 3 weeks, although only 8,510 signatures were required. The referendum vote was overwhelmingly passed to reject the fair housing ordinance.

In Dayton, Ohio, almost the same situation prevailed. It is interesting to note in the Dayton case that some of the heavily populated Negro wards opposed the coercion of the Dayton law.

In Berkeley, Calif., the electorate rejected a fair housing ordinance in 1963.

Tacoma, Wash., rejected such an ordinance. Seattle, Wash., voted down an ordinance in 1964.

We are aware of no popular vote which has accepted a fair housing law.

Further, the proposed title IV is so extreme, we would anticipate an even stronger reaction by the people, should it be enacted.

We turn now to the constitutional questions involved.

Attorney General Katzenbach testified before the House subcommittee that he had no doubts concerning the constitutionality of title IV based on the commerce clause and the 14th amendment.

We respectfully differ; we submit that the Supreme Court of the United States has not yet extended section 5 of the 14th amendment to authorize congressional power over private action as opposed to State action.

We would be presumptuous to include in this statement a brief on the constitutional law involved. It is common ground in many cases and opinions of Justices of the Supreme Court that the 14th amendment is directed against State action only. Indeed, recent opinions of the Court clearly indicate that substantial sophisticated analysis has been required to find State action. It is now apparent that the simplistic view which many of us had of what constituted State action is no longer valid. State action is broader today than in times past.

This does not, however, detract from our position that State action as opposed to private action must be found in order to support Federal legislation. Indeed, the very subtle and sophisticated analysis which the Court has used to find State action indicates that they have not abandoned this legal precedent established in the civil rights cases of 1883 and followed to this day.

We feel, however, that we should comment on the recent cases of *United States* v. *Guest* (34 Law Week 4323). It was to this case that the Attorney General alluded in his testimony before the subcommittee. The gratuitous dicta in two concurring opinions which suggested that the 14th amendment now could reach private action may be com-

forting to proponents, but the fact remains that the Supreme Court of the United States decided the *Guest* case on the basis of State action.

The long line of cases limiting the vitality of the 14th amendment to State action have not been overruled, and unless or until they have been, they remain the law of the land.

Turning to the asserted constitutional basis of the commerce clause, we are aware of the ever-expanding web woven by that clause. Nevertheless, the commerce clause is not so all-encompassing as to hold that private, contractual intrastate dealings where the residence dealt with is a structure attached to the soil, within the State, and for all practical purposes immovable for all time, are within the embrace of that clause.

We agree with Senator Dirksen's analysis that the commerce clause does not reach that far. Indeed, if it does reach into the American home, then that clause must be unlimited in scope. The language of the commerce clause refutes such a contention as it is obviously a limited, rather than unlimited, grant of power.

We further submit that it is not only the judicial branch of government which has power to interpret the meaning of the Constitution. The legislative branch is composed of Members, who also took an oath to protect and defend the Constitution. We maintain that the Congress has not only the right, but the duty, to make independent judgments on the extent of congressional power.

Other constitutional impairments to the passage of title IV which have been posed are that the impaired right to sell is an encroachment upon the constitutional right to possess, and that title IV constitutes a deprivation of that right wihout due process of law in violation of the 5th and 14th amendments. We believe that this argument has some merit.

We respectfully urge that title IV be rejected in its entirety.

Senator JAVITS. Does that end your statement, Mr. Sawyer?

Mr. SAWYER. Yes, sir.

Senator JAVITS. Mr. Sawyer, I just have one or two questions of you and then we will have counsel for the committee question you. Mr. Sawyer, there is a law against discrimination in housing in Ohio, is there not?

Mr. SAWYER. Yes, sir.

Senator JAVITS. I have a summary of that law before me, prepared by the Library of Congress, together with its various provisions. Would you mind if that went in as part of the record?

Mr. SAWYER. Indeed not. In fact, Senator, we have a full copy of the law which we would be delighted to proffer.

Senator JAVITS. All right, without objection then the summary prepared by the Library of Congress will be printed in the record with a reference to the Ohio statute.

Mr. SAWYER. Thank you, sir, that will be fine.

(The document referred to follows:)

OHIO

Summary

Ohio prohibits discrimination in the sale or rental of all categories of housing except the sale or rental of an owner-occupied two-family dwelling. The Ohio Civil Rights Commission is authorized to receive complaints of unlawful dis-

crimination. The Commission investigates, and if reasonable cause exists for concluding that a violation has occurred, the Commission attempts to settle the matter by conciliation. If conciliation fails, a hearing is held before the Commission or a panel of hearing officers. In the event the Commission finds that an unfair practice has been engaged in, it issues a cease and desist order and many require other affirmative action. The Commission may petition for court enforcement of the order and either the complainant or respondent may obtain court review of an order dismissing the complaint, or a cease and desist order. Violations of the court's orders are to be punished as contempt.

I. Public Housing

Citation.—Page's Ohio Rev. Code, §§ 4112.01–4112.07 (Supp. 1965).

Note.—These provisions are set forth below under the title Private Housing, but they also apply here.

II. Urban Renewal

Citation.—Page's Ohio Rev. Code §§ 4112.01–4112.07 (Supp. 1965).

Note.—These provisions are set forth below under the title Private Housing, but they also apply here.

III. Other Publicly Assisted Housing (FHA, Etc.)

Citation.—Page's Ohio Rev. Code §§ 4112.01–4112.07 (Supp. 1965).

Note.—These provisions are set forth below under the title Private Housing, but they also apply here.

IV. Private Housing

Citation.—Page's Ohio Rev. Code §§ 4112.01–4112.07 (Supp. 1965).

§4112.01 Definitions

As used in sections 4112.01 to 4112.08, inclusive, of the Revised Code:

(A) "Person" includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and other organized groups of persons. It also includes, but is not limited to, any owner, lessor, assignor, builder, manager, broker, salesman, agent, employee, lending institution; and the state, and all political subdivisions, authorities, agencies, boards and commissions thereof.

* * * * * * *

(F) "Commission" means the Ohio civil rights commission created by section 4112.03 of the Revised Code.

(G) "Discriminate" includes segregate or separate.

(H) "Unlawful discriminatory practice" means any act prohibited by section 4112.02 of the Revised Code.

* * * * * * *

(J) "Housing accommodations" includes any building or structure or portion thereof which is used or occupied or is intended, arranged, or designed to be used or occupied as the home residence or sleeping place of one or more individuals, groups, or families whether or not living independently of each other; and any vacant land offered for sale or leased for commercial housing.

(K) "Commercial housing" means housing accommodations held or offered for sale or rent by a real estate broker, salesman, or agent, or by any other person pursuant to authorization of the owner, by the owner himself, or by legal representatives, but does not include any personal residence offered for sale or rent by the owner or by his broker, salesman, agent, or employee.

(L) "Personal residence" means a building or structure containing living quarters occupied or intended to be occupied by no more than two individuals, two groups, or two families living independently of each other and occupied by the owner thereof as a bona fide residence for himself and any members of his family forming his household. If a personal residence is vacated by the owner it shall continue to be considered owner-occupied until occupied by someone other than the owner or until sold by the owner, whichever occurs first.

(M) "Restrictive covenant" means any specification limiting the transfer, rental, lease, or other use of any housing because of race, color, religion, national

origin, or ancestry, or any limitation based upon affiliation with or approval by any person, directly or indirectly, employing race, color, religion, national origin, or ancestry as a condition of affiliation or approval.

§ 4112.02 Unlawful discriminatory practices.

It shall be an unlawful discriminatory practice:

* * * * * * *

(H) For any person to: (1) Refuse to sell, transfer, assign, rent, lease, sublease, finance, or otherwise deny or withhold commercial housing from any person because of the race, color, religion, ancestry, or national origin of any prospective owner, occupant, or user of such commercial housing;

(2) Represent to any person that commercial housing is not available for inspection when in fact it is so available;

(3) Refuse to lend money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of commercial housing or personal residence or otherwise withhold financing of commercial housing or a personal residence from any person because of the race, color, religion, ancestry, or national origin of any present or prospective owner, occupant, or user of such commercial housing, provided such person, whether an individual, corporation, or association of any type, lends money as one of the principal aspects of his business or incidental to his principal business and not only as a part of the purchase price of an owner-occupied residence he is selling nor merely casually or occasionally to a relative or friend;

(4) Discriminate against any person in the terms or conditions of selling, transferring, assigning, renting, leasing, or subleasing any commercial housing or in furnishing facilities, services, or privileges in connection with the ownership, occupancy, or use of any commercial housing because of the race, color, religion, ancestry, or national origin of any present or prospective owner, occupant, or user of such commercial housing;

(5) Discriminate against any person in the terms or conditions of any loan of money, whether or not secured by mortgage or otherwise; for the acquisition, construction, rehabilitation, repair, or maintenance of commercial housing or a personal residence because of the race, color, religion, ancestry, or national origin of any present or prospective owner, occupant, or user of such commercial housing or personal residence;

(6) Print, publish, or circulate any statement or advertisement relating to the sale, transfer, assignment, rental, lease, sub-lease or acquisition of any commercial housing or personal residence or the loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of commercial housing or a personal residence which indicates any preference, limitation, specification, or discrimination based upon race, color, religion, ancestry, or national origin;

(7) Make any inquiry, elicit any information, make or keep any record, or use any form of application containing questions or entries concerning race, color, religion, ancestry, or national origin in connection with the sale or lease of any commercial housing or the loan of any money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of commercial housing or a personal residence;

(8) Include in any transfer, rental, or lease of commercial housing or a personal residence any restrictive covenant, or honor or exercise, or attempt to honor or exercise, any such restrictive covenant, provided that the prior inclusion of a restrictive covenant in the chain of title shall not be deemed a violation of this provision;

(9) Induce or solicit or attempt to induce or solicit a commercial housing or personal residence listing, sale, or transaction by representing that a change has occurred or may occur with respect to the racial, religious, or ethnic composition of the block, neighborhood, or area in which the property is located, or induce or solicit or attempt to induce or solicit such sale or listing by representing that the presence or anticipated presence of persons of any race, color, religion, ancestry, or national origin, in the area will or may have results such as the following:

(a) The lowering of property values;

(b) A change in the racial, religious, or ethnic composition of the block, neighborhood, or area in which the property is located;

(c) An increase in criminal or antisocial behavior in the area;

(d) A decline in the quality of the schools serving the area.

No person shall discourage or attempt to discourage the purchase by a prospective purchaser of a commercial housing or a personal residence by representing that any block, neighborhood, or area has or might undergo a change with respect to the religious, racial, or nationality composition of the block, neighborhood, or area.

(I) For any person to discriminate in any manner against any other person because he has opposed any unlawful practice defined in this section, or because he has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under the provisions of sections 4112.01 to 4112.07, inclusive of the Revised Code.

(J) For any person to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, or to obstruct or prevent any person from complying with the provisions of sections 4112.01 to 4112.07, inclusive, of the Revised Code, or any order issued thereunder, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice.

(K) Nothing in division (H) of this section shall bar any religious or denominational institution or organization, or any charitable or educational organization, which is operated, supervised, or controlled by or in connection with a religious organization, or any bona fide private or fraternal organization, from giving preference to persons of the same religion or denomination, or to members of such private or fraternal organization, or from making such selection as is calculated by such organization to promote the religious principles or the aims, purposes, or fraternal principles for which it is established or maintained.

§ 4112.05 Proceedings on complaint; findings; transcript of record

(A) The Ohio civil rights commission shall, as provided in this section, prevent any person from engaging in unlawful discriminatory practices, as defined in section 4112.02 of the Revised Code, provided that before instituting the formal hearing authorized by this section it shall attempt, by informal methods of persuasion and conciliation, to induce compliance with Chapter 4112, of the Revised Code.

(B) Whenever it is charged in writing and under oath by a person, referred to as the complainant, that any person, referred to as the respondent, has engaged or is engaging in unlawful discriminatory practices, or upon its own initiative in matters relating to any of the unlawful discriminatory practices enumerated in divisions (A), (B), (C), (D), (E), (F), (I), or (J) of section 4112.02 of the Revised Code, the commission may initiate a preliminary investigation. Such charge shall be filed with the commission within six months after the alleged unlawful discriminatory practices are committed. If it determines after such investigation that it is not probable that unlawful discriminatory practices have been or are being engaged in, it shall notify the complainant that it has so determined and that it will not issue a complaint in the matter. If it determines after such investigation that it is probable that unlawful discriminatory practices have been or are being engaged in, it shall endeavor to eliminate such practices by informal methods of conference, conciliation, and persuasion. Nothing said or done during such endeavors shall be disclosed by any member of the commission or its staff or be used as evidence in any subsequent proceeding. If, after such investigation and conference, the commission is satisfied that any unlawful discriminatory practice of the respondent will be eliminated, it may treat the complaint as conciliated, and entry of such disposition shall be made on the records of the commission. If the commission fails to effect the elimination of such unlawful discriminatory practices and to obtain voluntary compliance with Chapter 4112, of the Revised Code, or, if the circumstances warrant, in advance of any such preliminary investigation or endeavors, and if, with respect to an alleged violation of division (H) of section 4112.02 of the Revised Code, the commission finds that the complainant acted with intention of fulfilling any contracts or agreements he was seeking, the commission shall issue and cause to be served upon any person or respondent a complaint stating the charges in that respect and containing a notice of hearing before the commission, a member thereof, or a hearing examiner at a place therein fixed to be held not less than ten days after the service of such complaint. Such place of hearing shall be within the county where the alleged unlawful discriminatory practice has occurred or where the respondent resides or transacts business. The attorney general shall represent the commission at such hearing and present the

evidence in support of the complaint. Any complaint issued pursuant to this section must be so issued within one year after the alleged unlawful discriminatory practices were committed.

(C) Any such complaint may be amended by the commission, or a member thereof, or its hearing examiner conducting the hearing, at any time prior to or during the hearing based thereon. The respondent has the right to file an answer or an amended answer to the original and amended complaint and to appear at such hearing in person, or by attorney, or otherwise to examine and cross-examine witnesses.

(D) The complainant shall be a party to the proceeding and any person who is an indispensable party to a complete determination or settlement of a question involved in a proceeding shall be joined. Any person who has or claims an interest in the subject of the hearing and in obtaining or preventing relief against the acts or practices complained of may be, in the discretion of the person or persons conducting the hearing, permitted to appear for the presentation of oral or written arguments.

(E) In any proceeding, the member, hearing examiner, or commission shall not be bound by the rules of evidence prevailing in the courts of law or equity, but shall, in ascertaining the practices followed by the respondent, take into account all reliable, probative, and substantial evidence, statistical or otherwise, produced at the hearing, which may tend to prove the existence of a predetermined pattern or employment or membership, provided that nothing contained in this section shall be construed to authorize or require any person to observe the proportion which persons of any race, color, religion, national origin, or ancestry bear to the total population or in accordance with any criterion other than the individual qualifications of the applicant.

(F) The testimony taken at the hearing shall be under oath and shall be reduced to writing and filed with the commission. Thereafter, in its discretion, the commission upon notice to the complainant and to the respondent with an opportunity to be present may take further testimony or hear argument.

No person shall be compelled to be a witness against himself at any hearing before the commission or a hearing examiner of the commission.

(G) If upon all the reliable, probative, and substantial evidence the commission determines that the respondent has engaged in, or is engaging in, any unlawful discriminatory practice, whether against the complainant or others, the commission shall state its findings of fact and conclusions of law, and shall issue and, subject to the provisions of Chapter 119 of the Revised Code, cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such further affirmative or other action as will effectuate the purposes of sections 4112.01 to 4112.08, inclusive, of the Revised Code, including, but not limited to, hiring, reinstatement, or upgrading of employees with, or without, back pay, admission or restoration to union membership, including a requirement for reports of the manner of compliance. If the commission directs payment of back pay, it shall make allowance for interim earnings. Upon the submission of such reports of compliance the commission may issue a declaratory order stating that the respondent has ceased to engage in unlawful discriminatory practices.

(H) If the commission finds that no probable cause exists for crediting the charges, or, if upon all the evidence, the commission finds that a respondent has not engaged in any unlawful discriminatory practice against the complainant or others, it shall state its findings of fact and shall issue and cause to be served on the complainant an order dimissing the said complaint as to such respondent. A copy of the order shall be delivered in all cases to the attorney general and such other public officers as the commission deems proper.

(I) Until a transcript of the record in a case is filed in a court as provided in section 4112.08 of the Revised Code, the commission may, subject to the provisions of Chapter 119 of the Revised Code, at any time, upon reasonable notice, and in such manner as it deems proper, modify or set aside in whole or in part, any finding or order made by it.

§ 4112.06 Judicial review

(A) Any complainant, or respondent claiming to be aggrieved by a final order of the commission, including a refusal to issue a complaint, may obtain judicial review thereof, and the commission may obtain an order of court for the enforcement of its final orders, in a proceeding as provided in this section. Such proceeding shall be brought in the common pleas courts of the state within any county

wherein the unlawful discriminatory practice which is the subject of the commission's order was committed or wherein any respondent required in the order to cease and desist from an unlawful discriminatory practice or to take affirmative action resides or transacts business.

(B) Such proceedings shall be initiated by the filing of a petition in court as provided in division (A) of this section and the service of a copy of the said petition upon the commission and upon all parties who appeared before the commission. Thereupon the commission shall file with the court a transcript of the record upon the hearing before it. The transcript shall include all proceedings in the case, including all evidence and proffers of evidence. The court shall thereupon have jurisdiction of the proceeding and of the questions determined therein and shall have power to grant such temporary relief of restraining order as it deems just and proper and to make and enter, upon the record and such additional evidence as the court has admitted, an order enforcing, modifying and enforcing as so modified, or setting aside in whole or part, the order of the commission. The court shall require the posting of a sufficient bond before granting temporary relief or a restraining order in a case involving a violation of division (H) of section 4112.02 of the Revised Code.

(C) An objection that has not been urged before the commission shall not be considered by the court, unless the failure or neglect to urge such objection is excused because of extraordinary circumstances.

(D) The court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the commission.

(E) The findings of the commission as to the facts shall be conclusive if supported by reliable, probative, and substantial evidence on the record and such additional evidence as the court has admitted considered as a whole.

(F) The jurisdiction of the court shall be exclusive and its judgment and order shall be final subject to appellate review. Violations of the court's order shall be punishable as contempt.

(G) The commission's copy of the testimony shall be available at all reasonable times to all parties without cost for examination and for the purposes of judicial review of the order of the commission. The petition shall be heard on the transcript of the record without requirement of printing.

(H) If no proceeding to obtain judicial review is instituted by a complainant, or respondent within thirty days for the service of order of the commission pursuant to this section, the commission may obtain a decree of the court for the enforcement of such order upon showing that respondent is subject to the commission's jurisdiction and resides or transacts business within the county in which the petition for enforcement is brought.

(I) All suits brought under this section shall be heard and determined as expeditiously as possible.

§ 4112.07 Posting of notice.

Every person subject to division (A), (B), (C), (D), or (E) of section 4112.02 of the Revised Code, shall post in a conspicuous place or places on his premises a notice to be prepared or approved by the commission which shall set forth excerpts of this chapter and such other relevant information which the commisison deems necessary to explain sections 4112.01 to 4112.07 inclusive, of the Revised Code.

Senator JAVITS. Mr. Sawyer, in view of the fact that you have had this law for some years, have you not——

Mr. SAWYER. No. sir. It went into effect October 31, 1965.

Senator JAVITS. You have had, let us say, 6 months or so experience with it. What makes you think that Federal laws are going to be very much harder to live with than your State law?

Mr. SAWYER. We have not suggested, sir, that the Federal law will be hard to live with. The Ohio law, we believe, is and has been ineffective, and we merely suggest that the Federal law in our opinion will be equally ineffective.

Senator JAVITS. The Ohio law has been effective?

Mr. SAWYER. Is ineffective.

Senator JAVITS. In what way?

Mr. SAWYER. It has not solved the problem that it presumes to solve.

Senator JAVITS. It has only been on the books 6 months.

Mr. SAWYER. Precisely.

Senator JAVITS. Has there been many cases under it?

Mr. SAWYER. Yes, sir. Counsel, if you please, has statistics on that.

Mr. FOLK. Since the law went into effect in the public housing area, there have been 56 complaints filed, all of which are in the conciliation stage. Approximately 80 to 85 percent of these complaints are in the rental area. In my discussions with Mr. Ellis Ross, who is the director of this in Ohio, he told me that only a very small number, and I personally only have knowledge of two cases which were filed against realtors. In the one case there was a situation where the complainant alleged matters which came within the exclusion of the law. In the other case, at the conciliation meeting, with the members and the referee for the Commission, we were able to show that the realtor had done everything that the law required of him. Actually what had happened here was a lady thought that she had been discriminated against, and so she filed against several realtors and a builder and it was kind of a "shotgun" sort of a thing that ensnared this particular realtor. So, so far as the realtors are concerned, we have——

Senator JAVITS. The Ohio law has the commission form of administration, does it not?

Mr. SAWYER. Yes, sir. It is administered by the Civil Rights Commission. The Ohio law is greatly different, however, than the proposed Federal law in that it does not apply to single family dwellings.

Senator JAVITS. Or to two- family dwellings.

Mr. SAWYER. Exactly, owner occupied in part.

Senator JAVITS. Would that make a major difference in your opposition to this measure?

Mr. SAWYER. None whatsoever, sir. We simply think that the method of approach is wrong.

Senator JAVITS. If there were a federally established housing discrimination law, would you rather have a commission type of administration or the individual suit type which is contained now in this administration bill?

Mr. SAWYER. We think there is a wide latitude. I have personally been a member of a commission, and we think that justice is many times bent in commissions by the admission of evidence that wouldn't be admitted in a court of law, et cetera. So that I believe I would rather see it adjudicated in the court system.

Senator JAVITS. Individual suits?

Mr. SAWYER. Yes, sir.

Senator JAVITS. No further questions. Counsel for the committee.

Mr. AUTRY. I won't be but a minute, Mr. Chairman.

Mr. Sawyer, on page 4 of your statement the last paragraph wasn't quite clear to me. You say the enforcement provision provides a vehicle for political and discriminatory enforcement?

Am I correct in stating what you aver to there is the discretion given to the Attorney General as to when and where he may bring suit?

Mr. SAWYER. Precisely, without direction and without a set of definitive standards by which one could make an adequate defense.

Mr. AUTRY. Perhaps your counsel may want to answer this question. Have you a copy of the bill there?

Mr. FOLK. Title IV is all I have.

Mr. AUTRY. That is all right. I call your attention to section 403(c), if you will look at that for just a minute please. It is my understanding that in Ohio there are several Catholic colleges.

Mr. FOLK. Yes.

Mr. AUTRY. Assume that in the vicinity of the campus of one of these colleges there is a Catholic family that advertises rooms for rent in the paper which says "Catholic family has room to rent to Xavier student." Now, in your opinion, under the terms of 403(c), would this be in violation?

Mr. FOLK. It sounds to me like it would be, because I would think that as soon as they indicated what they were, that this would be an implication of, an indication of an intention to make a preference. There might be some question as to whether or not this would be proscribed under the Ohio law, but I would think it would be under the proposed statute.

Mr. AUTRY. Can you tell me whether in your experience since the Ohio law has passed there has been an impact on the housing industry, the real estate industry in one way or another such as might affect the flow of commerce?

Mr. FOLK. We have only had the thing 7 months. I can't really say that there is any impact on it at all. It looks to me like things are about the same now as they were before.

Mr. AUTRY. If you will refer to this for just a second, I would like to call your attention to section 406(c). Let us assume that title to a house has already passed to a third person who has taken possession. Could the court order the sale set aside and have title transferred to a complainant, in your opinion?

Mr. FOLK. I think that is a good question. I think that the definitive language here, where the court may grant such relief as it deems appropriate, is just as broad or just as narrow as that particular court might wish to make it.

Mr. AUTRY. It is possible?

Mr. FOLK. It is a possibility, it is a real possibility. It is a real danger in this draftsmanship.

Mr. AUTRY. Mr. Sawyer, just one question of you. Could you tell me how you personally handle real estate transactions? Is there any discrimination as far as the real estate profession is concerned?

Mr. SAWYER. Of course, there is both overt and covert discrimination. Indeed there is, and we make no denial of this. But how do we handle cases?

Mr. AUTRY. How do you handle a case, if a property owner asks you to restrict the sale of his house to members of his race?

Mr. SAWYER. If I may just for a moment speak of the Reverend Walter Jones' testimony this morning, where he said that realtors were often guilty of withholding houses from minority groups. I think that there is a grave misunderstanding, sometimes by misinformation, sometimes by malicious intent, of the realtor's role in this business.

We are agents for sellers, and the sellers direct us, as is common in any agency procedure, as to what they wish to do, and I don't think that any intelligent realtor would withhold any offer from any owner. In fact, he would be in violation of our State law if he did, and he certainly would be something less than prudent if he attempted it. So basically we act under the direction of the person with whom we are contracting, the owner, and, therefore, we think the realtor discharges his responsibility quite properly in that respect.

Mr. FOLK. If I may comment on that a little bit further, I think that it is interesting to note that if you look at the Ohio statute, I might say we have a complete text of the statute and an analysis of what the housing meant which we mailed to all 12,000 of our members, advising them to comply with the law and this is what the law requires, and so on and so forth. But, it is interesting that the impact, that the thrust of this law is directed at the people that really have the right to make the decisions, the people who put their names on the deeds. This is not a law that is directed at realtors. It is a law that is directed at owners.

Senator JAVITS. That is the Ohio law?

Mr. FOLK. The Ohio law.

Mr. SAWYER. Yes, sir.

Senator JAVITS. Has any effort been made, Mr. Sawyer, and the president of the association, in your State by individual boards, that is in cities or areas, to come to an agreement on enforcing a code of ethics against discrimination or segregation?

Mr. SAWYER. Yes, sir. As I read to you, we adopted this code of ethics, and we mean it and we believe in it, and we have held innumerable educational seminars to enforce it.

We think that we, as realtors and brokers, are willing, ready and certainly want to shoulder our equal responsibility across the body politic of the community, but that we certainly are not to be singled out for infractions that are imaginary or harassing.

Senator JAVITS. But you also testified that if the owner of a piece of property tells you to discriminate, you will.

Mr. SAWYER. If you consider that discrimination, sir, the answer is yes, but we do not. We consider it a legal responsibility of our agency agreement.

Senator JAVITS. I understand. But if the owner says, "Don't sell this property to a Negro, don't bring me a Negro offer, don't bring me any Negro to look at it," you don't.

Mr. SAWYER. We would either do one of two things. Not become a party to the agency or we would then abide by the direction of the contract.

Senator JAVITS. But your code of ethics doesn't say that you should reject any such agencies.

Mr. SAWYER. No, sir. Neither does it say that we must go out and carry the burden for the moral responsibility of the whole community.

Senator JAVITS. I see. All right, gentlemen, if there is nothing else to be added——

Mr. SAWYER. We are very grateful for the time and we appreciate the opportunity to appear.

Senator JAVITS. Thank you. We are delighted to hear your views.

The subcommittee will stand in recess until 10:30 a.m. tomorrow.

(Whereupon, at 2:35 p.m., the subcommittee recessed until 10:30 a.m., Thursday, June 16, 1966.)

CIVIL RIGHTS

THURSDAY, JUNE 16, 1966

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:35 a.m., in room 2228, New Senate Office Building, Senator Edward M. Kennedy of Massachusetts presiding.

Present: Senators Kennedy of Massachusetts and Javits.

Also present: George Autry, chief counsel; H. Houston Groome, Lawrence M. Baskir and Lewis W. Evans, counsel; and John Baker, minority counsel; Rufus L. Edmisten, research assistant.

Senator KENNEDY of Massachusetts. The subcommittee will come to order. Our first witness this morning is Mr. Roy Wilkins.

Mr. Wilkins, I want to welcome you to this committee. As Mr. Wilkins is taking the chair, I would like to state for the record that Senator Ervin is unable to be here today because of a death in his family. Senator Ervin has invited me to preside and I am delighted to do so.

Mr. Roy Wilkins is a gentleman who has appeared many times on many different questions. I consider him to be one of the outstanding authorities on questions of civil rights and civil liberties. He is a man of great dedication and great commitment, and he is a representative of a very effective and dedicated organization. He is here to speak for that organization today.

This morning, he has with him two associates. They need no introduction to the subcommittee, but I will permit him to present them to the committee if he so desires.

STATEMENT OF ROY WILKINS, CHAIRMAN OF THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS AND EXECUTIVE DIRECTOR OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP); ACCOMPANIED BY JOSEPH L. RAUH, JR., GENERAL COUNSEL FOR THE CONFERENCE; AND CLARENCE MITCHELL, CHAIRMAN OF ITS LEGISLATIVE COMMITTEE, AND DIRECTOR, WASHINGTON BUREAU OF THE NAACP

Mr. WILKINS. Thank you, Senator Kennedy. First, I should like to thank the subcommittee for the opportunity of appearing before it and to express my regret over the circumstances that cause Senator Ervin's absence today. I am sure we all extend to him and his friends our condolences.

With me today, in order to supply the information which I customarily, habitually lack, is Mr. Joseph L. Rauh, Jr., the general counsel of the Leadership Conference on Civil Rights, on my immediate left, and Mr. Clarence Mitchell, the director of the Washington Bureau of the National Association for the Advancement of Colored People.

I ask the subcommittee's permission for them to supplement my testimony as far as certain details are concerned with which I am not technically familiar.

Senator KENNEDY of Massachusetts. Their comments will be extremely welcome. I must say from my own personal experience I know the value of their contributions to the important civil rights legislation that has been passed by the Senate and the Congress in recent years, and I, for one, feel that their contributions have been extremely significant, and I feel that this committee is extremely fortunate to have the benefits of their thinking, so I welcome them as well.

Mr. WIKINS. Thank you, sir. Mr. Chairman, before embarking on this statement, I would like to say that I speak today as chairman of the Leadership Conference on Civil Rights, an organization representing more than 100 civil rights, religious, labor, civic, and other groups dedicated to equality for all, as well as executive director of the National Association for the Advancement of Colored People.

I submit for the record a list of the organizations, sir, who have formally endorsed the testimony which I am about to give. This list is up to date, from those who were not on it some time ago.

(The list referred to follows:)

LIST OF OVER 100 ORGANIZATIONS THAT ENDORSE THE STATEMENT OF ROY WILKINS, CHAIRMAN OF THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS

African Methodist Episcopal Church.
AME Zion Church.
Alpha Kappa Alpha Sorority.
Alphia Phi Alpha Fraternity.
Amalgamated Clothing Workers of America.
Amalgamated Meat Cutters & Butcher Workmen.
American Civil Liberties Union.
American Ethical Union.
American Federation of State, County & Municipal Employees.
American Federation of Teachers.
American Jewish Committee.
American Jewish Congress.
American Newspaper Guild.
American Veterans Committee.
Americans for Democratic Action.
Anti-Defamation League of B'nai B'rith.
A. Philip Randolph Foundation.
B'nai B'rith Women.
Brotherhood of Sleeping Car Porters.
Christian Family Movement.
Christian Methodist Episcopal Church.
Church of the Brethern Service Commission.
Citizens Lobby for Freedom & Fair Play.
Congress of Racial Equality.
Delta Sigma Theta Sorority.
Episcopal Society for Cultural & Racial Unity.
Frontiers International.
Hotel, Restaurant Employees & Bartenders International Union.
Improved Benevolent & Protective Order of the Elks of the World.

LIST OF OVER 100 ORGANIZATIONS THAT ENDORSE THE STATEMENT OF ROY WILKINS, CHAIRMAN OF THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS—Continued

Industrial Union Department—AFL/CIO
International Ladies Garment Workers Union of America.
International Union of Electrical, Radio & Machine Workers.
Iota Phi Lambda, Inc.
Japanese-American Citizens League.
Jewish Labor Committee.
Jewish War Veterans.
League for Industrial Democracy.
National Alliance of Postal & Federal Employees.
National Association for the Advancement of Colored People.
National Association of College Women.
National Council of Puerto Rican Volunteers, Inc.
National Association of Colored Women's Clubs, Inc.
National Association of Negro Business & Professional Women's Clubs, Inc.
National Association of Real Estate Brokers, Inc.
National Bar Association.
National Beauty Culturists League, Inc.
National Catholic Social Action Conference.
National Catholic Conference for Interracial Justice.
National Community Relations Advisory Council.
National Council of Catholic Men.
National Council of Catholic Women.
National Council of Churches—Commission on Religion & Race.
National Council of Jewish Women.
National Council of Negro Women.
National Council of Senior Citizens, Inc.
National Dental Association.
National Farmers Union.
National Federation of Catholic College Students.
National Federation of Settlements & Neighborhood Centers.
National Federation of Temple Sisterhoods.
National Jewish Welfare Board.
National Medical Association.
National Newspaper Publishers Association.
National Organization for Mexican-American Services.
National Student Christian Federation.
National Urban League.
Negro American Labor Council.
North American Federation of the Third Order of St. Francis.
Northern Student Movement.
Omega Psi Phi Fraternity, Inc.
Phi Beta Sigma Fraternity.
Phi Delta Kappa Sorority.
Pioneer Women.
Presbyterian Interracial Council.
Protestant Episcopal Church—Division of Christian Citizenship.
Retail, Wholesale & Department Store Union.
Southern Beauty Congress.
Southern Christian Leadership Conference.
Transport Workers Union of America.
Union of American Hebrew Congregations.
Unitarian Universalist Association—Commission on Religion & Race.
Unitarian Universalist Fellowship for Social Justice.
United Automobile Workers of America.
United Church of Christ, Committee for Racial Justice Now.
United Church of Christ, Council for Christian Social Action.
United Church Women.
United Hebrew Trades.
United Packinghouse, Food & Allied Workers.
United Presbyterian Church, Commission on Religion & Race.
United Presbyterian Church, Office of Church & Society.
United Rubber Workers.
United States National Student Association.

LIST OF OVER 100 ORGANIZATIONS THAT ENDORSE THE STATEMENT OF ROY WILKINS, CHAIRMAN OF THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS—Continued

United States Youth Council.
United Steelworkers of America.
United Transport Service Employees of America.
Women's International League for Peace & Freedom.
Workers Defense League.
Workmen's Circle.
Young Women's Christian Association of the USA.
Zeta Phi Beta Sorority.

OTHER ORGANIZATIONS

Citizens Crusade Against Poverty.
Executive Committee of the Division of Human Relations and Economic Affairs, General Board of Christian Social Concern of the Methodist Church.

NOTE.—Other organizations will be made a part of the record as we receive them.

Mr. WILKINS. With the subcommittee's permission and in the interests of conserving the time of the Senator, I should like to summarize and touch in points upon the written testimony which has already been submitted for the record and which I would like to request be included in the record in toto.

Senator KENNEDY of Massachusetts. It will be included in its entirety.

Mr. WILKINS. And then, sir, I would like at the conclusion to present a short supplementary statement.

At a meeting on May 5, specially called to consider the administration's civil rights program as proposed in S. 3296, the Leadership Conference on Civil Rights endorsed the program and agreed to recommend that its associated organizations work for its passage. Pursuant to the will of the conference as expressed at that meeting, I am here to present the conference's views on this proposed legislation. We support S. 3296 and urge certain vital strengthening amendments.

The need for me and others to return to testify on another major civil rights bill so soon after passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965 is occasioned by the cumulative effect of nearly a century of neglect of section 5 of the 14th and section 2 of the 15th amendments. These sections, which authorize Congress to enact appropriate legislation to enforce the amendments, were a dead letter from the 1870's until passage of the Civil Rights Act of 1957. This long period of congressional inaction spawned problems which could not be resolved in any one or even a number of congressional enactments, in the light of the existing political realities. As Congress responded to pressing needs by passage of civil rights legislation in 1957, 1960, 1964 and 1965, experience under this legislation and reaction and resistance to it have indicated the need for further legislative action to refine and protect the rights encompassed by these laws. We believe that the proposal sent to Congress by the President goes a long way toward pointing out the areas of concern in which such legislative action is urgently needed.

The first two titles of S. 3296 concern themselves with reform of the jury selection system—both Federal and State. The conditions that make this reform necessary are a prime example of a situation created by the Nation's neglect to which I have previously referred. Despite the adoption of the 14th amendment 98 years ago and despite the

Supreme Court's upholding, in *ex parte Virginia* in 1880, the statute making jury discrimination a criminal act, the practice of exclusion of Negroes from juries still exists. It exists not on an accidental or limited basis, but as part of widespread, systematic, and concerted State action practiced in contempt of the Constitution and in total disregard of the civil rights of millions of American citizens whose skin happens to be colored.

I need not elaborate on the details on where or how this racial exclusion is practiced. I am sure the subcommittee has been well briefed on this point. I cannot, however, refrain from citing once again the case of Lowndes County, Ala., which I believe the Attorney General has already brought to your attention. In this county a Federal court found that no Negro had ever served on a jury, despite the fact that Negroes comprised 72 percent of the population from which juries were selected.

Through the years jury exclusion has been a matter of continuing concern to civil rights organizations, and a substantial number of cases have been handled by lawyers of the NAACP and the NAACP legal defense fund, including such landmark ones as *Hale* v. *Kentucky*, *Hill* v. *Texas*, *and Shepherd* v. *Florida*, to mention only a few. This experience in the courts has led the Leadership Conference to the conclusion that while case-by-case litigation may secure justice in specific instances, it is not an effective means of combating the problem of jury exclusion with all of its ramifications. We, therefore, welcome efforts to reform the system itself to eliminate the curse of racial discrimination. That the President's program is concerned with the total jury selection system inspires hope that Congress will meet the crying need for a complete overhaul of jury selection procedures.

We are pleased that the bill offered to carry out this program attacks all types of discrimination—on the basis of sex and economic status as well as race, color, religion, or national origin.

It is significant to us that in those States where women are barred from jury service—Alabama, Mississippi, and South Carolina—harsh treatment of Negroes in judicial procedures is often the rule rather than the exception. We would hope that the inclusion of ladies in the jury system would add elements of both mercy and justice. This hope is inspired by our memory of the valiant work that women—and especially Southern churchwomen—performed in the long and ultimately rewarding fight against the evil of lynching.

The prohibition of discrimination because of economic status is a necessary complement to that barring racial discrimination. It would be of little moment to Negro litigants in areas such as the Mississippi Delta if prospective Negro jurors, having overcome the factor of race, were struck from the list because of a means test. The unfortunate historical and socioeconomic factors that have relegated masses of Negroes to lower economic classifications would then become as effective a barrier to jury service as the jury commissioner's deliberate policy of handpicking "white only" venires.

We are likewise pleased that the provisions of S. 3296 apply universally—to Federal as well as State juries—to practices in the North as well as those in the South. While our experience in Federal courts in the South is generally better than in most local courts, we see in the Federal system many of the deficiencies in jury selection that prevail

in the State system. In the North, the private prejudices of the persons selecting jurymen may be more subtle—in some cases even unconscious—but the ultimate result is often the same—juries that conform to the selector's concept of what a jury should be, rather than one composed of a representative cross section of the community. In some cases—such as my own State of New York—these prejudices are reinforced by statutory standards requiring ownership of property or payment of specified taxes as qualifications. That the bill before the subcommittee seeks to eliminate these practices indicates it is not regionally oriented.

Conditions that exist nationwide require that there be a new, speedy, nondiscriminatory jury selection system, under which the authority of the individual selector or selectors is replaced by an automatic system of choosing those who serve.

Closely associated with the jury system is the prosecution of crimes against Negroes and against civil rights workers, Negro and white, because of their pursuit of racial justice. Too often have we seen such crimes go unpunished, either because of failure of local authorities to act, or because juries, selected under the conditions noted above, are more sympathetic to the criminals than to their obligation to see that justice is done.

The murders of Medgar Evers, William Moore, James Chaney, Michael Schwerner, and Andrew Goodman, the four young girls in Birmingham, Jimmie Lee Jackson, Col. Lemuel Penn, Rev. James Reeb, Jonathan Daniels, Vernon Dahmer, Samuel Young, and others, all as yet unpunished, cry out for removing the trial of racial killers from the control of local courts and juries which as President Johnson has said may tip the scales of justice one way for whites and another way for Negroes, and placing it in a forum more likely to mete out impartial justice. So long as such crimes go unpunished, none of us, white or colored, can be assured of the rights guaranteed by the Constitution and by the great congressional enactments of recent years. Rights exercised in fear are not rights at all. To us it is both fitting and logical that Federal rights should as far as possible be protected in Federal courts.

We were, therefore, gratified to see the response of the Attorney General, set out in title V of the bill, to the invitation that the Supreme Court extended in the *Guest* and *Price* cases. It is a matter of the most urgent national policy that we protect in full the basic civil rights that have far too often been jeopardized by unruly mobs, by the Klan, by terrorists who strike in the dark, and by other unlawful elements, some, unfortunately, who wear the badges of officers of the law.

We are most hopeful that vigorous enforcement of these provisions when enacted will serve as a deterrent to those who have often relied on their locally administered brand of "justice" to protect them from just punishment for their deeds. We look forward to the day when constitutional rights may be exercised without fear of reprisal.

Having skipped to the last substantive title of the bill, I will now return in regular sequence to title III, dealing with desegregation of public facilities and public schools and authorizing the Attorney General to file suit to require that schools and other facilities be operated free from discrimination. And on that section having to

do with the added powers of the Attorney General in school desegregation cases, it is well to remember that it is 12 years—that was on May 17, 1954—in which it was held racial segregation in the public schools to be inherently unequal and hence unconstitutional.

This month thousands of colored schoolchildren who entered first grade after that great decision was rendered by the Supreme Court will graduate from high school without having benefited from that ruling. Their entire elementary-secondary school life will have been spent in a condition of inherent inequality. Unless significant changes occur in the immediate future, additional thousands of children will be totally denied the benefits of the *Brown* decision. For, as the President has pointed out in his message to Congress on this legislation, only 1 in 13 colored children in the South attends school with white children; and I must say that many informed sources consider this estimate to be on the optimistic side. In the North thousands more colored students spend their entire school careers in de facto segregation.

If I may interject here, Mr. Chairman, only this morning the New York Times recorded a report of the Board of Education of the City of New York, in which officially the board pointed out that in the past recent years, de facto segregated schools in the city of New York, that is those composed predominantly of Puerto Rican or Negro or both have "sharply increased" so that the question of de facto segregation is one squarely before the Congress. It is not a historical matter. It is right here in our own presence.

Senator KENNEDY of Massachusetts. And what you are suggesting by that observation is that it should be a national goal and a national policy if we are going to realize the spirit of the *Brown* case, and that we have an obligation to institute positive steps to insure that de facto segregation is eliminated. Is that correct?

Mr. WILKINS. Yes, Senator, and I would say, sir, if I may be permitted to do so, that your own advocacy in the State of Massachusetts against imbalance, racial imbalance in the schools and your own record there is one entirely in keeping with the spirit of this legislation and with the needs of the day.

Massachusetts under the stimulation of leaders like yourself and others in your State has taken official action against racial imbalance in the schools and directed its cities to correct such imbalance on pain of having their State assistance withdrawn, and it is interesting to note that only this week the School Committee of Boston, Mass., and I am sure I am not telling you anything new——

Senator KENNEDY of Massachusetts. That is right.

Mr. WILKINS (continuing). Has reversed itself and voted unanimously to begin a program of correction of imbalance because some $4 million in State aid has been withheld from the Boston schools. I think this is in line with your own suggestion.

Senator KENNEDY of Massachusetts. It is. The point that is still somewhat distressing, Mr. Wilkins, is that the board in Boston still has not really agreed on a final program for the bussing of students. They are meeting at the present time as you quite accurately pointed out. The State is presently withholding funds. However, I am certainly hopeful, as you are, that there can be reached, in the not too distant future, a solution to the problem.

I would like to make a comment on this particular subject. I think the opportunity of withholding funds in situations such as this is something which the Congress should carefully consider. I have introduced legislation that would provide for various school communities the opportunity to receive Federal assistance and Federal funds when a school board or a school district is atttempting to reach a racial balance.

This would provide funds first of all for different kinds of technical help and assistance in drawing up boundaries and redesignating boundaries to provide a point of balance.

Secondly, it would provide funds for transportation to help and assist students who want to go to other schools. Funds would also be available to consider necessary curriculum changes.

This would not be coercive in any way, but it would offer aid to those communities and school districts which desire assistance in achieving a better balance.

Mr. WILKINS. Yes.

Senator KENNEDY of Massachusetts. I know you haven't had an opportunity to consider it, but I am just wondering about the possibility of two approaches. One, involving the restriction and the withholding of funds, the second, offering school districts the opportunity to receive Federal help and assistance, if they are sincerely interested in making adjustment. Do you feel that the first approach is worthy of consideration?

Mr. WILKINS. Senator, I can say to that flatly and completely that our conference and our association has always been in favor of any inducements, legal and constitutional, to induce and assist the school boards and school districts in making this change. In fact, immediately after the 1954 decision, we were among the pioneer advocates of the so-called "carrot" approach, the assistance approach. This is a strange field.

Senator KENNEDY of Massachusetts. Yes.

Mr. WILKINS. They need assistance. It is an extraordinary drain on school budgets. They need help. They need the training of teacher's technicians, the study of boundaries, transportation problems, and all the things you have outlined.

Senator KENNEDY of Massachusetts. Yes.

Mr. WILKINS. So that there is no conflict here.

Senator KENNEDY of Massachusetts. Yes.

Mr. WILKINS. In fact, we are for any constitutional assault that will accomplish the diminution and the abolition of de facto segregation in the North.

In that connection I would like to emphasize that point in our testimony on the freedom of choice matter which we touch upon.

We have always felt that the executive branch of Government had a speical obligation to implement the principles enunciated in the Court's school desegregation opinion. For this reason we supported titles III, IV, and VI of the Civil Rights Act of 1964. But unfortunately the resistance to the right to enjoy equally the use of public schools and facilities has been so great that these provisions of law, while helpful, have not been able to secure the free exercise of constitutional rights. Discharge from employment, denial of credit, refusal to renew farm tenancy agreements and other economic pres-

sures have been exerted against those seeking rights for themselves or their children. Where these tactics have proved ineffective, intimidations subtle and overt have been used.

The Department of Health, Education, and Welfare was given the task of securing compliance with title VI.

Senator KENNEDY of Massachusetts. Mr. Wilkins, with your permission we will recess for just a few moments and then continue. I am needed in the Labor Committee.

(Short recess.)

Senator KENNEDY of Massachusetts. The subcommittee will come to order. I appreciate your indulgence, Mr. Wilkins. Continue.

Mr. WILKINS. Thank you, Senator Kennedy. I was saying in connection with de facto segregation and with segregation in the South which has been outlawed that previously existed by law, title VI of the 1964 civil rights bill and its enforcement were entrusted to the Department of Health, Education, and Welfare, and that freedom of choice has been the battle cry of those who seek to cling to the status quo. But they have refused to allow the choice to be free. Studies and reports published and complaints filed by civil rights organizations, including American Friends Service Committee, SNCC, the Urban League, Southern Regional Council, the NAACP, the NAACP legal defense fund and others, show that time and time again the choice of parents has been thwarted by the organized opposition. Principals and teachers have been used to influence the selection of schools. Threats of failures, of nonparticipation in athletic events and other extracurricular activities, have been utilized. Discharges of colored teachers have been widespread. Transportation has been refused to colored children attending desegregated schools. They have been psychologically and physically harassed inside and outside of school while the authorities have done nothing. Violence and the threats of violence have been the last resort of the die-hard segregationists. Freedom of choice is segregation with a new ritual.

We regret, Mr. Chairman, that the Department of Health, Education, and Welfare, either through its inability for lack of staff or because of the conviction of some of the people below the high administrative level and conviction of Secretary Gardner, is accepting the freedom of choice excuse of Southern States and southern school districts as evidence of compliance with title VI, and that as a matter of fact the southern political structure as represented by an impressive number of Senator and Governors has protested and resisted the so-called guidelines set down by HEW for the schools who are to comply with title VI.

As a matter of fact, Mr. Chairman, these guidelines we regard as being comparatively mild. They are not by any means as strict as we would have them be, nor did the Congress provide the funds which would enable HEW to police this title as we would like to have it policed. In effect, HEW here in Washington must accept an assurance from a school board in deep Florida or South Carolina or Mississippi or Texas which says that "We are in compliance, we have freedom of choice, and we have satisfied your guidelines," when as a matter of fact even a casual inspection of the past record or the present activity would demonstrate that the guidelines are not being observed.

I don't have to cite for this committee, I am sure, all of the examples of this kind of thing that have taken place.

Senator KENNEDY of Massachusetts. Mr. Wilkins, I have seen statistics that point out that there is only 1 Negro child in 12 attending schools which are integrated. Could you give me your general impression as to the accuracy of that figure?

Mr. WILKINS. Senator, our impression is that this is an optimistic estimate. I don't know, of course, statistics can be handled in a variety of ways.

Senator KENNEDY of Massachusetts. Yes.

Mr. WILKINS. But it is our belief from the information that we have, and we don't have the investigative facilities or the resources, financial resources to do a complete study, that to say that 1 in 12 or 1 in 13 is optimistic. It might be more nearly 1 in 20, and this is not amazing when you consider that in the first 10 years of the decision of the Supreme Court in *Brown* v. *Board of Education*, the desegregation rate in Southern States and border States was at the rate of less than 1 percent a year, and that even in these statistics, desegregation was counted as where one Negro child attended one school in one school district, and that school district was then said to be desegregated and was counted among statistics.

Now less than that I think it was nine-tenths of 1 percent a year, that was the average rate, and the only reason it was as fat as that was because you had the averages of Tennessee and West Virginia and Oklahoma and Missouri and Kentucky, the so-called border States, to average against the Deep South States. Else it would have been nearer to four-tenths of 1 percent rather than nine-tenths of 1 percent. So that when we consider those statistics, Senator Kennedy, it is not unbelievable that the present rate is greater or less, depending on your point of view, than 1 in 12.

I will cite a few examples to show the range of tactics used. In Wilcox County, Ala., the school superintendent has written to the parents of the Negro students advising the children to return to their segregated schools, regardless of what the Federal Government does. In Coosa County, Ala., the loss of welfare benefits was threatened if requests for school transfers were not withdrawn. In Mitchell County, Ga., a parent was severely beaten; in Burke County in the same State, the home of a child attending a desegregated school was shot into. In a Maryland community a cross was burned on the lawn of a home where a student lived. These represent only a sampling of the coercive tactics used. The cumulative effect of intimidation and threats has been to discourage many parents from applying for transfer for their children; many more have withdrawn their children after their transfer to a desegregated school.

The authority of the Attorney General under the 1964 act to file school desegregation suits is inadequate. It requires a written complaint to invoke its use. The same conditions that discourage school transfer applications discourage complaints. It does little good to say that such complaints are confidential; the Negro leaders and parents in the community are well known to those who resort to terror. A new approach is needed under which the initiative for filing desegregation suits is placed in the Attorney General.

There is another compelling reason why the Attorney General should be granted this authority. Title VI of the 1964 act reaches only those programs and communities that accept Federal funds. The 14th amendment reaches all public schools and facilities. Some political leaders see the refusal of Federal funds as a method of both avoiding desegregation and grabbing racist political headlines. To attain these objectives they are willing to compromise the future of their State's students, both white and colored, by denying them the Federal assistance needed to bring their school system into the 20th century. Already over 100 school districts have failed to even file plans under the relatively mild guidelines issued by the Office of Education under title VI. Those who defy the Constitution and jeopardize the future of thousands of young people must be convinced by the Federal Government that equal educational opportunity is the national policy, whether or not Federal funds are involved. This can only be done on a scale large enough to make it convincing by the Federal Government, acting through its chief law officer.

We welcome the inclusion in the pending bill of the provisions in title IV aimed at the ghetto system that disfigures residential areas in all parts of the country. With the whole housing market dominated by practices of discrimination, one finds all over the country the pattern of the central city with ever increasing ghettoes surrounded by a ring of completely segregated suburbs. Because of their confinement to limited areas, minority group families are forced into doubling up and other expedients that breed slum conditions, with resulting increases in delinquency, fire losses, depressed health conditions, and other evils.

No less important is the fact that continued bias in housing is nullifying gains made elsewhere in the fight against inequality. Residential segregation means segregation in schools, playgrounds, health facilities, and all other aspects of our daily lives. It is primarily responsible for the widespread segregation in northern urban and suburban public schools. It has even impaired the job opportunities opened up by fair employment laws. Finally, it is the most potent source of the intergroup tension that too often explodes in violence—a fact attested by a long list of names like Cicero, Rochester, and most recently Watts, and only this week Chicago, where the Puerto Ricans are reported to have been in the midst of violence with the Chicago police over the shooting of a Puerto Rican there, and the consequent actions and attitudes of the department. All of the dispatches from Chicago mention that the basic cause abscribed to this by Puerto Rican leaders was the breakdown of communications between the city and the Puerto Rican community.

Now I submit that this housing section of the proposed bill is directed at eliminating these enclaves, these ethnic enclaves that are so easily shut off in communication from the main body of the cities and from the main city officials. If you have either a segregated school system or a segregated housing community which can be isolated, cut off from the mainstream of American cities, and if you build fences there without any communication by reason of this exclusion, then you have the ingredients there of a riot.

Title IV of the present bill is designed to come to grips with this problem. It would bar discrimination not only by the owners of

housing but also by their agents and by those who provide necessary financing. Most important, it would apply to all housing. That is as it should be. Recent proposals, for example, to exclude "Mrs. Murphy's boardinghouse," would make unnecessary compromises with principle. Once Congress recognizes that housing bias works a harm to the national interest that it has power to prevent, it should do the job that needs to be done. It should not leave pockets of bias in the housing market.

There are some who say that this is of no concern of government—that the sale of housing is a private matter to be left to the whims and prejudices of the parties involved. This ignores the realities of recent years. Suburbia as it now exists was made possible largely by FHA and VA insured financing. Its residents are served by facilities constructed with Federal assistance, commute to work over highways and are treated in hospitals built with Federal funds.

In this connection we read just this week of the new plan to build a 120-mile-an-hour-train communication between Boston and Washington, and this is being pursued with Federal funds. All of the research, all of the building of the experimental trains, all of the assistance to the Pennsylvania and New Haven Railroads for the creation of rights-of-way, curbs, signals, and so forth, are being done with the initial appropriation of $90 million by the Federal Government, and to say that private enterprise is private in one sense but public when it comes to getting funds from the Federal Government, and that the Government cannot step in and set up any regulations is leading us down a path of inconsistency.

The children of these objectors attend schools receiving the benefits of Federal programs. To say that it is no concern of the Federal Government that Negroes are denied the right to live in these communities that would not exist except for this massive Federal assistance is to us an absurdity.

I note that this housing section, of course, has caused a great deal of discussion, and one of the leading discussants is the eminent and valuable and respected and colorful Senator from Illinois, the Honorable Everett McKinley Dirksen. Mr. Dirksen was joined by a less colorful witness this past week, the president of the National Association of Real Estate Boards. But their philosophy is almost identical.

They both believe that it is a great tragedy and threatens the end of the American institution of free enterprise if a man cannot sell his property to whom he wishes, and it is a great crime for the Government to step in and to say to whom he may not sell. These people, including the good Senator from Illinois who knows better, pretend as though there had never been any restrictions on the use of private property and, of course, this is simply not so.

There are regulations everywhere on the use of private property. The first that must occur to any member of this committee and to anyone in this room must be the zoning laws. We have zoning laws specifically to say to property owners that you may or may not do this or that with your property. It must set so many feet back from the sidewalk. It must do this, it must not do that.

We even have rent control laws and we tell them what rents they can charge, and we have laws which say they may not evict people

during certain times under certain conditions. So that if they get a tenant they are stuck with him.

And we also have laws that do with grazing rights out here on our great wide open spaces. A man cannot just graze his cattle wherever he pleases. He has to graze in accordance with grazing laws.

He may not build fences over his land in certain places because of Federal restriction.

It was once cited that a man who owns a shipment of hogs or cattle and is disposing of them as a private owner in the marketplace and shipping them to slaughterhouses has to comply with certain Federal regulations as to how long he may keep them without water and without exercise. He must open up the cattle trains and let them out and feed them and exercise them and water them at certain intervals. So that these cows are not his property to do absolutely as he pleases with them.

We have laws about setbacks and easements and entrances, sanitary codes, sprinkler systems, and a variety of other safety measures. We have never regarded it as an invasion of privacy to be involved here, and there is no preservation of the status of people.

This discussion of housing comes in the realm, Senator Kennedy, of the discussion of God and home and mother, and takes on all the overtones that we customarily ascribe to these so-called sacred subjects. Yet the people who say this never raise any objection when it is discovered, for example, that ladies of a certain easy profession are renting apartments in the most exclusive areas say of the East Side of New York and have gentleman callers at all hours of the day and night. The people who live in those apartment houses do not raise any objection with the landlord, or if they do, it has no force and effect, and one of the leading kings of the underworld in the United States lived on a certain avenue in New York City in a very plush duplex apartment, and he was the overlord of gambling, prostitution, drugs, and God knows what else. Yet nobody objected to his staying there and nobody said that nobody should interfere with him.

Yet if the Negro family went to church every Sunday and sent their kids to school regularly and took a bath every morning, not every Saturday night, tried to rent that apartment, there would be all this palaver about privacy and about the use of a man's property, about the preservation of the neighborhood and about the status of the family and the protection of mothers and the future of the children, and so on and so forth.

We simply believe, sir, that this housing provision is just and right, should be enacted.

Now we realize, of course, that there is a tremendous investment involved. The National Association of Real Estate Boards sells not only houses and lots but it sells location and status and exclusiveness and a variety of other things. It all goes in the price. Probably a $15,000 house has a $5,000 status tag added to it. But even so, we point——

Senator KENNEDY. Mr. Wilkins, would part of your theme be, as related to title IV, that under present laws, particularly in the field of public housing, the Federal Government has actually helped and assisted in the continuation of segregation in many of our urban areas?

Mr. WILKINS. Yes, it has.

Senator KENNEDY. Has that been your——

Mr. WILKINS. The Government has been a partner in this, sometimes unconsciously.

Senator KENNEDY. That is right.

Mr. WILKINS. And sometimes, without meaning to be so——

Senator KENNEDY. That is right.

Mr. WILKINS. But nevertheless, it has been such a partner. And it has made certain efforts to correct these in the regulations it has handed out, but these fall afoul of bureaucratic interpretation and enforcement, so that actually the Federal Government's position, while stated clearly, has not been enforced effectively.

Senator KENNEDY. Public housing has encouraged the continuation or the perpetuation of segregation in many instances. Would you not also agree, that it has been through FHA and VA loans that suburban housing has really been built up and established in recent years?

Mr. WILKINS. Oh, indeed so.

Senator KENNEDY. In suburban areas?

Mr. WILKINS. Indeed so.

Senator KENNEDY. So actually, the interest of the Federal Government in this is very real?

Mr. WILKINS. It is very real.

Senator KENNEDY. That is right.

Mr. WILKINS. In terms of not only millions of dollars, but providing living space for our people and therefore the Government has, it seems to me, a right to make these housing developments available to all of its people without distinctions between them on the basis of race.

Why should the Government spend hundreds of millions of dollars building up suburbs, desirable locations, underwriting builders and guaranteeing mortgages to provide an opportunity for families to escape from the central cities, but shall say to the black families that want to escape, "You cannot do it because this would be a bad national policy"?

Senator KENNEDY. Is it not true that a number of States have fair housing laws and that the States that do have it contain close to 50 percent of the Nation's population?

Mr. WILKINS. I think there are, Senator, some 17 States.

Senator KENNEDY. That is correct.

Mr. WILKINS. And they do. They have about half the population in the United States. This suggestion that the people in the South by a vote of their own representatives have recognized this area as a critical one to be corrected, to attempt to correct it through legislation, and the Federal Government ought not to follow behind these States.

As a matter of fact, the Federal Government ought to be out in front. I think it was President Harry Truman who said as long ago as 1947 that the Federal Government cannot wait for the slowest State to make up its mind, but must lead the way. He spoke in the general field of civil rights.

Senator KENNEDY. Yes.

Mr. WILKINS. And he was a true prophet, of course. But here we have the spectacle of 17 States and some municipalities with fair housing ordinances out in front of the Federal Government.

Now, if you want to pursue that, sir, on national policy, we have established the national policy of nondiscrimination on race. We have done it through legislative enactment, through court pronouncements and through executive action and through the statements of some of our great Presidents, including your late brother.

The policy of this country is unmistakable. The official national policy is against racial discrimination, and yet in this one great area, which has to do with family life, with the rearing of children, with the inculcating of ideals, with the opening up of ambitions and the providing of opportunities as well as health, welfare, and all the things that we glorify in America, we say to the Negro, "You cannot have this because you are not the right color."

This is the reason why we are for the enactment of this provision, and we believe that it ought to be enacted.

We would hope—we do not want to get into an argument with the Senator from Illinois because he is not really wrong. He is just misguided. But we would hope that we could recruit him to this position, because in his own State he has a growing problem there as a result of this housing deprivation.

Senator KENNEDY. I think the point you make is very well taken. It suggests that if we are really going to meet the problems in education, job opportunities, and the other areas which President Johnson stressed so eloquently in his address at Howard University a little over a year ago, this is fundamental. This is basic to achieving those aims and those goals.

Would you not agree?

Mr. WILKINS. That is right, Senator. You are absolutely right.

I just want to mention briefly the proposals we have for amendments. We are for all these sections. We propose in the matter of the jury selection procedures that a trigger be constructed based on statistical evidence of nonparticipation of Negroes in the jury service, that this trigger be included in the bill for the purpose of suspending discriminatory State qualifications in appointing a Federal official to select State juries where discrimination exists.

I am not trying to spell out the details of such provisions. Mr. Rauh, who has the technical information, will be glad to supplement this.

The second amendment we propose is that the provisions apply to State and local public employment practices, because one of the aberrations of the present system in the administration of justice in many areas is the all-white personnel policy. As commentators have pointed out, it is possible for a colored defendant to be arrested, jailed, and arraigned and indicted, tried, convicted, and fined without seeing anything but white faces in the whole process of the judicial procedure.

Now this may seem at first blush to be a small matter, and yet it emphasizes the very thing that not only this bill but our whole civil rights action is endeavoring to get rid of; namely, the racial differentiation. And if it is impressed upon a Negro plaintiff or defendant as he comes into contact with the judicial process that he is dealing here with them over there who are white against me who is black, if he gets that in his mind, no matter what the judicial determination

may be, it is hard for him to conceive of it as being just and on the facts rather than on the color of his skin.

I am not saying that merely one person over there of his own race would completely reassure him, but at least it would help to destroy that persisting suspicion in his mind that he is the victim of the judicial procedure because of his color rather than because of any crime or alleged crime he may have committed.

Senator KENNEDY. I think that the Southern Regional Council study mentioned that in 11 States of the old Confederacy, 28 court clerks and the 109 jury commissioners attached to Federal courts were all whites and were all appointed by 65 white district judges.

Mr. WILKINS. Yes.

Well, this bears out my point. It drives home to a Negro who comes into court the man who arrested him was white, the paddy wagon he rode in was driven by a white man, the jailer was white, the fingerprint man was white, and when he came up for arraignment he was arraigned in a white court, he was tried by a white jury, a white judge sat there, and if he was convicted, he was sent back to jail and went to a white prison, and that sort of thing, the jailers and everybody were white, sometimes he feels justifiably so, that he is the victim of color injustice rather than justice.

Mr. Chairman, the next amendment we suggest, the third one, is in connection with the persons injured because of race in their efforts to establish racial justice. We propose that an indemnification be included for the family, for the survivors of all victims.

The State of California has recently experimented with this legislatively and provided indemnification. The contention is that maybe this ought to be extended to all crimes. We feel that because this is a civil rights bill and these people are being punished because they are advocating conformity with civil rights, that it ought to be restricted to that. But we do urge it and most vigorously, that this amendment be included.

The final amendment, Mr. Chairman, is to ask that administrative enforcement be included in title IV, that is the housing title.

This provides at present that the complainant may file suit in court, and this is a long, time-consuming matter and also expensive, and he may not for a variety of reasons be able to do so. But an administrative remedy ought to be provided for him, so that he could go and make a complaint, and a hearing could be held, and a cease-and-desist ruling could be handed down. This would follow in the same kind of case as the chairman has cited of the State legislation that has been passed. It is also consistent with the action of the House of Representatives in adopting the Hawkins bill providing for administrative enforcement of the equal employment opportunity law.

Now, Mr. Chairman, these suggestions do not represent a criticism of the administration's program, nor are they offered in derogation. We believe it would be a national tragedy if Congress failed to enact the administration bill. Our changes here suggested are advanced as a supplement in the same manner that the leadership conference in 1954 and 1965 offered suggestions adopted by the Congress, suggestions which went beyond the original bill as introduced.

The time has come to break the vicious circle that confines Negroes to second-class housing status. This can be done only by a total Fed-

eral program, legislative and Executive. The legislative aspect will commerce with the adoption of title IV. It will not only be effective in its own right; it will stimulate action by the executive branch to make housing desegregation a prime goal of Federal action.

I cannot complete my comments without reference to the President's request that the bill sponsored by Congressman Hawkins (H.R. 10065) be included as part of the administration's program. We have already gone on record in support of this by testifying and working for its passage.

Since the House has already passed the bill with overwhelming bipartisan support, we hope the Senate will include it as part of the pending bill just as it passed the Equal Employment Opportunity Act as title VII of the Civil Rights Act of 1964.

For all the reasons I have noted, we will work for the passage of S. 3296. For the same reasons, however, we will support with all our resources efforts to make this bill an even better vehicle for the protection of the rights of those persons who are represented by our combined organizations, by addition of reasonable, constructive amendments.

At the May 5 meeting of the leadership conference, to which I have previously referred, there was general agreement that four proposals met this criterion and should be specifically brought to the attention of the Congress.

It is our belief that the jury selection procedures, particularly as they relate to State juries, should be strengthened to better assure that the prohibitions against discrimination will be enforced. We are all only too well familiar with the failure of reliance on case-by-case judicial procedures to assure the right to vote.

Accordingly, the Congress last year adopted an "automatic trigger" to suspend State literacy requirements and to appoint Federal examiners for the election processes.

We propose that a similar trigger, based on statistical evidence of nonparticipation of Negroes in jury service, be included in the bill, for the purpose of suspending discriminatory State qualifications and appointing a Federal official to select State juries where discrimination exists.

I will not attempt to spell out the details of such a provision. One possible approach is the presumptive method contained in Congressman Diggs' bill (H.R. 12807) and other House bills, and in S. 2923, sponsored in the Senate by Senators Douglas, Case, and 19 bipartisan colleagues.

Another would be a certification by the Attorney General that a given statistical formula of nonparticipation of Negroes in jury service had been met. We are confident that the Senate can devise and adopt a more expeditious and effective method of enforcement than is contained in the present administration proposal.

One of the aberrations of the present system of the administration of justice in many areas is its all-white personnel policy. As commentators have pointed out, it is possible for a colored defendant to be arrested, jailed, arraigned, indicted, tried, convicted, and confined, without seeing anything but white faces in the whole process of the judicial procedures.

To at least begin to break down this obstacle to equal justice, we proposed that the equal employment law (title VII of the 1964 act), either as now constituted or as amended by the Hawkins bill, be amended to cover State and local public employment practices.

Next, we would urge the Congress to give most serious consideration to establishing a program of indemnification for persons injured because of race or their efforts to establish racial justice, along the lines of the Diggs and Douglas-Case bills.

There are those who say that such a program should not be considered unless applied to all victims of crime. We believe, however, that there are valid reasons for beginning this program with indemnification for victims of the civil rights struggle.

This is a civil rights bill, one of the principal purposes of which is to deter violence against Negroes and civil rights workers. It is our belief that the Klan, and other night riders and perpetrators of violence, would be deterred if they knew their victims could receive an award of indemnification and that they, in turn, would be sued by the U.S. Government for the amount of that award.

The rights here protected are Federal rights, rooted in the Constitution. Therefore, their denial or abridgement by violence is a matter of Federal concern, unlike the usual crime, which is primarily within the jurisdiction of local government.

Another reason for Federal interest is that the victims of these crimes are engaged in activities that further the national policy of equality of opportunity. They are not victimized, as are most persons subjected to criminal assaults, by chance, but are specifically chosen because of their efforts to make the Constitution a living reality.

Medgar Evers, the Chaney-Schwerner-Goodman trio, Mrs. Liuzzo, Reverend Reeb and others can properly be compared to those in the service of their country in Vietnam, in that they died to protect and advance our American ideals.

Finally, we feel there is an obligation to compensate the victims of racial violence or their kin because the violence to which they are subjected results from governmental action in the true sense. This violence stems from 100 years of official State action suppressing the constitutional rights of Negro citizens, and from nearly the same length of Federal indifference to this systematic denial of rights. Surely if ever an institution were a creature of government, it is that of racially motivated violence to suppress legitimate aspirations of millions of Negro citizens and their white advocates. That the Government should now indemnify for this suppression is certainly not too much to ask.

The other major change we ask in the bill is that administrative enforcement be included in title IV. This is consistent with our long-established policy of supporting administrative enforcement of civil rights statutes. It is also consistent with the action of the House of Representatives in adopting the Hawkins bill, providing for administrative enforcement of the equal employment opportunity law.

A few of the advantages of the administrative procedure may be mentioned.

First, it neutralizes the well-known fact that victims of discrimination are rarely in a position to initiate and carry through lengthy

court proceedings. Under the administrative process, the burden is largely lifted from the complainant once he invokes the statutory procedure. From that point on, the administrative agency takes over responsibility for carrying out the public purpose of preventing and remedying violations of the law.

Second, the administrative process assures expert treatment in dealing with a difficult and frequently technical area. Expertise is needed both in evaluating the facts and in shaping the appropriate remedy. It is needed also in the vital task of continuing supervision of past offenders.

Third, an administrative agency can deal with whole sectors of a problem in a unitary fashion. This is difficult, of course, acting on a case-by-case basis. Moreover, the agency can concentrate its forces at the points most in need of corrective action.

Fourth, the administrative process protects persons against unwarranted charges. The agency can quicky screen out those charges of bias that arise out of pique, misunderstanding, or vindictiveness. It is a well-known fact that litigation has been kept at a very low level under all administrative civil rights laws.

These considerations, fully buttressed by experience, have been persuasive with the State legislatures. In State after State, antibias laws of the old-fashioned type have been amended to provide for administrative enforcement and most new laws contain that feature.

At present, of the 18 fair-housing laws in 17 States and the District of Columbia, all but one are enforced administratively. The corresponding figures for employment are 30 out of 35; for public accommodations, 23 out of 36.

It should be noted that none of the evils so freely predicted for this type of law have eventuated. Neither hotel owners, employers nor housing developers have been harassed by overzealous bureaucrats. They have not been put out of business by being forced to defend themselves against floods of complaints.

On the other hand, steady, though unfortunately inadequate, gains have been made toward practical equality of opportunity.

Administrative enforcement of title IV should supplement rather than replace the present enforcement features of the bill. In many States, parties aggrieved by discriminatory practices may make an election between filing a complaint with the State antibias agency and bringing their own suit in court. Although experience shows that the latter alternative is rarely used, its availability is a valuable counter to the ever-present danger of bureaucratic sluggishness.

In a conference coordinating the legislative interests of over 100 separate organizations, there are many opinions as to other changes that would improve the proposed legislation, and each organization retains the right to suggest additional amendments to the Congress. But the four changes I have urged represent a firm consensus within the leadership conference as to what civil rights groups should support as a minimum.

These suggestions do not represent a criticism of the administration's program, nor are they offered in derogation of it. We believe it would be a national tragedy if Congress failed to enact the administration bill.

Our changes are advanced as a supplement, in the same manner that the leadership conference in 1964 and 1965 offered suggestions that were adopted by the Congress—suggestions that went beyond the original bill as introduced.

It is our hope that just as in 1964 and 1965, the voice of public opinion let Congress know that what we sought was reasonable, just, and practical, it will again convey to the Congress the sense of necessity and urgency for the strengthening changes we advocate. We shall dedicate our efforts to seeing that this message is relayed to the members of your subcommittee, committee, and the full Congress.

Finally, in closing, Mr. Chairman, I would like to have a word of supplementary testimony which I filed with the clerk, but I would like to read it.

Last week I talked for more than a half hour with James H. Meredith in his hospital room in Memphis, June 7. I addressed two rallies there, one crowd packed in to the doors, and talked with numbers of Negro citizens in Memphis.

My estimate is that the mood of the majority of the Negro community at present is one of slow-burning anger and of a growing feeling that the method of the law is not helping them where they hurt most.

They nod their heads and they agree in logic that the path of law is the sensible way. But they look at the gunning down of James Meredith by a man who apparently drove to near the ambush point, parked his car, took his time in rising from cover, called out to distinguish Meredith from the others, and then fired three times. When apprehended in a matter of minutes, he was calmly making his way back to his parked car.

The Negro people with whom I have talked, in the South and in the North, are shocked and outraged over the Meredith ambush. They feel strongly that a law is needed at once which will authorize Federal action against this kind of crime, a law which will operate from the outset through to trial and verdict in a Federal court.

The people—except for an exceedingly active and explosive minority—are not yet in the riot mood of quick, retaliatory, and destructive anger. Their anger is the more dangerous kind in a society based upon law and order; they are being instructed by the Meredith shooting and by a long list of similar shootings, burnings, and killings that the law either cannot or will not protect them. They suspect strongly that when they seek their citizenship rights in areas where hitherto these have been denied, individual white citizens, confident of the sympathy of a part of the white community, feel free to become terrorists and assassins.

These persons know that too often they can depend upon overt or covert assistance on the part of some local and State officials in law enforcement agencies.

They know, too, that they have little to fear from present Federal laws, since none of these apply directly and forcefully to their activity. These people know, too, that present Federal statutes compound their inherent weaknesses through cumbersome procedures hampered at every turn by court interpretation. These rulings have given precedence, even in bald and shocking examples of State court

actions, to local and State peremptory and summary procedures and verdicts where Negro citizens have been the adversaries of white citizens.

It is most urgent, therefore, and I cannot say this too strongly, Mr. Chairman, that there be prompt and favorable action by the Congress on the pending civil rights bill. The deadly assaults upon Negroes and upon the advocates of their cause during the past years have been savage ones upon the person. Most of these have gone unpunished, some without even the initial formality of an arrest.

The nature of these attacks and their casual disposition are eroding what little confidence in the law some Negro citizens had been able to maintain.

If the present civil rights bill should be defeated or should be enacted in an emasculated form, the assassins will have won, in the minds of growing numbers of Negro citizens, and the law and democratic processes will have lost.

More disturbingly—and more tragically—the preachers of violent retaliatory action will have won more converts than they could have enrolled had they not had the aid of the zealous technicians in our legislatures. The legislators have been backed by the cooperative sympathy of those whose experience with the law have never included the burning down of one's home or one's church and the wanton slaying of a loved one. Not one white Senator or Congressman, for example, has ever been told he could not purchase a home or rent an apartment because he is white.

In such circumstances all people, white as well as black, are bewildered and unconvinced by theoretical arguments on the desirability of law as against potentially explosive and blindly resentful punitive action.

Any solid beginning on interracial peace must contain the basic requirement that the law function without regard to race and color. There can be but skepticism among Negro citizens on any phase of a program directed toward eradicating inequality and opening up opportunities until it is demonstrated in unmistakable fashion that the law can protect Negroes from personal racial persecution.

In this climate, so potentially damaging to the Nation, it is dismaying to have the report that some Members of the House were restrained in their attempt and suggestion that title V, the title authorizing Federal action in cases like the Meredith shooting, be completely eliminated from the pending bill.

I cannot imagine a move so slightly in contact with the racial facts of life in 1966, or one more disastrous in its effect upon our national life.

Since as early as February those persons in the civil rights field have been met with the question on the possibility of what has been called a "long, hot summer." The answer may have been taken out of their mouths by the sniper who shot James Meredith in the back June 6 as the young man walked peacefully down U.S. Highway 51 near Hernando, Miss.

What a tragedy it would be for human decency and for an ordered society if the timidity or the opportunism or the plain ignorance of our lawmakers should produce legislation that will deepen the despair of

the helpless and reinforce the arrogance of the architects and practitioners of racial oppression.

On such a day each one of us should hide our faces in shame and draw a shroud over the plaques and other mementoes of our national ideals. Before the world we would stand as the Nation mighty enough to rebuild the European Continent, yet one too weak in will to protect the basic physical birthright of the humblest American within the borders of his own country.

Thank you, Mr. Chairman.

Senator KENNEDY. Mr. Wilkins, I want to commend you for your testimony. It is extremely helpful and comprehensive. I think the suggestions which you have made will be considered very carefully and with a great deal of sympathy.

Is it your feeling and the feeling of the Leadership Conference that while the passage of title V, which deals with crimes of violence, is certainly an important and a fundamental part of this legislation that what is more fundamental is an attitude which can really be corrected to a substantial and significant extent only by the acceptance of all the various provisions of this bill, especially title IV, the housing section? It certainly is mine.

I feel that inherent in the shooting of Meredith is the contempt for Negroes in certain parts of our country. I am sure that much of this contempt arises out of misunderstandings that result from the Negro's isolation from the rest of society. Thus the title IV provisions are equally as important because they are designed to help remedy the ghetto problem and to remove barriers to understanding.

Mr. WILKINS. Senator, I could not endorse more completely this sentiment.

I am sure you recall that it was your illustrious brother who came to the conclusion in 1963 that we could not enact piecemeal legislation. Consequently he sent a 10-title bill to the Congress. It was a comprehensive bill for the first time in the history of the country.

What he was saying by that, it seems to me, is precisely what you are saying now and what I believe the leadership conference is saying, and that is as long as you separate out the Negro and put him in a special position, you invite the contempt and the differential treatment on the part of other citizens, and that if you seek to correct only one phase of it, you leave him still in an exposed position as a detached member of society.

I am sure my colleagues, Mr. Mitchell and Mr. Rauh, have comment on this, and I want to thank the Senator for going really to the bottom of this whole thing. It is of a piece.

I think the President a year ago referred to it as a seamless web, in his speech at Howard University, the whole fabric of discrimination and racial segregation, and unless it is recognized and treated in some such fashion as we have indicated here, because if this bill is chopped up and a piece passed here and the other piece discarded, it will still leave the Negro exposed.

Mr. RAUH. Mr. Chairman, I would just like to make two points, as Mr. Wilkins suggested I do so.

The first point is that I think the questions of constitutionality of title IV are not raised in good faith. I do not think that there is any

longer any constitutional question concerning the powers of Congress to deal a civil rights matter.

When Senator Dirksen and the others say that they question the constitutionality, they do not really mean that. They do not mean that they have any doubts that the Supreme Court will uphold the statute of Congress. What they mean is they have some idea that the Supreme Court should not do so. But I respectfully suggest that the Supreme Court is the highest legal body in this land, and that if it is clear, as I respectfully suggest it is clear, that the Supreme Court will uphold title IV on the basis of its invitation for action of this kind in its recent decisions, then I do not think it is in good faith to say "I question the contitutionality * * *."

I respectfully suggest that both under the commerce clause and under section 5 of the 14th amendment, there is no question that the Supreme Court would uphold title IV, and that, it seems to me, is the only question put before the Congress, not whether a Senator himself wants the Supreme Court to do that.

Second, I would like to say a word about the four amendments which Mr. Wilkins referred to.

We are concerned lest the absence of these four amendments weaken the bill in the Congress rather than strengthen it. Without these four amendments, there is a serious question whether the bill is strong enough to do the job. We think you will get more support with the amendments than you would have with the bill in its present form.

(At this point, Senator Javits entered the hearing room.)

Mr. RAUH. We are concerned lest these amendments be treated as a mere pro forma effort on our part. They are not. Without these four amendments there will be a large part of the civil rights movement that may not feel they can really give everything they have to the bill, and we strongly urge each of them upon you, and I would be happy to answer any questions about the four amendments, but Mr. Wilkins certainly did express, did state them accurately and well.

With the last question which you put to Mr. Wilkins, concerning the integration of the problem, I could not agree with his answer more. It is more eloquent that I could say it, so I simply subscribe to it.

Mr. MITCHELL. Mr. Chairman, I would like to comment on that, too. Before I do, I would just like to say that I think your action at a parade some time ago is an illustration of what must be done when you are confronted with practical instances of discrimination. It is my recollection that there was a parade, and that some Negro participants in that parade were the objects of persons on the sidelines who were throwing trash and other debris at them. As I understand what happened from the newspaper reports, you got out from the head of the parade and went to a place where the trouble was occurring and proceeded to expose yourself to the same missiles that were possibly aimed at the Negroes.

I think that is the kind of personal commitment we need on the art of public officials these days, if we are to save the country from chaos that comes necessarily after people lose hope. I think people would lose hope if the amendments that we have spoken about are not included, and I would like particularly to stress, in addition to the others, the indemnification amendment, because yesterday the sub-

committee of the House Judiciary Committee, by a voice vote as I understand it, declined to include that amendment in the bill.

It seems to me this is a very callous thing to do when you recognize that in many of these instances people who assert their constitutional rights lose their homes, their ability to make a living, and their lives, simply because they have taken a stand for what is just.

I believe that the Government of the United States, which can protect people in hurricanes, which can come to the aid of persons who are stricken by earthquakes in Alaska, and which can reach out to protect the economic interests of Spanish farmers who lost their land because we dropped an atom bomb or an H-bomb on their property and thereby contaminated the soil, it is my belief that this same government ought to be able to have the resources and the means of indemnifying people who are the victims of problems because they took a stand for human rights.

Senator KENNEDY. I would like to ask you one or two questions with regard to the suggestions and recommendations you made. Mr. Rauh, you mentioned the advantages of an automatic trigger in title II, the State jury section.

We questioned the Attorney General on this point. He feels that the current legislation would be sufficient to meet what I think Mr. Wilkins has pointed out to be the dramatic inequities as far as the judicial system in the South.

The point that concerns me and a number of the other members of the committee is that it appears that we have tried a case-by-case approach in the past and subsequently, a year or two afterward found ourselves considering the kinds of approaches which were utilized in the administration bill with regard to voting rights.

I am wondering if you would develop this point to some extent, describe the basis for the conclusions which you reached here, and give the reasons why you believe that the current provisions in the legislation are not suitable to do the job.

Mr. RAUH. I would like very much to do that, Senator Kennedy. You have put the thing very well when you referred to the voting rights analogy.

In 1957 Congress passed a voting rights bill which provided for a case-by-case method, and 7 years later it had to pass another bill, because the case-by-case method had not worked. I would have thought the lesson was perfectly clear to the Justice Department, since they had been the ones who for 7 years had been unable to make the voting rights thing work under a case-by-case method.

We suggested that we wanted to model the 1966 bill on the 1964 bill, not on the 1957 bill. They rejected our contention and went back to the 1957 bill. We think that is a mistake.

We think it should be modeled on the 1964 bill. The simplest way to do this would be to say that were the Attorney General makes a finding that the ratio of Negroes on a jury to the total jury service is so much under Negro population to total population, then he can send in a jury commissioner just as he can send in a voting registrar.

This is our first choice. I think it is right. I think it is the way to do it. It is modeled perfectly on the voting rights bill, and it has already been upheld by the Supreme Court in *South Carolina* v. *Katzenbach*.

If, however, I had to fall back from that position, which I do not want to do, but if I were forced to, I would say better than the present bill would be some procedure whereby if the Attorney General certifies that the ratio is such, then a commissioner can be sent in there temporarily while the matter is being litigated.

I prefer the first, but the second, too, would seem to me to work.

To go this way I am afraid what is going to happen is, the people are going to be disappointed again. You have heard Mr. Wilkins on what happens when Negroes today are disappointed, and I cannot add a word to that, but I can say that I think the way the jury provision is now written, if it is not strengthened, you are going to have a lot of disappointed people back here a year from today saying "Well, there are no Negroes on the juries in my county," and, of course, there will be a litigation going there or there will be a litigation in some of the places.

But the basic thing of trying to get a wholesale revamping of the jury system, where there has been exclusion, is not provided for in the bill. That is why we have come before you with this amendment and why we have come before the House.

Senator KENNEDY. And that same reasoning has applied as well in the fields of education where there has been a case-by-case and district-by-district, county-by-county approach. Has it not?

Mr. RAUH. Mr. Wilkins just pointed out a very good analogy. You needed title VI because case by case did not work in education. Case by case does not work, and we are most anxious to get an automatic trigger in here, and we would just hope that you who made the wonderful fight last year for the poll tax, and which I believe ultimately had a real effect on the outcome of the poll tax fight, which is now behind us, would help us with this.

Senator KENNEDY. Could you extend this same reasoning to the title IV provisions in the housing section?

Do you feel that there should be provisions made to have an administrative agency which would bear the responsibility for the enforcement of these provisions as well as judicial machinery to implement it?

Mr. RAUH. That is certainly clear of the housing, that speed will come from an administrative agency. I do not mean that they are always so fast.

Senator KENNEDY. Yes.

Mr. RAUH. We have got some criticism about the speed with which the Government is going on the 1964 and 1965 laws, but it does speed it up from what you will have if we have to go to court every time with the individual himself. So that certainly the comments are apt, as you suggest on the housing.

Now on the education, we already have a wholesale method, if the Government will use it.

Mr. Wilkins spoke of the title VI slowness of Secretary Gardner, and we are quite critical. We recognize he has got a lot of political pressure on him from the other side, but we feel that he has been given a bill to enforce, and that you have a wholesale method there to enforce it, and I cannot think of an automatic trigger there really to suggest that would not rather discredit my belief that these other things are workable.

For example, to suggest an automatic trigger with the Federal Government taking over the educational system I think would be at this moment not well received, and I would rather not make that suggestion, as I would feel that other suggestions that we make here very earnestly are colored by it. I think that we are well on our way in education if Secretary Gardner will really enforce title VI, and if we can have this additional provision for suits where title VI does not bring compliance.

Senator KENNEDY. Can I ask you whether from your own experience and from the studies that have been made what the effect, if any, title IV will have on the valuation of property. I know that you are familiar with a number of studies that have been made.

Could you give us the results of these studies?

Mr. RAUH. As far as I know, and I am sure Mr. Mitchell and Mr. Wilkins know more, it simply is not true that real estate values go down, and there was a very good study that I say approximately a year ago on this point.

What happens is that in particular moments, due to ugly blockbusting and vicious real estate practices, you may have a temporary reduction in values, but that has nothing to do with real value. What happens if people are frightened in any situation, you can have that happen in the stock market. People get frightened and you get a temporary reduction in value. But the real value is still there, and as far as the long range is concerned, there is not the slightest evidence of reduction in values in any study.

I am sure Mr. Wilkins and Mr. Mitchell agree.

Mr. WILKINS. Senator, I endorse this of course, but I recall a study done at the University of California under the Commission on Race on Housing, in which Earl Schwults, the past chairman of the board of the Bowery Savings Bank was general chairman. Earl Schwults of course cannot be accused of being a civil rights pink liberal. He is a hardheaded businessman banker, and yet this study, conducted at the University of Chicago, in seven cities, selected cities across the country, three of them as I recall on the west coast, showed that in controlled experiments in the observations of housing, there was not only no depreciation of property, but an actual increase in some instances in the value of property, by reason of Negroes moving in the neighborhood.

Actually all studies, in addition to the University of California, have shown this to be true.

Mr. MITCHELL. Mr. Chairman, I would just like to cite the testimony of Mr. William Levitt.

Mr. Levitt, as you know, is one of the great builders in this country and we have tangled with him quite often on his discriminatory policies. But in his statement to the House he said:

> Our sales volume for the fiscal year just completed—

Presumably referring to 1965—

> came to some $74 million. That is a fivefold increase in the five years since we began to sell on an open occupancy basis. Just to keep things in the right perspective, I want to point out that this growth is not in any way attributable to boom conditions in the homebuilding industry. Obviously integration certainly has not hurt us, and that is why it is logical to believe there is absolutely no reason for anyone to fear the economic impact of title IV on the homebuilding industry.

He further testified, in response to a question, that he had no trouble in the resale of property that had been occupied by Negroes, and there was no adverse effect on value.

Senator KENNEDY. I think that certainly supports another study that I saw with Dr. Luigi Lorenti, who did a three-city study, San Francisco, Oakland, and Philadelphia. Lorenti compared the price movement in test neighborhoods with those in similar neighborhoods remaining all white in the same period. He maintained 85 percent of the cases showed upward improvement or remained stable.

I think all these demonstrate fairly conclusively that there have been a great many estimates which have been made which are certainly not substantiated by the tests that have been made.

I know Senator Javits is interested in developing some questions. I would like to just ask you one final question for now, and that is, as I understand title IV, we have to recognize that this is not going to be the answer to all the problems in housing, and you are really not maintaining, as I understand it from your testimony, that it will be the final answer, but that you do feel that it is a fundamental answer, and it is a question of both of national policy and national direction in one of the most basic areas, and you feel that there are those that say, "Well, this is not going to be the answer." You are not even suggesting that it is the answer, but as I gather, what you are saying is, it is absolutely fundamental and basic and that if we are going to carry through the purposes of the 1949 act to guarantee to all Americans the opportunity to own homes and develop and grow in the society, that this is absolutely fundamental to achieve what has already been stated as our national goals in the field of housing.

Mr. WILKINS. That is correct, Senator. We do not maintain that this section will answer all the housing problems or cure all the housing ills or even the ills in the area of race.

Senator KENNEDY. Yes.

Mr. WILKINS. But we think it is an essential beginning.

Consider just two items if you will.

First, we are making efforts in other areas, employment, education, to upgrade Negroes. We are telling them they ought to be better citizens, they ought to train themselves, they ought to become technically available. The jobs are here and the corporations are hiring them. And they are getting technical and managerial salaries.

Are you going to say to such a man who trains himself and moves into a $15,000, $20,000, or $25,000 job that he has to live in a slum, and that he cannot move into a comfortable apartment? So that if we do not do something about housing, we nullify all the other efforts we are making in the fields of education and employment.

The second point is that we feel that this housing measure as a broad national policy will encourage people like Levitt, who want to obey the law, who have found that the law does not hurt their sales, and many others even in the Deep South, just as they did with the Civil Rights Act of 1964, we had compliance in a surprising number of areas, of people who said, "Well, it is the law now and we want to obey the law."

Senator KENNEDY. Very good.

Senator Javits?

Senator JAVITS. Thank you, Mr. Chairman.

May I express my own appreciation to the Chair for keeping this hearing going all morning. We are all very much engaged on urgent business. I welcome the opportunity to question the witnesses.

As you are my witnesses, I will do nothing to impeach you I assure you. But I did want to ask you this: How do you feel about the question of a Presidential Executive order in lieu of title IV?

And bearing on that, the grave problem which I see is that if for any reason title IV should be watered down, or should be defeated on the floor, it would then be very difficult to get an Executive order. Yet our research indicates that as much as 80 percent of the housing in the Nation could be covered by an Executive order, that is, by escalating the famous 1963 order.

Mr. WILKINS. Senator, our feeling is that always if you can get something in legislation it is better than having an Executive order. We have no doubt that an Executive order properly drawn and issued and properly enforced and observed might cover 80 percent of the housing. But it is our belief, and the Leadership Conference on Civil Rights debated this for months on end, that the law was preferable to Executive orders.

Now we had before us President Kennedy's Executive order which was issued in 1962, if I recall, and it has been notable for the fact that it has not been observed. It was drawn in good faith. It applied to a certain segment of the housing problem. But even in that segment, it has not been enforced.

And you face also the difficulty of the interpretation of an Executive order as being the will of one man.

Senator JAVITS. He happens to be the President.

Mr. WILKINS. He happens to be the President, but nevertheless, in the eyes of Americans, as I am sure you recognize, both with respect to Republican Presidents, witness our last one, and the present one, they all had their areas of opposition, even within their own parties. So that we cannot afford to discount this attitude that an Executive order represents the will of one man. It was not issued by a court. It was not issued and passed by the Congress. It is just what he says. And in this sense of a touchy field, that interpretation is not likely to be given large weight.

In addition to that, there is the difficulty of policing, enforcing. You recall the difficulty of getting FHA regulations changed. It took 10 or 15 years.

Senator JAVITS. I was a party to that.

Mr. WILKINS. You were a party, that is right. For that reason, not because we are opposed to Executive orders, nor to the idea behind it or the purpose, but just as a matter of feasibility and effectiveness, we feel that the law is better.

I do not know whether there are any technical answers that Mr. Rauh or Mr. Mitchell have to add to this.

Senator JAVITS. You say that on balance, notwithstanding the fact that 80 percent of housing might be covered by the Executive order; is that correct, Mr. Wilkins?

Mr. WILKINS. Mr. Rauh——

Senator JAVITS. I want to get your judgment because you are the leader here.

Mr. WILKINS. Yes. I am only here interpreting our debate. We debated and arrived at this conclusion.

Senator JAVITS. All right, that is all I want to know. You arrived at this conclusion?

Mr. WILKINS. That this is preferable, that legislation is preferable to the Executive orders.

Senator JAVITS. We will get to Mr. Rauh and Mr. Mitchell in a minute.

Mr. WILKINS. Yes.

Senator JAVITS. You know that I will never deny them the right to be heard. But I am anxious to pursue one thing with you.

Under those circumstances, is it not a fact that title IV becomes the critical part of this bill, because we are in great danger here. We are in greater danger with title IV than we are in any other title. We can come back to any other title, but with this one we give the possibility of an Executive order, we accept the hazards of legislation. Therefore, title IV becomes the focus of the bill, does it not?

Mr. WILKINS. Oh, yes.

Senator JAVITS. And so talk of giving up title IV, watering it down, letting it go because without it we will get the whole bill passed faster, you reject that, do you not?

Mr. WILKINS. Yes. We considered all the hazards, Senator, of the legislation, and it strikes us that whatever becomes of title IV, that the Congress nor the country, neither one will be able to dodge this question of housing.

Now if we were to say, speaking only strategically now, if we were to say we will give up title IV and we will take the rest of the bill, because it is a tough area, and we will try to settle title IV with an Executive order, and we will just have this bill dealing with this, we have found in the civil rights movement the minute you name a priority, all the guns are trained on that priority. If we remove housing from this bill, all the guns will be trained on some other section of the bill.

In this case we want all of it. I cannot stress this too strongly. And we recognize the hazards. But we also rest in the conclusion that housing is an issue that this country will never be able to dodge, whether it talks about Executive orders or legislation or how tough it is or whether it endangers this, that and the other. The fact is that we have got to face up to housing either in 1966 or 1967 or 1968. We can postpone it or play with it in Executive orders, pieces of paper, legislation, court orders or what have you, but we have got to face it.

Senator JAVITS. So that you would say I gather that the housing discrimination problem must be dealt with if Congress is really to do its job in the Civil Rights Act of 1966.

Mr. WILKINS. If you mean by that question that we will regard it as a failure of the Congress if it does not deal with the Housing Act, I would say we would regard it as a failure but not the complete failure, if you mean by that to say that other sections of the bill which might survive will be of no consequence.

Senator JAVITS. No, I do not say that at all.

Mr. WILKINS. Very good.

Senator JAVITS. You see, you are leaders. You are the leadership conference. There are Congressmen and Senators who want to know what you think.

Mr. WILKINS. Yes.

Senator JAVITS. They are not bound to follow it.

Mr. WILKINS. I understand.

Senator JAVITS. They want to know what you think.

Mr. WILKINS. We are trying to make it plain.

Senator JAVITS. Good. That is what I am trying to help you do because I think that is the service that questioning by a committee performs.

Now did you, before the President sent up this bill, urge him to issue an Executive order?

Mr. WILKINS. Yes, we did. We joined with others in the request for an Executive order on housing, because we have never left the housing issue out of the total civil rights picture. It has never been far behind any immediate consideration, and we have persisted in it. We have persisted for expansion, for example, of President Kennedy's order. But we came to the conclusion, and helped along by adherents of legislative procedure, that it would be helpful. I do not think anybody can maintain that this administration, which runs certain risks in certain areas of the country because of certain expressions on the civil rights issue, would deliberately pick out an issue which is as sensitive and as touchy as housing equality legislation, and back it without the conviction that this was a channel to effective results.

Senator JAVITS. Did the leadership conference recommend legislation or was their effort directed toward an Executive order?

It is true that now you have decided to follow the legislative path, but did you people recommend legislation rather than an Executive order?

Mr. WILKINS. We were in the early stages discussing the advisability of an Executive order, and in the course of the discussion and the give and take back and forth, we have some 38 or 40 legislative agents who give us the benefit of their advice on practical dealings with Senators and Congressmen, and in the debate back and forth on this, we came to the conclusion, we moved from the Executive order to the legislative approach.

Mr. MITCHELL. Senator Javits, I do think the record ought to show, though, that the National Association for the Advancement of Colored People has consistently always advocated the passage of housing legislation, and the only reason the leadership conference was in the position of asking for an Executive order was because at the White House Planning Conference, those who are most active in the housing field asked us to support the effort to get an Executive order, and we, in an effort to be cooperative, did so.

But I think there is nothing in our record which shows that we have failed to give priority to the legislative approach.

Senator JAVITS. Mr. Wilkins, I know from my assistant that you gentlemen were rather harsh on the minority leader, Mr. Dirksen, on this subject.

Mr. WILKINS. No, I think we were very——

Senator JAVITS. Very fair?

Mr. WILKINS. Oh, very.

Senator JAVITS. In pursuance of this fairness, may I ask you this question?

Mr. WILKINS. Yes.

Senator JAVITS. You recall, do you not, that Senator Dirksen was pretty vehement on the question of the public accommodations section of the 1964 act; is that not true?

Mr. WILKINS. That is right.

Senator JAVITS. And that ultimately he was credited with being—I will not say the principle architect, though I think that is correct—certainly a principal architect of the inclusion of a public accommodations section in the 1964 act. Under those circumstances, do you think we ought to quite give up on him on this one?

Mr. WILKINS. Well, I refer the Senator to my testimony, which ended with the expression that we might yet convert Senator Dirksen, and with respect to his role in the public accommodations section, I believe the word "catalyst" rather than the architect of the final solution.

I think Senator Dirksen was most helpful there and everyone now realizes it and acknowledges it. I was the first one to say so to him.

Senator JAVITS. You were. You were very generous.

Mr. WILKINS. I was the first one, and we have not given up on Senator Dirksen at all. We do not condemn him outright. Of course, since he is a master in this field, we cannot match him in the exchange of what might be called pleasantries on this matter. But in our weak way we did express the hope that he would come back to the mourners' bench and eventually be converted.

Senator JAVITS. I have great hope. It is unilateral at the moment, but I have great hope that our history in 1964 may repeat itself.

Finally, Mr. Wilkins, my assistant tells me that you raised a rather interesting question, which interests me for obvious reasons, that white Senators perhaps do not know what housing discrimination means.

Mr. WILKINS. No. I had you in mind when I wrote that sentence, sir. I had you in mind when I wrote that sentence. The sentence was that white Senators and Congressmen have never had the experience of being told that they cannot buy a home or rent an apartment because they are white.

I was fully aware that some Senators, sir, had been refused homes because of their religious affiliations, and we know about that, and of course we decried it at the time.

Senator JAVITS. It does not hurt any less, I am sure you understand.

Mr. WILKINS. Yes; it does not hurt any less, but I was careful I think to protect my flanks in that matter.

Senator JAVITS. All right.

Now finally, gentlemen, these amendments which you suggest have all been offered. They will be before the committee. They will be before the Senate. I have offered them, but only as an instrument.

Will you be good enough to give us the benefit of a memorandum, a critique of my amendments or perhaps others that have already been offered, because I have the greatest respect for the expertise of Mr. Rauh and Mr. Mitchell in this area. Give us your ideas on the subject so that when we come to offering the bill we will have the benefit of a polished and chiseled bill. Your views on my indemnification amendment would be particularly valuable. That amendment, incidentally, in my judgment, is based upon compensation for a century of repression and neglect, in which the Federal Government played

direct part, because Senator Ervin I think has quite properly challenged us to ask ourselves if we want a general policy of compensation for the victims of all crimes, or all violations of the Constitution. I think we have to make the point that we are compensating for a century of neglect and repression and default of duty on the part of the Federal Government.

My amendment suggests a $10 million fund so that there need not be annual appropriations, and uses the experience which we have in war claims, to establish a fund. So if you can now or in due course give us your critique of that, it would be greatly appreciated.

Mr. MITCHELL. I would like to comment on that amendment, Senator Javits, and commend you for your boldness in facing up to what is a real problem. I am in the category of some of the Negroes Mr. Wilkins was talking about who have a deep sense of anger about some of the unjust aspects of the law. Many times around here I have been reassured by your championship of constructive things. This is one of the times.

It is inconceivable to me that this Congress would dodge its responsibility to help the widows, the maimed, and the orphaned by making funds available as you have proposed. There is only a slight difference between what you propose and what was surreptitiously knocked out in the House Judiciary Committee yesterday, in an effort to meet what we consider the legitimate requests.

We made a ceiling of $50,000 for awards in indemnification, and also we attempted to relate it to the provisions of the bill, section 501–A I believe it was, in order to make certain that this was not just a shotgun approach providing indemnification for any kind of little crime, as some people objected to.

But even with that effort on our part to be constructive and reasonable, the committee did not have the willingness, I would like to use another word but some of those people are my friends and I do not want to say anything too critical, but they did not have the willingness to put this in, and I want to thank you for doing it.

I think your proposal is tremendous. It is my belief that we would certainly be 100 percent for it.

Mr. WILKINS. Mr. Chairman, may I say that in that connection, in connection with Mr. Mitchell's answer to Senator Javits, I join in the commendation and I want to point out one example, Senator, of this application of this indemnification. The president of the NAACP chapter in Natchez, Miss., is a man by the name of Metcalf, who worked at the Armstrong Tire & Rubber Co. there in Natchez and who had finished 4 hours of overtime and left his job and went out to the parking lot to get in his car and go home, stepped on the starter and a bomb exploded and he is a cripple for life. He cannot work at the Armstrong Tire & Rubber Co. any more. He cannot finish the purchase of a home that he started.

Here is a man who is deprived of his right to earn a living as well as the use of his limbs, not because he committed any crime, robbed anybody or bamboozled anybody, or embezzled any money, or did anything except to head up a campaign for voter registration among the Negro citizens of Natchez. This was the extent of his "crime." He was simply seeking to register people to exercise their right to vote

and for this he is a cripple for life and must sit around in a wheelchair or hobble around on crutches.

In such a case indemnification is a must, and I don't see how anybody can deny it.

Senator JAVITS. Mr. Wilkins, one thing that we do not see enough in civil rights debates is indignation. It is unbelievable what we tolerate in the fashion of gentlemen, murders, beatings, bombings, killing of little children—all in the name of cool and lofty debate. Again I would like to close by saying that the attitude of the Negro people has been one of the most extraordinary examples in history of discipline and restraint and, I hasten to point out, that is why they are getting somewhere. The other way they would get, in my judgment, nowhere. They must continue such discipline and restraint, and I hope you gentlemen will continue to lead in that direction. But this doesn't stop, and shouldn't stop, some of the rest of us from showing indignation during the course of this very, very historic process which is trying to make up for so many decades of the deepest kind of injustice. Thank you, Mr. Chairman.

Senator KENNEDY. I want to once again express the appreciation of the members of the committee for your appearance here, Mr. Wilkins. Excuse me, the counsel has some questions.

Mr. AUTRY. I will try not to be long, Mr. Chairman. Mr. Wilkins, in connection with your statement concerning what Senator Dirksen said about the sanctity of the home and right to privacy, I thought that I should read—because I knew if the chairman were here that he would—a short quote from Mr. Justice Douglas' opinion in *Marsh* v. *Alabama:*

> The Bill of Rights as applied to the States through the due process clause of the 14th amendment casts its weight on the side of privacy of homes. The third amendment which extends to quartering soldiers in private homes radiates that philosophy. The fourth amendment, while concerned with official invasions of privacy through searches and seizures, is eloquent testimony to the sanctity of private premises, for even when the police enter private precincts they must with rare exceptions come armed with a warrant issued by a magistrate. A private person has no standing to obtain even limited access. The principle that a man's home is his castle is basic to our system of jurisprudence.

Do you have any comment on that statement, either you or Mr. Rauh?

Mr. WILKINS. I really don't. Privacy isn't involved in this at all, of the kind quoted in this.

Mr. RAUH. Mr. Wilkins' statement is perfect. It is ridiculous to compare the maxim that a man's home is his castle with his right to sell it. It is his castle because he lives there and someone shouldn't come in there and take away his rights. But when he sells that document, that house, that castle, it no longer remains as that. To compare the fact that you can't intrude upon a man's home when he is there and living in it with his right to sell it discriminatorily is a non sequitur. There is just no relationship between the two problems.

Mr. AUTRY. Certainly, in a sale that is a distinction. How about Mrs. Murphy, that lady we keep alluding to, who supplements her social security by renting out a room?

Mr. WILKINS. I don't know about Mrs. Murphy from the standpoint of what Senator Javits referred to as the area of cool and intel-

lectual debate, but I would say that if Mrs. Murphy advertises her home as one in which rooms can be rented by transients, then Mrs. Murphy has no right to differentiate between the transients who come there, unless she wants to say that they must not be drunk or disorderly; but on the basis of race or religion, if anybody presents themselves and wants to live in a tourist home for the night and pay the rate, and is as far as can be determined an orderly person, then I don't believe Mrs. Murphy ought to be excluded from this, because we come here, as I am sure the Senator would recognize but wouldn't acknowledge, we come here to the point of the differentiation between citizens on the basis of race and religion, and the courts and the legislature, the Congress have said that the national policy will not permit such differentiation.

I have no doubt that people possess these in their own minds. We all have our personal prejudices. I have my own. But these cannot be made public policy. If you have any way of enforcing your private prejudices, for example, if you want to go and live in the deep recesses of the Sierra Nevada Mountains in order to get away from either Negroes or Indians or Mexicans or Catholics or whatever you choose, that is your right and privilege.

Mr. AUTRY. Mr. Wilkins, I think you made very clear in your colloquy with Senator Javits, that no exceptions should be made to coverage of title IV. Because possible exceptions have been mentioned so often in the press recently, it is important that your opinion be in the record. Is it correct that there should be no exceptions to the coverage of title IV as it is presently writen even as to owner-occupied dwellings or as to religious homes?

Mr. WILKINS. We think title IV ought to be enacted with the addition of the amendment we suggest on administrative remedies. We don't think title IV is a monumental piece of legislation that will cure all housing ills, as I attempted to make clear to Senator Kennedy, but it certainly is a desirable piece of legislation.

Mr. AUTRY. I think you did make that clear. However, since you mention it, your own State of New York, I believe, has as strong a State law as any other State. Has this State law had a great impact on the ghetto?

Mr. WILKINS. It hasn't had a great impact on the ghetto nor has it produced the terrible consequences that the opponents maintained. It hasn't, for example, depreciated property. It hasn't destroyed real estate values. It hasn't interfered with real estate brokers pursuing their profession. It hasn't done any of the things that the detractors of this type of legislation say.

Now as far as removing ghettos is concerned, no law except a housing law with adequate relocation provisions is going to melt solid masses of populations settled in one spot. But the important thing, it seems to us, is that there shall be no restriction based upon race or ethnic origin or religion upon those who may want to or who reach the point of their ability to escape such ghettos.

I am fond of saying that there are Negroes living in Harlem whom you could not get out of Harlem with a team of oxen. They simply love Harlem and they are not going to move. You can offer them a gold-plated acre in Westchester and they will not go there, just like

there are Jewish people who still live on the Lower East Side of New York and who haven't moved to Riverside Drive, who haven't moved to West End Avenue, who haven't moved to Grand Concourse, and are not interested in Park Avenue or Fifth Avenue, and there are Germans who live in Yorktown in New York who lived there for years and who will continue to live there for years. But nobody tells a German in Yorktown that he cannot get out of Yorktown if he does want to go to Park Avenue, and that is what we feel as to this legislation.

Mr. AUTRY. I understand that. It has been alleged before the committee that title IV would have a sizable impact on eliminating the ghetto and that was the reason I asked the question.

Mr. WILKINS. It will help to eliminate the ghetto, but it won't happen tomorrow morning.

Mr. AUTRY. In connection with elimination of the ghetto, I am sure you are familiar with neighborhoods around the country which have been integrated voluntarily. I believe that this is usually maintained as an integrated neighborhood by a voluntary quota system. Is that correct?

Mr. WILKINS. I don't know. I am frank to say that I don't know the devices, if any, that are used. But I do know there is a growing number of integrated neighborhoods. There is a street, for example, in the Bronx in New York which claims to have had an integrated history for about 40 years, one street I think, Fox Avenue or Fox Street. I am not sure about it.

But how it was maintained, whether it had a quota system or not or whether it just maintained itself, I don't know. But the people there are very proud of the fact that for 40 years Negroes and whites have lived on this same street.

Mr. AUTRY. I wonder if these integrated neighborhoods maintained by voluntarily imposed quotas would be destroyed by title IV.

Mr. WILKINS. I don't think so. I don't see how any piece of legislation that advises what you practice every day could destroy what you practice.

Mr. AUTRY. So that the spirit of title IV would overcome the letter of it?

Mr. WILKINS. I don't see that. I see the opposition to title IV in two great categories. One is the entrenched, organized, and understandably biased real estate category, and the other is in the category of homeowners who have been brainwashed into believing that the presence of Negroes or other different people—we had the same prejudice against the Irish when they first came here. They said to have Irish in the neighbrohood would ruin the neighborhood. Now they are so glad to have Irish in the neighborhood.

Mr. AUTRY. It is a status symbol.

Mr. WILKINS. But this argument was against the Irish, it was against the Italians, it was against the Jews, it was against the Hungarians, and it is against—in Chicago, for example, it is against the hillbillies who come from Apalachia, and even among the Negroes it was against the new migrants who came fresh from the plantations of the South.

But all of these fade it seems to me in front of this kind of legislation. In fact this legislation ought to be regarded as an educational

tool to bring these people closer to the American ideal. You know we can always find a law when we want to.

I was interested to see how quickly we came up with legislation or suggested legislation—it hasn't been enacted yet—when we found that certificates of deposit paying 5 and 5¼ percent were draining billions of dollars from savings and loan associations, who couldn't pay 5¼ percent, and the commercial banks were draining off this money which was ordinarily going into home mortgages, and right away we went and enacted a law or are proposing a law to make it impossible or difficult or to prescribe the means by which commercial banks will issue certificates of deposit and making it illegal for them to do so under certain circumstances, and thus offering protection to the savings and loan associations. Well, if you can protect savings and loan associations, and if the law is a good thing for that, why is not the law a good thing for providing housing for Negroes on an unsegregated basis? We are a society of laws.

Mr. AUTRY. Thank you, Mr. Wilkins. Mr. Rauh, did I understand you correctly that the duty of Congress on this legislation is to consider its desirability. But as far as the constitutional questions are concerned, you feel that they should be left to the Supreme Court, as the Supreme Court has in your opinion expressed itself that such a law would be constitutional?

Mr. RAUH. I don't know if I agree with that exactly, but in general I agree with that. It seems to me that where the Supreme Court has gone as far as it has in civil rights, to make clear that this is a national problem, which can be dealt with by Congress, where only last month they uphold the Kennedy-Javits amendment, which everybody was saying was so doubtful as to its constitutionality and they didn't have any trouble with it at all, where this situation is clear, I am saying that most of the senatorial talk on constitutionality, and especially the junior Senator from Illinois is not saying this is unconstitutional. What he is saying is, "I wish it were unconstitutional," because he knows that the Supreme Court would uphold title IV. So what he is saying is not that is it unconstitutional, not that the Supreme Court will knock it out, but that "If I were on the Court I would knock it out." Now he is not on the Court and it is unlikely that President Johnson is going to appoint him. The fact of the matter is that the judges who have been appointed to the Court and who have been confirmed by the Senate will uphold this, and that the job is to compare the statute with the decisions that have already been rendered, and one who compares the statute with the decisions that have already been rendered can have no doubt about its constitutionality. Therefore, I say that all he is really doing is not deciding constitutionality in the sense of what the Supreme Court would hold, but he is deciding a kind of a political constitutionality that I don't think is correct.

Mr. AUTRY. But isn't it true though that the Court does give a presumption of constitutionality to all acts of Congress, and that legislators must satisfy themselves in their own consciences and minds that it is constitutional before they send it to the Court? Isn't it in that sense their duty to consider constitutionality aside from this presumption which the Court gives to acts of Congress?

Mr. RAUH. Their duty is to try and make sure that what they are presenting will in all probability meet the requirements of the Supreme

Court, and here there isn't even any reasonable doubt as to what the Supreme Court would do in this kind of situation.

For any Senator to say, "I don't like this because even though the Supreme Court will uphold it, I don't think it should," that is not a constitutional argument. That is a political argument, because the Constitution is what the Supreme Court says it is, at the particular moment, and here there is no question. The Senator has a perfect right to get up and say, "I know the Supreme Court would uphold this, but that is nothing to me. I don't think it should." All I am saying is that that is not a constitutional argument. That is a political argument of his own, namely that he doesn't think that we should pass this because he doesn't think it is within the Constitution.

Mr. AUTRY. I am not sure there is disagreement; but for the record I will just read two sentences into the record from *U.S.* v. *Gambling Devices*, 346 U.S. 441 at 449:

> This Court does and should accord a strong presumption of constitutionality to Acts of Congress. This is not a mere polite gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is within their delegated power or is necessary and proper to execution of that power.

As I say, I am not sure there is any disagreement, but for the record this is the Court's view.

Now, if I can just ask you some technical questions, Mr. Rauh. You have a copy of 3296?

Mr. RAUH. Yes.

Mr. AUTRY. At the bottom of page 5 and the top of 6 there is designated a form which all prospective jurors are required to fill out. The American Civil Union and the Anti-Defamation League have suggested that the question of religion be deleted. I believe the Attorney General, as I understood him, agreed that since he has no evidence of discrimination on the basis of religion, he would delete that. Do you have any suggestions?

Mr. RAUH. The Leadership Conference supports the position of the ACLU and Anti-Defamation League concerning that word "religion."

Mr. AUTRY. Also, there was some discussion earlier, Mr. Rauh—you are probably aware of it—as to the question "race" on this proposed form since it might present particular problems in States such as Hawaii and New York, and it might present problems to those who object to such questions. Do you feel that "race" is necessary on this form?

Mr. RAUH. Yes. It is the position of the Leadership Conference that in this particular, "race" should be in there. There is no penalty for someone who refuses to give his race, so that you do not get a serious problem of infringement of rights, but I understand that the Leadership Conference meeting, where we agreed on the word "religion," it was the general feeling that we would support the word "race" as it is.

Senator KENNEDY. Just on a related point, Mr. Rauh, would you support an amendment to title II which would permit the maintaining of State lists and including the word "race" in there so there could be a clear determination in the assembling of proof, to find out the color of a man's skin, to find out whether they are being represented on juries?

Mr. RAUH. My answer would be "Yes," subject to any criticism by my colleagues. I think it is the same problem you have on the form here and my answer to your question would be, "Yes."

Mr. AUTRY. Mr. Rauh, I refer you to section 301(b), page 23. Do you see any drafting problem with that section, especially as it refers to "attempts or threats to intimidate, threaten, coerce, or interfere with"?

Mr. RAUH. Yes, I had that pointed out to me. I think there is a drafting mistake there. I think you shouldn't be indicted for threatening to threaten, and I suggest on line 21 that you delete the words "or threatens" and then it makes perfectly good sense. I think they made a mistake and I am sure they would say so.

Mr. AUTRY. A typographical error?

Mr. RAUH. It may have even been a typographical error.

Mr. AUTRY. You don't see any problem with "attempts to threaten"?

Mr. RAUH. No.

Mr. AUTRY. You would have it read "or has attempted to intimidate, threaten, or coerce or interfere with." You don't see any constitutional problems of vagueness or freedom of speech there?

Mr. RAUH. No. If you dress up in a white gown and go around threatening somebody, but he isn't the least bit intimidated, I think you could well have committed a crime, but I don't know if it really would have been a threat. I don't see any difficulty if you take out the words "or threatens."

Mr. AUTRY. Just one more question on this point. This is a criminal provision I believe, isn't it? Do you think this would be more properly covered in title V than in title III, and specifically by amendment to section 501(a)(2)?

Mr. RAUH. I think that is a perfectly sensible suggestion. I know the history of this. It was put in 301(b) before there was a title V because they hadn't brought down the *Guest* and *Price* cases, and so there wasn't any title V when this was first written.

I certainly would have no objection to moving it to title V, now that that has been included.

Mr. AUTRY. Thank you. You have a proposed substitute for title VI, I believe on indemnification.

Mr. RAUH. I didn't understand the question, Mr. Autry.

Mr. AUTRY. "Substitute the following for title VI," that is the title of your proposed indemnification statute.

Mr. RAUH. Oh yes, we have a proposal.

Mr. AUTRY. I just wanted to call your attention to page 2. It seems to me there might have been a drafting error there. Maybe I am wrong. Right at the top of page 2, do you have that in front of you, or Mr. Mitchell or Mr. Wilkins?

Mr. RAUH. I have it now, I think.

Mr. AUTRY. As I understand it, reading just the top line on page 2, there must be intent "for the crime to be committed because of race or color,"—this is the phrase immediately preceding what you have underlined—is that right?

Mr. RAUH. That is correct. The specific intent required would be that the act is because of race or color. There is no specific intent required, that the violator know that the person being hurt was exer-

cising one of these rights. All that the violator must have is an intent to do this because of race or color.

Mr. AUTRY. We received testimony yesterday on the *Reeb* case. Reverend Reeb was, as I recall, a white man. Was the violence done to him because of his race or color? This is purely a technical question.

Mr. RAUH. Race or color as defined in the bill includes not only race but those who are urging racial equality. Reeb was clearly in that category.

Mr. AUTRY. So you think this reference back to title V is sufficient to make it clear? You do understand what I am talking about?

Mr. RAUH. Yes, I understand perfectly clearly.

Mr. AUTRY. I just wanted to get it on the record.

Mr. RAUH. I see now what the problem is. The provision you have before you is title V of the so-called Douglas-Case bill. It was taken from it. In that bill we have in the definitions of race or color any person who is urging equality on the grounds of race or color. Therefore, if this is taken separately, without that definition, a definition will have to be added. It would depend on where you were adding it. Previously we had said that what we were standing by was this section of that bill, because that was the one that the leadership conference had drafted and proposed. With the definition of race or color I have given you, it considers Reverend Reeb and that was the intention.

Mr. AUTRY. Let me ask you this, you and Mr. Wilkins. Will this cover the Natchez case, since as I understand it the man involved in the car explosion there was not seeking or attempting to exercise any of the rights enumerated in title V?

Mr. RAUH. I think he was exercising several of the rights in title V.

Mr. WILKINS. Yes.

Mr. RAUH. Mr. Autry, I think if you will look, he was urging people to vote.

Mr. AUTRY. No, I am not talking about the Meredith case.

Mr. RAUH. I know.

Mr. WILKINS. You are talking about the Metcalf case in Natchez.

Mr. AUTRY. He was urging people to vote?

Mr. WILKINS. He was urging people to register to vote.

Mr. AUTRY. I am sorry. This is where I got confused; there was a recent case reported in Natchez where a Negro was killed who had no connection with any civil rights activity.

Mr. WILKINS. Yes, in the last 24 or the last 48 hours, something like that. I am speaking of the Metcalf case. It does apply to him.

Mr. AUTRY. Thank you very much. Thank you, Mr. Chairman.

Senator KENNEDY. I just wanted to ask one final question. Title V applies only to acts of "force or threats of force." The question which I would raise is, do you think that there ought to be an amendment to prohibit acts of economic as well as physical coercion, similar to the provisions that were made in the Voting Rights Act?

Mr. RAUH. We certainly have every reason to support broadening this in any way. That was not among those we had agreed on, but my personal reaction to it at once is that it would be a strengthening provision that we would support. I would also not only support that but

point out to you that we have some things we call minor amendments. The four major ones we gave you.

Senator KENNEDY. Yes.

Mr. RAUH. But I would like to point out that there is one thing that is troublesome in 501(a), and that is No. 7 at the top of page 33, where you see the words "using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air." We would like to see the words "common carrier" stricken, because we feel that a person driving on a road ought to be protected, too, from shooting because of his race, and I give you the case of Lemuel Penn. It is true the Supreme Court upheld that indictment, but there are very serious questions whether they could prove some of the statements they made in the indictment, and we feel that 7 could be strengthened.

We had proposed that to the Attorney General, and he has not yet been willing to strengthen it, but we feel that 7 should be strengthened, and we also would support the suggestion implicit in the question you put to me.

Senator KENNEDY. If you have some other changes, I will ask that they be submitted, and that they be included at the end of your testimony.

I asked the question of the Attorney General. He thought that there was a real problem in the assembling of proof on questions of economic coercion under that provision. I would appreciate it if at your leisure you could review at least the exchange that we had with the Attorney General, and, conscious of that exchange, you would be kind enough to give us the benefits of your judgment. That would be helpful.

I want to thank you once again. You have been extremely helpful and constructive in your comments, and I want to say how much the members of the committee appreciate it.

The subcommittee stands adjourned until 10:30 on Tuesday morning.

(Whereupon, at 12:50 p.m., the subcommittee recessed until 10:30 a.m. Tuesday, June 21, 1966.)

CIVIL RIGHTS

TUESDAY, JUNE 21, 1966

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:35 a.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin, Jr., presiding.

Present: Senators James O. Eastland, chairman of the full committee, Ervin, and Smathers.

Also present: George Autry, chief counsel and staff director; Houston Groome, Lawrence M. Baskir, and Lewis W. Evans, counsel; and Rufus Edmisten, research assistant.

Senator ERVIN. The subcommittee will come to order.

Counsel will call the first witness.

Mr. AUTRY. Mr. Chairman, our first witness is Mr. Leon RisCassi and with him Mr. William Colson, representing the American Trial Lawyers Association.

Senator ERVIN. Gentlemen, we are delighted to welcome you to the subcommittee.

Senator SMATHERS. Mr. Chairman, before this witness starts, I wonder if I might interject this word as a form of introduction.

Senator ERVIN. Yes, certainly.

Senator SMATHERS. I may have to leave to go to a meeting of the Finance Committee. I want to welcome these witnesses, particularly Mr. Bill Colson, who comes from my State, one of the finest and most distinguished lawyers we have had in our State and a past president of the American Trial Lawyers Association. I am sure you will make a fine contribution to the matters which are before this committee. He knows what he is talking about in legal circles and, as a matter of fact, we have great hopes for him in political circles in our State in the near future. So we are happy to have him.

Senator ERVIN. I appreciate these remarks from my colleague, Senator Smathers. I would like to add this, as one who has just returned after spending 3 days in Florida, I found that my colleague on the subcommittee, Senator Smathers, rises above even the Scriptures. The Scriptures say that no man is without honor save in his own country, and I found that Senator Smathers has honor even in his own country.

Mr. COLSON. That is correct, sir.

STATEMENT OF LEON RISCASSI, CHAIRMAN, LEGISLATIVE COMMITTEE, AMERICAN TRIAL LAWYERS ASSOCIATION, HARTFORD, CONN., AND WILLIAM COLSON, PAST PRESIDENT, AMERICAN TRIAL LAWYERS ASSOCIATION, MIAMI, FLA., ACCOMPANIED BY WAYNE SMITH

Mr. RISCASSI. Senator Ervin, and it is so good to see Senator Smathers looking so well—Mr. Chairman, the American Trial Lawyers Association, their legislative section, has a great interest in the jury bill, naturally, because by far and wide, in tort litigation, the greater percentage of trial of same takes place before juries. Senate bill 3296 is a bill which will do much to cure the inequities which have been in existence in the past in the experience of all trial lawyers, be they Bill Colson or myself, or others who do not have too many cases to try before juries. This bill is far superior to 5640, the House version, which passed the House and which was such a disappointment to active trial lawyers. I think integral and important in every measure so that the unwilling citizen will be made to see every importance of jury duty and the fact that he has to be present are two points. Those two points revolve around a short term of service and secondly, an opportunity to serve, and that opportunity can only be given by having a cross section of the community.

Now, in reference to 3296, the Trial Lawyers Association endorses title I of that measure wholeheartedly, with the following amendments:

On page 3, line 18, we should like to have stricken the words, "at random," and we should like to substitute in lieu thereof the words there, "by lot."

And we should like to add on page 3, after line 19, after the words, "it serves," the following sentence. This sentence is taken from the prevailing law in the State of Washington and it reads as follows. It is descriptive of what is meant by the words, "by lot":

> The selection of prospective jurors within a given judicial district or division shall be by selection of names in a given and identical numbered sequence based upon the number of jurors to be selected therefrom.

Simply translated, if you have a registration list of 500 names, you need 50 jurors, you select your 1st number, and assuming that that is 11, you move on rhythmically and take every 10th number until you have gotten your 50 prospective jurors for your jury panel. We submit that there is no substitute for this system.

I have before me an article from the Times, a London, England, newspaper, January 1965, and there a committee has been recommending sweeping changes in the selection of jury service. There they have recommended that the jury be—represent a cross section and that it be drawn at random from the community. I think that the words "by lot," are more specific and leave nothing to the human element.

Ballentine's Law Dictionary defines "lot"——

Senator ERVIN. It might be helpful to insert the newspaper item you referred to in the record.

Mr. RISCASSI. Yes, I would like to submit it into the record. There are other features of this article that are very interesting, would be very interesting to the committee, having to do with disqualification.

It also states here that the names shall be selected from the voting registration list, and I think this is what they are attempting to get across in the Federal judiciary in the selection of juries.

Senator ERVIN. Let the record show that the statement will be printed in the body of the record at this point.

(The material referred to follows:)

[From the Times, Jan. 26, 1965]

COURT OF APPEAL

TRIAL BY JURY

WARD v. JAMES

Before the MASTER OF THE ROLLS, LORD JUSTICE SELLERS, LORD JUSTICE PEARSON, LORD JUSTICE DAVIES, *and* LORD JUSTCE DIPLOCK

The COURT, in a reserved judgment, dismissed this appeal by the defendant, Sergeant Brynley John James, now stationed in the Far East, from an order of Mr. Justice Roskill, given on July 30, 1963, in the exercise of his discretion under R.S.C. Ord. 36, r. 1, and dismissing an appeal from Master Lawrence, that an action for damages for personal injuries brought against him by the plaintiff, Warrant Officer Thomas Robertson Ward, of "Chaseley", Southcliff, Eastbourne, should be heard by a Judge and jury and not by a Judge alone.

The action arose out of an accident on a road in Germany when the plaintiff was a passenger in the defendant's car. The car overturned and as a result the plaintiff had become a permanent quadriplegic. The defendant denied negligence and did not admit the damage. On November 2, 1964, the defendant applied for leave to appeal out of time and on November 10, 1964 (*The Times*, November 11, 1964) the Court of Appeal enlarged the time for appealing, gave leave to appeal, and adjourned the appeal for hearing before a full Court. The hearing took place on December 7, 8, and 9, 1964 (*The Times*, December 8, 9, and 10, 1964).

Mr. F. Tudor Evans, Q.C., and Mr. Roy Beldam appeared for the defendant; Mr. Martin Jukes, Q.C. and Mrs. Margaret Puxon for the plaintiff.

JUDGMENT

The MASTER OF THE ROLLS said that it was unlikely that there would be any serious contest on liability. The substantial question was: What damages should be awarded?

The case *was* to be tried by jury. It was set down for trial in the jury list and was about to come on for hearing. Then, on November 2, 1964—15 months after trial by jury was ordered—the defendant sought to have the mode of trial altered. He wanted trial by Judge alone. He applied for leave to appeal out of time. On November 10, 1964, Lord Justice Sellers and Lord Justice Russell enlarged the time for appealing, gave leave to appeal from the order of Mr. Justice Roskill and ordered that the appeal be heard by a full Court. Both parties agreed to accept the decision of the full Court and not to appeal to the House of Lords.

The reason why leave was given was so that the view of the full Court might be obtained on the question of trial by jury in personal injury cases.

Up to 1854 all civil cases in the Courts of Common Law were tried by juries. There was no other mode of trial available. Since 1854 trial by jury in civil cases had gradually lessened until it was now only some 2 per cent of the whole. The governing enactment today was section 6 of the Administration of Justice (Miscellaneous Provisions) Act, 1953. It gave a right to trial by jury by a party in the Queen's Bench Division where fraud was charged against that party or a claim was made for libel, slander, malicious prosecution, false imprisonment, seduction, or breach of promise of marriage. Then for all the remaining cases (which included personal injury cases) it said: "But, save as aforesaid, any action to be tried in that Division may, in the discretion of the Court or a Judge, be ordered to be tried either with or without a jury."

Four years later section 6 of the Act of 1933 was considered by the full Court of Appeal in Hope v. Great Western Railway Co. ([1937] 2 K.B. 130). That case had commonly been supposed to decide that, once a Judge in chambers had

exercised his discretion as to trial by jury or not, the Court of Appeal would not interfere with it; for his discretion was absolute. His Lordship did not think the case decided any such thing. In his Lordship's opinion Hope's case was a decision simply on the construction of the Act and the Rules then in force. It decided that the mode of trial was in the discretion of the Court or a Judge, without his being fettered by any *presumption of law* in favour of or against a jury. It did not decide that the discretion of the Judge in chambers was absolute, or incapable of review by the Court of Appeal. That point was never discussed at all.

ABSOLUTE DISCRETION

The decision in Hope's case had, however, been constantly misunderstood. Probably because of a phrase used by Lord Wright at one point that the discretion of the Judge was "completely untrammelled". The editors of the Annual Practice stated thereafter, year after year, that the discretion of the Judge is absolute" in the notes to Order 36, rules 1 and 2, as then in force. That was so much taken for granted that in 1958, the Rules Committee amended Order 36, rule 1(3) so as to say: "the discretion of a Court or Judge in making or varying any order under this Rule (as to mode of trial) is an *absolute* one".

What did the word "absolute" mean here? He thought it was so used in the sense in which we spoke of an "absolute monarch". It meant that the discretion was unfettered and unrestrained, not subject to review by any Court. If that be the sense in which the word "absolute" was used in the Rule, then in his Lordship's opinion the Rule was *ultra vires*.

Section 6 of the Act of 1933 spoke of "discretion" simply. The Rule added the word "absolute" to the Statute, and in adding, altered it. That it had no right to do. Whenever a Statute conferred a discretion on the Court or a Judge, the Court of Appeal had jurisdiction to review the exercise of that discretion: save only as to costs, for them the Judge had the last word.

No rule could diminish the jurisdiction of this Court so given by statute. In his Lordship's opinion therefore the word "absolute" *either* added nothing: *or*, if it added something, it was *ultra vires*. It could be ignored.

This brought him to the question: In what circumstances would the Court of Appeal interfere with the discretion of the Judge? At one time it was said that it would only interfere if he had gone wrong in principle. But since Evans v. Bartlam ([1937] A.C. 473) that idea had been exploded. The true proposition was stated by Lord Wright in Charles Osenton v. Johnson ([1942] A.C. at p. 148.) This Court could and would interfere if it was satisfied that the Judge was wrong.

Even if the Judge had given no reasons which enabled this Court to know the considerations which had weighed with him, the Court might infer, simply from the way he had decided, that the Judge must have gone wrong in one respect or the other and would thereupon reverse his decision.

RULES TO GUIDE DISCRETION

In Sims v. Howard ([1964] 2 W.L.R. 794) this Court had laid down a rule for the guidance of the Judges. It said that in personal injury cases a jury should not be ordered except in special circumstances. That rule had been challenged. It was said to be an unwarranted fetter on the discretion of the Judges. Yet is was of the first importance that some guidance should be given. Else you would find one Judge ordering a jury the next refusing it, and no one would know where he stood. It might make all the difference to the ultimate result of the case. That would give rise to much dissatisfaction.

It was an essential attribute of justice in a community that similar decisions should be given in similar cases; and that applied as much to mode of trial as anything else. The only way of achieving that was for the Courts to set out the considerations which should guide the Judges in the normal exercise of their discretion. And that was what had been done in scores of cases where a discretion had been entrusted to the Judges.

The cases all showed that, when a statute gave a discretion, the Courts must not fetter it by rigid rules from which a Judge was never at liberty to depart. Nevertheless the Courts could lay down the considerations which should be borne in mind in exercising the discretion: and point out those considerations which should be ignored. That would normally determine the way in which the discretion was exercised and thus ensure some measure of uniformity of decision.

From time to time the considerations might change, as public policy changed: and so the pattern of decision might change. That was all part of the evolutionary process. That had been so in the exercise of discretion in divorce cases. So also in the mode of trial. Whereas it was common to order trial by jury, now it was rare.

Let it not be supposed that this Court was in any way opposed to trial by jury. It had been the bulwark of our liberties too long for any of us to seek to alter it. Whenever a man was on trial for serious crime; or when in a civil case a man's honour or integrity was at stake: or when one or other party must be deliberately lying; then trial by jury had no equal. But in personal injury cases trial by jury had given place of late to trial by Judge alone because in those cases trial by a Judge alone was more acceptable to the great majority of the people. Rarely did a party ask in those cases for a jury. That was why jury trials had declined. It was because they were not asked for.

The important consequence followed: the Judges alone, and not juries, in the great majority of cases, decided whether there was negligence or not. They set the standard of care to be expected of the reasonable man. They also assessed the damages. They saw, so far as they could, that like sums were given for like injuries. That had its impact on decisions as to the mode of trial.

If a party asked for a jury in an ordinary personal injury case, it was often because he had a weak case, or desired to appeal to sympthy. If no good reason was given, then the Court ordered trial by Judge alone. Hence, nowadays, the discretion in the ordinary run of personal injury cases was in favour of Judge alone. It was no sufficient reason for departing from it, simply to provide a "guinea-pig" case.

SERIOUS INJURIES

For many years, however, it had been said that serious injuries afforded a good reason for ordering trial by jury, or that it was a consideration which should be given great weight. Recent experience had led to some doubts being held on that score. It began to look as if a jury was an unsuitable tribunal to assess damages for grave injuries, at any rate in those cases where man was greatly reduced in his activities. No money could compensate for the loss of much that made life worth while. Yet compensation had to be given in money. The problem was insoluble. To meet it, the Judges had evolved a conventional measure. They went by their experience in comparable cases. But the juries had nothing to go by.

His LORDSHIP referred to specific cases of personal injuries: (i) Loss of a limb, (ii) Loss of expectation of life, (iii) Loss during a man's shortened span, (iv) The "unconscious" cases, (v) The quadriplegic cases.

In referring to Morey v. Woodfield ([1964] 1 W.L.R. 16) and Warren v. King ([1964] 1 W.L.R. 1) two cases of girls paralysed in all four limbs where juries had awarded damages of £50,000, his LORDSHIP said that if those cases had been tried by a Judge alone he would have had before him the comparable cases of people paralysed in two limbs (paraplegics) where the general run of awards was £15,000 or £20,000, and he might well have arrived for a quadriplegic at a figure of £30,000 or £35,000 which was the very figure that this Court had thought proper in each case. But the jury had no guidance at all.

Those recent cases showed the desirability of three things: first, assessibility. In cases of grave injury, where the body was wrecked or the brain destroyed, it was very difficult to assess a fair compensation in money. So difficult that the award must basically be a conventional figure, derived from experience or from awards in comparable cases. Secondly, uniformity. There should be some measure of uniformity in awards, so that similar decisions were given in similar cases. Otherwise there would be great dissatisfaction in the community, and much criticism of the administration of justice. Thirdly, predictability. Parties should be able to predict with some measure of accuracy the sum which was likely to be awarded in a particular case, for by that means cases could be settled peaceably and not brought to Court. A thing very much to the public good.

None of those three was achieved when the damages were left at large to the jury. Under the present practice the Judge did not give them any help at all to assess the figure. The result was that awards might vary greatly, from being much too high to much too low. There was no uniformity and no predictability. But could they not do more than at present to secure some measure of uniformity?

One remedy suggested was that the Court of Appeal should be more ready to correct the verdict of a jury and to correct it in much the same way that it corrected the decision of a Judge. The test was similar, nevertheless in practice the result was very different. In case after case the Court had held that it could not interfere with a jury as readily as with a Judge.

One reason was the difficulty of showing the basis of the jury's award. They gave no reasons. They found no facts. Their verdict was as inscrutable as the sphinx. So you could not pick holes in it. In cases of personal injury the jury were ignorant. The award was basically a conventional figure: but the jury were not told what that figure was. No wonder they want wrong sometimes. When they did, they would be the first to wish it to be put right.

Their Lordships could not change the principles on which the cases were decided but they could, he thought alter the emphasis. In future this Court would not feel the same hesitation in upsetting an award of damages by a jury. If it was "out of all proportion to the circumstances of the case", that is, if it was far too high or far too low, the Court would set it aside. On setting it aside the Court had power, he thought, to order the fresh assessment to be made by a Judge alone. This could not be done in the old days when there was a right to trial by jury. But now that the mode of trial was a matter of discretion, this Court could, on granting a new trial, order that it be held by a Judge alone. That power was, he thought, contained within the words of Order 58, rule 9 (3), (6).

CAN THE JURY BE GIVEN MORE GUIDANCE?

In lieu of ordering a new trial, the Court could substitute its own figure, but only where the necessary consent was forthcoming under Order 58, rule 10(4).

The other remedy suggested was that the jury should be given more guidance. All in all, he was quite satisfied that the present practice should be maintained where the jury were not told of awards in comparable cases. As to the suggestion that the jury should be told of the conventional figures by the Judge being at liberty in his discretion to indicate to them the upper and lower limits of the sum which in his view it would be reasonable to award, such as between £4,000 and £6,000 for the loss of a limb there was little point in having a jury at all. You might as well let the Judge assess the figure himself.

He had come to the conclusion therefore that they must follow the existing practice: and their Lordships could not sanction any departure from it.

The result of it all was: They had come in recent years to realize that the award of damages in personal injury cases was basically a conventional figure derived from experience and from awards in comparable cases. Yet the jury were not allowed to know what that conventional figure was. The Judge knew it. But the jury did not. That was a most material consideration which a Judge must bear in mind when deciding whether or not to order trial by jury. So important was it that the Judge ought not, in a personal injury case, to order trial by jury save in exceptional circumstances. Even when the issue of liability was one fit to be tried by a jury, nevertheless he might think it fit to order that the damages be assessed by a Judge alone.

As far as the present case was concerned, on July 30, 1963, when it was before him, Mr. Justice Roskill exercised his discretion in the light of the considerations then current. He had not the benefit of the three decisions since then, particularly *Sims* case. Nor, of course, had he the guidance which, his Lordship hoped, was to be found in the present judgment.

The defendants acquiesced in the order for trial by jury for months and months. It was not until the case was just about to come for trial before a jury that they sought to change the mode of trial to Judge alone. It seemed to his Lordship they came too late. He was not disposed in these circumstances to interfere with the order made by the Judge: and all the more so when he thought that, if the jury should go seriously wrong, the Court would not feel the same hesitation as it formerly did in upsetting them. He would, therefore, dismiss the appeal.

LORD JUSTICE SELLERS, LORD JUSTICE PEARSON, LORD JUSTICE DAVIES *and* LORD JUSTICE DIPLOCK agreed.

Solicitors.—Messrs. Wm. Charles Crocker; Messrs. Thompson, Smith & Puxon, Colchester.

Mr. RISCASSI. May I submit for the record also, if I may, Senator, one other newspaper clipping on the same subject, having to do with the fact that in England, where the right to a civil jury trial is within

the purview and discretion of the presiding judge, that system is being questioned and the right, the God-given right or the law-given right, to a trial by jury in all civil cases is being sought even there.

(The documents referred to follow:)

LONDON LETTER

(By Francis Cowper)

COUNSEL AND JURY

Few factors have so much altered the British Bar and the British legal scene as the almost total disappearance of the jury from civil litigation. In the inequity courts there was no jury tradition, and for centuries counsel and judges threading their way through labyrinths of legal learning and technical terminology lived in a cloistered seclusion of their own creation utterly insulated from the world of ordinary human beings. But in the common law courts the entire atmosphere was different. Into them the great, big, rough, technically untrained outside world burst every day in the person of twelve jurymen, plucked at random and unwillingly from their homes to determine all disputed issues of fact in civil and criminal litigation alike. Their presence transformed the whole face of advocacy. While they were there the courts could never be just cosy little committees of lawyers. The successful advocate had to know how the mind of the ordinary man worked and (yet more important), how his heart worked even if it was only for the purpose of flattering his vanity or befogging his judgment. That meant that the advocate had to be a man of the world, if possible somewhat larger than life, able to talk to the jury as man to man and yet with a compellingly persuasive authority. He had to cultivate the arts of the actor and the auctioneer, and the more roles there were in his repertoire the better his performance. But since the war the civil jury has gone out of fashion and has become a rarity in any but fraud and defamation cases, so that in the common law courts just as much as in the equity courts oratory is out and quiet conversational exchanges between lawyers are the rule. There are no more great forensic gladiators whose feats were followed daily by the press and public alike. The "image" of the Bar has sadly shrunk.

THE APPEAL COURT AND THE JURY

Nobody appears to mind much. Indeed, in the technological temper of the times the most forward-looking progressive seem ready to welcome a Bench and Bar composed entirely of electronic computers and "lie detectors," which would leave as little function for the jury as for the lawyer. But now quite suddenly juries find themselves unexpectedly basking in a bright patch of progressive popularity. This is the sequel to a recent decision of the Court of Appeal on a point of procedure in the case of Ward v. James (1964, 2 W.L.R. 455) an action for damages for serious personal injuries sustained in a road accident. In July, 1963, Mr. Justice Roskill had made an order in chambers that the trial should be before a judge and jury and not, as is now the almost invariable practice in such cases, before a judge alone. Fifteen months later, after the case had actually been set down for hearing, the defendant appealed against the order, asking that the trial should be by judge alone. After a three-day hearing, the court reserved judgment for a month and a half and then dismissed the appeal because the defendant had acquiesced so long in a trial by jury and had appealed so late. But in giving judgment Lord Denning took the opportunity to review the whole field of trial by jury in actions for damages in achieving assessibility, uniformity and predictability. He said that it was within the jurisdiction of the Court of Appeal to interfere with a judge's discretion in ordering a trial to be by jury. He also said that a jury's award of damages was not sacrosanct and that if it was either far too high or far too low and out of all proportion to the circumstances of the case, the Court of Appeal could set it aside and order a fresh assessment by a judge alone.

UNEXPECTED CLAMOUR

In the course of his observations Lord Denning paid a perfectly orthodox tribute to the jury as "the bulwark of our liberties" and there seemed nothing in the perfectly sensible principles he laid down to set liberty-loving mobs marching on

the law courts to lynch the judges. But of recent years there has grown up in some quarters a settled habit of nagging the "legal establishment" and carping at the law. Consequently the immediate reaction to the Court of Appeal's decision was a motion in the House of Commons by a hundred of the more congenitally critical Socialist members of Parliament there, affirming the "desirability of the right to a jury being available" and expressing apprehension at "any usurpation of the legislative function by decisions calculated to override the declared intention of Parliament." This attack on the judges by a large body of its supporters considerably embarrassed the government. In the House of Lords, Lord Dilhorne, who was Lord Chancellor in the late Conservative government, questioned its present Lord Chancellor, Lord Gardiner, who replied that the motion "neither required nor received the approval of the government." In the House of Commons the Attorney General, Sir Elwyn Jones, said that, while the government recognized that the present state of the law and practice relating to the assessment of damages was unsatisfactory, a full enquiry would be necessary before amending legislation could be introduced and the Lord Chancellor was considering what form such an enquiry should take. The fact is that nobody really knows whether judges or juries give higher damages. Some say that juries give lower damages because they are middle-class men unaccustomed to "thinking big," while judges as richer men, moving in richer circles, have higher financial standards. Others say that juries give higher damages because they are in touch with current values and rising prices, while judges are old fossils who know nothing of the world around them and whose money values are a quarter of a century out of date. The hundred Socialist members of Parliament think that judges are class-conscious capitalists who give small damages to working class plaintiffs and big damages to the middle and upper classes. The fact is that since both judges and jurors are human beings they work unpredictably on imponderables and intuitions, unlike the computer which is arbitrarily instructed on a limited number of considerations. Another complicating factor is that even the intimidating robed English judges are, as was said long ago, "one-third a common juror beneath the ermine." Nor have they an entirely Olympian indifference to outside atmosphere. Since the controversy started, awards of damages by judges for personal injuries have perceptably risen and soon afterwards Lord Denning in the Court of Appeal in upholding an award of £7,004/7s/4d to a young Jamaican who had lost all the fingers of his right hand in a factory accident remarked, with evident satisfaction, that the figure was far higher than it would have been a few years ago and that the judges do keep pace with the times.

Mr. RISCASSI. Now, selection by lot from the registered voting list will insure a cross-section of the community, with nothing left to chance, as would be in the case of jury selection at random. Now, the second amendment that we propose is rather than have these prospective jurors come in for the observation of the clerk and to fill out their questionnaires at the loss of a day's work, I think that that can be done by mail. That is the system that is used in Connecticut, it is the system that is used in Florida, certainly in Pinellas County, Senator Smathers, because I visited there and inquired.

And there is a saving there, particularly in view of the fact that—there is a saving of time and of money, both.

Senator ERVIN. If you will pardon my interruption, I think that is a very wise suggestion, because this deals with prospective Federal jurors——

Mr. RISCASSI. And the districts are large.

Senator ERVIN. And in many cases jurors would have to travel 50, 100, or 150 miles to fill out their questionnaires.

Mr. RISCASSI. Yes, sir.

The last one, in 3296, has to do with the length of service. Now, 5640 was deficient in that it had nothing to say about the length of service; 3296 mentions 30 days. That is on page 12, service as a petit juror for more than 30 calendar days, except when necessary to complete service in a particular case.

Now, the greatest weakness and the reason why, in many jurisdictions, you have your jury panels which finally end up hearing cases, these panels are composed of elderly people who are supplementing their social security income by seeking this service and they get it for the following reasons, but when you send out a questionnaire or by statute or by Federal enactment, you state that someone has to serve 30 days. Unless you guarantee their pay, I submit, and even if you do, I submit, Senator, that that is a hardship on the great majority of the people. That is why we end up with these elderly people in these jury boxes and in the trials of these cases.

The comment that goes along with this amendment reads as follows, that the failure to select prospective jurors by lot, together with insufficient pay and a long term of service, always result in juries that are not a true cross-section of the community. A maximum of 70 calendar days of service, together with adequate pay, would make it difficult for anyone to find an excuse to evade jury service. Excuses are usually offered by the young with family on hardship grounds. It is hard for a judge to refuse them, and the net result is that the jury panels end up overloaded with old, retired pensioners, well meaning but nonetheless not a true cross-section of the community to which a litigant in our courts is entitled.

The State of Florida has a 1-week time limit for petit jury service. Here the system has worked most effectively in this regard. There have been no complaints of difficulty in administration. They do it entirely with a 5-cent stamp and the mail.

Not only that, although title I in this civil rights bill perhaps does not get the scrutiny or the time or will not get the time that titles III, IV, V, VI, or II will get, still title I is as important, if not more important than any of the other sections of this bit of legislation. And we have in this country of ours today an overwhelming amount of jury work. All of our courts are loaded up to the gunwales, and we have to do things that will streamline the procedure and that will give, at the same time, everybody an equal opportunity to serve.

Now, one of the things that is true in Florida is the fact that when anyone serves for a week alone, the presiding judge will keep them there after school in order to finish that case so that those people do not have to serve over the 1-week period. There is no good and adequate reason why any person should have to serve on a jury more than once or twice in a normal lifetime. If everybody is given an opportunity to serve, you will find out that that will be the average and there will be that many that will not have that wonderful pleasure of watching your system at work. The objective should be to make jury service a duty attractive and instructive to all segments.

Senator ERVIN. It is also true, is it not, that any person, no matter how busy, could reasonably be called on by his country to serve as a juror for a week?

Mr. RISCASSI. Yes.

Senator ERVIN. But if a man has a business or a profession and he is called to serve 30 days out of the year, this is a disproportionate sacrifice because it may mean that a lot of other people who owe the same obligation to the country do not serve at all?

Mr. RISCASSI. Yes; and in our Federal system today, unbelievable as it may seem, they have these jury panels that sit for a term, the whole

term of the court, 2, 3, and 4 months. And how, I ask you, can you ever get everybody or give all an opportunity to serve under circumstances such as that? The limit must be named. It should not be more than 1 week, because no one can then claim a hardship, and the butcher, the baker, the drugstore man, the garage man, everybody should be given an opportunity to participate.

Senator ERVIN. Do you not agree with me in the thought that one of the wisest things about our system of administration of justice is that we have the jury system and we have laymen from the body of the citizenship to assist in the administration of justice?

Mr. RISCASSI. Yes; that is the most wonderful part of our jury system. Only the trouble is that at the present time, in a great number of the States, the people that come in and sit as jurors are cynics and they deride the system rather than being boosters of the jury system. That is something to be really alarmed at.

In keeping with that, I want to close by stating that this committee, if it is within its power, should also give attention to the use of 6-man juries on a compulsory basis in civil cases, rather than the use of 12-man juries. Now, there is no good and adequate reason why these Federal courts trying civil cases, a lot of which revolve around who was at fault at an intersection or whether or not a banana peel lay on a sidewalk for an hour or a week, things of that sort, why a 6-man jury would not do as well as a 12-man jury. That goes for the larger cases, also.

The expense that is involved here, you bump the pay up to $20 a day; you are giving them $17 a night if they lay over. You give them transportation both ways, you have increased the three categories and it is worthwhile. I think you could have a tremendous savings, both in time—because when you pass these exhibits around in the trial of a case and you have 6 instead of 12 looking at it, and when they file out, where a question of law is being argued, as happens many times in the trial of a case and the judge wants the argument in the absence of the jury, all of these factors which are so important today, so that we can get away from this hue and cry in a lot of quarters that we should have a compensation system for the trial of civil cases, would be done away with if we used a six-man jury, if we used a shorter term so we could get away from cynics, who, No. 1, abuse the system and deride the system, and if we use a cross section in the inception.

Senator, if there is anything I can tell you after 33 years practicing generally as a smalltown practitioner, it is this, that the cross-section, that the selection by lot in the inception is most important. This 5640, which was the bill that passed in the House, which called for a jury commissioner to select the original panel subject to directions to be given him by the presiding judge, still gets the human element in there, which gives you a jury which, in the final analysis, can only be the reflection of the selector. And if you are going to do it so that it is fair and equally applied to everybody so that everybody must serve and learn that duty, No. 1, it has to be by lot from the registration list, which I think is about as fair a system as you could get, particularly when you bring it up to date in the Southern States. And the bill makes provision for the chief judge getting names of minority groups if they are not fairly represented at the present time.

And then the short term, that 1-week term, is the rock upon which all of these measures have fallen so that people have not been able to get a fair trial.

I wish to thank the counsellors to your very capable committee, with whom I sat prior to this time, particularly Mr. George Autry, and you, Senator, and you, Senator Smathers, for permitting me to speak.

Senator ERVIN. Thank you. We certainly appreciate your appearance. You have made some very thoughtful suggestions, and I might add you have pretty good Scriptural warrant for selection by lot, because the New Testament tells us that after Judas betrayed the Lord his successor Matthias, was selected by lot.

Mr. RISCASSI. And I wish to point out in reference thereto that the greatest travesty, in my opinion, has been what has been going on in many of our States. There are only two States in the Union to my knowledge that have selection by lot of the jurors in the inception. One is the State of Washington and one is the State of Connecticut, believe it or not. We passed it there 2 years ago. If it is possible in Connecticut, it should be possible on a Federal level.

Senator ERVIN. We appreciate your taking the time and the trouble to appear before the subcommittee and give us the benefit of your experience, thoughts, and philosophy on this subject.

(The complete statement of Mr. RisCassi follows:)

STATEMENT OF ATTORNEY LEON RISCASSI, HARTFORD, CONNECTICUT LEGISLATIVE CHAIRMAN, AMERICAN TRIAL LAWYERS ASSOCIATION

The undersigned wishes to be registered in favor of Title I of S. B. 3296 with the following amendments and comments thereto.

Section 1864. Master jury wheel

A. On page 3 line 18 strike out the words "at random" and substitute in lieu thereof "by lot."

B. On page 4 line 16 strike out the word "random" and substitute in lieu thereof the word "by lot."

C. By adding on page 3 line 19 after the words "it serves" the following sentence, "The selection of prospective jurors within a given judicial district or division shall be by selection of names in a given and identical numbered sequence based upon the number of jurors to be selected therefrom."

Comments. Ballentine Law Dictionary defines "lot" as a method to determine a question by chance or without the action of man's choice or will.

The language of the amendment is used in the Statutes of the State of Washington and State of Connecticut.

Selection by lot from registered voting lists will insure a cross section of the community with nothing left to chance as would be the case in the selection of jurors in the inception at random.

Section 1865. Drawing of names from the master jury wheel

Strike out in page 5 lines 21 and 22 the following "shall appear before the clerk and fill out" and substitute in lieu thereof "shall be mailed by the clerk."

Comments. A saving in time and money to the government and to the prospective juror.

Section 1869. Exclusion from jury service

On page 12, line 1 strike out the word "thirty" and substute in lieu thereof the word "seven."

Comment. The failure to select prospective jurors by lot, together with insufficient pay and a long term of service, always results in juries that are not a true across section of the commuity. A maximum of seven calendar days of service together with adequate pay will make it difficult for anyone to find an excuse to evade jury service. Excuses are usually offered by the young of

family on hardship grounds. They are hard to refuse and the net result is that the jury panels end up overloaded with old, retired pensioners, well-meaning, but nonetheless not a true cross section of the community to which a litigant in our courts is entitled.

The State of Florida has a one week time limit for petit jury service. Here the system has worked most effectively in this regard. There have been no complaints of difficulty in administration.

The objective should be to make jury service a duty attractive and instructive to all all segments of our society. It should never discriminate against the young, working class people who make up the great bulk of the population. Jury service should never be permitted to be used by the pensioner as a means to supplement Social Security income. The opportunity and the duty to serve should be uniformly applied if we are to insure an effective Federal jury system.

Senator ERVIN. We would be glad to hear from either of your associates.

Mr. RISCASSI. I would like you to hear from Mr. Colson, who is an outstanding trial lawyer in Florida, with great experience, and a past president of this organization who will tell you how it has worked out in Florida.

Senator ERVIN. Mr. Colson.

Mr. COLSON. Thank you. I want to thank Senator Smathers for his remarks, and thank you, Senator, for coming to the Florida Bar Association meeting last week and making your very fine major address.

I come in support of this bill with certain minor exceptions. I think that one or two of them are important enough that we should comment on them.

I have had the privilege to study the jury systems in all 50 States during the last 2 years, both in the State and the Federal courts. As a result of my travel I can say that at the minimum we do not have the same system of jury selection in all 50 States; not even in the Federal courts. I do not know which systems are the best. I am not here to pretend that I know, but I will say they are different. Therefore, they are not offering a jury of our peers, of our equals, because our systems are not equal. It is wrong that in 1966 we should still have such a system.

I have tried cases both in the North and the South in 1966; in Albany, N.Y., and in New Orleans, La. I feel that it is wrong, for example, when a State attorney in a Mississippi county, in a case that I am personally handling, voluntarily dismisses the indictment because he recognized that the jury was wrongfully selected. In 1966 I still cannot get a fair trial for a Negro defendant in Mississippi, in my opinion. I am not going to get a jury that represents a cross section of his community. That is wrong. I have to try the case purely on the hope of getting that defendant to a higher court while I keep attacking the jury systems.

I think that we should take a hard look at blue ribbon juries. While blue ribbon juries is a wonderful phrase, very often they have been color conscious instead of color blind. The condition still exists where a guilty rich white man is not going to the electric chair. Something is basically wrong.

Now, I applaud this bill. The thing that concerns me most of all about the bill is the word "random." Mr. RisCassi mentioned the word "lot."

Senator ERVIN. I have always figured that when you select something at random, you wind up with something nondescript.

Mr. COLSON. I will show you the way we select juries at random in Miami, for instance. I think that Miami has a fine system free from discrimination. There is an attempt in many of our Federal courts to make sure that we have a certain percentage of lower and higher incomes represented, or a certain precentage of Negroes on juries. What we have to understand is that the very fact that a man, a human being, makes such a decision or determination allows the very opportunity for discrimination to exist. The opportunity to avoid discrimination gives the opportunity to achieve discrimination.

In our State courts, in Miami, they use the voter registration list. For some reason the Federal court uses the city directory. Our jury commissioner picks names from the city directory which are then placed in the jury wheel. Once the names are placed in the jury wheel no one is concerned about their selection by lot. Everyone is satisfied that it will be done. The key to this all is the selection of the overall group that is going to be placed in the jury wheel, the initial selection of prospective jurors, whether by lot or at random. In Connecticut this most important stage is handled by computer. There, they hit a certain number on the computer and from all the names in the computer, those names that are to go into the jury wheel are automatically produced. Thereafter, the judge or clerk selects, by lot, from the jury wheel, those jurors needed for a particular trial. This bill must be very clear about getting those names into the jury wheel in the first place.

In my opinion, this is not made clear by the words "at random." It is possible for a jury, whether civil or criminal, to be selected by merely looking to the occupations of the prospective jurors. For instances, here is a bank president, here is a carpenter, a bookkeeper, and a student. I can tell you whether they are male or female and what their income is. If we are able to pick out the people that we think a jury ought to be composed of, in this manner, then one side, in a criminal or civil case, is going to be off to a tremendous start by stacking a jury independently.

This is not what we want. We want a cross section. I want to make sure at this level, that whether by city directory, voter registration list, or anything else, the selection is done entirely by number.

I am concerned, as you are Senator, about the questionnaire provision of the bill. I do not have an answer to it. I share your concern, however, sir, and I will speak more about it, if you want.

I strongly suggest that you consider the provision for 1 week service by jurors. It certainly helps them and removes one of the major causes for excuse. I believe that more people should participate in our jury system; those who love, understand, and appreciate it. Those who do not are primarily the critics. The 1 week limitation on service has another built-in advantage; that is, a judge has more compulsion to finish the case within 1 week.

In traveling to the different States, I have found that the judges of this country try cases in completely different ways. Some judges do not hurry if they know that the jury has to be there for 30 days anyway. If a case goes over 2 or 3 weeks the judge can easily hold the jury over.

But if a jury is waiting for a case to end, the judge is likely to give it priority over any other matter. Beside the economic benefit, I think that this is another worthwhile consideration.

I also endorse the experience we have had with the six-man jury in Florida. With the exception of capital punishment cases and eminent domain proceedings, we use a six-man jury; even in criminal cases. Whereas we might limit the use of the 6-man jury to just civil cases, I do not see the necessity of the large 12-man jury at all times.

Senator ERVIN. I wonder if there is any constitutional question that can be raised. I do not recall any Federal decision offhand, but I know there are some State decisions which hold that the number of jurors has to be 12 where the Constitution is interpreted in light of the common law. I wonder if either of you has any doubt as to the constitutionality of reducing the number by legislation rather than by constitutional amendment?

Mr. COLSON. I have none, Senator. I am positive. I cannot give you a citation, but the six-man jury has been tested by the Florida and the U.S. constitutions. I believe that our system would be improved by requiring the service of our juries for a shorter time. In this way we could get our cases along much faster and with less cost. But I urge you to make sure that the original selection of names to be placed in the jury wheel is by some mechanical system out of the hands of any human being.

Senator ERVIN. I certainly share your belief that it is highly desirable to get as many citizens as possible to serve on juries. I think it gives a good deal of confidence in the administration of justice on the part of the public generally if they are familiar with it. I think they will come away from the average court persuaded that we have about as fine a system as can be devised to accomplish justice.

Do you have any questions?

Senator SMATHERS. No questions. I just concur with your statement.

Senator ERVIN. I was a trial judge for 7 years. On convening of the court each week I knew that a lot of the jury panel would like to be excused, so I would give them a little lecture in advance about certain duties a man owed his country, and one of the most important was that of serving upon the jury when he was chosen to do so. I concluded by saying, however, "there are certain exigencies that justify a man asking to be excused, so if any of you now have any reason you think would justify you in asking the court to excuse you from the performance of one of your sacred duties to your country, I will hear it at this time."

Mr. COLSON. You would have to be un-American.

Senator ERVIN. I very rarely got any requests to be excused after that.

Do you have anything you would like to add?

Mr. SMITH No, thank you, Senator.

Senator ERVIN. We are certainly indebted to the Association of Trial Lawyers for your appearance. I know there is no group of men in America who are more interested in having fair and impartial juries than the trial lawyers, and you have the experience which makes your observations of unusual worth in the considerations of the subcommittee. I thank you very much.

Mr. AUTRY. Mr. Chairman, the next witness is Alfred Avins.

Senator ERVIN. Professor Avins is a native of New York City. He has a B.A. degree from Hunter College and an LL.B. degree from Columbia University, an LL.M. degree from New York University, and L.M. and J.S.D. degrees from the University of Chicago. He holds a Ph. D. degree from Cambridge University. He is a member of the bars of New York, the District of Columbia, Florida, and Illinois. He was a special deputy attorney general of New York in 1956 and 1957.

Professor Avins has prepared several memorandums concerning the constitutionality of various portions of S. 3296 and the legislative history of the 14th amendment. These will be printed in the record immediately following Professor Avins' testimony.

Professor Avins is also general editor of the book, "Open Occupancy Versus Forced Housing Under the 14th Amendment," a copy of which is before each member of this subcommittee.

Professor, you may now wish to summarize your position on this legislation. Before you do, however, I would like to thank you for your willingness to appear and give us the benefit of your vast knowledge in this field.

I also would like to say I have read a number of articles which you have written. I was very much interested in your arguments before the Supreme Court in the literacy test situation. But unfortunately for the cause of constitutional government, I have to say that I think the Supreme Court has usurped the power to amend the Constitution in that case.

STATEMENT OF PROF. ALFRED AVINS, THE SCHOOL OF LAW, MEMPHIS STATE UNIVERSITY, MEMPHIS, TENN.; ACCOMPANIED BY SAM CRUTCHFIELD, ATTORNEY

Professor AVINS. Thank you, Senator. Since I argued *Katzenbach* v. *Morgan*, I could hardly say otherwise than that I agree with you.

Senator ERVIN. I might add that I have a great deal of consternation whenever I consider that case. There are two specific provisions in the Constitution: first section 2 of article I, which clearly gives the States the right to prescribe the qualifications for voting, subject to no exceptions other than those embodied in the 14th and 15th amendments, which was put in the Constitution before the 14th amendment, and second, the 17th amendment, which was inserted in the Constitution long after the 14th amendment. To have a general expression in the 14th amendment nullify two specific constitutional provisions, one antedating the amendment and the other postdating it, and at the same time, have the court indulge in the statement that the States have the power to prescribe qualifications for voting and then say that Congress could prescribe them in this particular case causes me to wonder. I do not believe any of us has any security apart from the Constitution as it was written. When the Court professed its adherence to the principle that the States have the power to prescribe qualifications for voting and immediately ignored that and annulled the States' requirements, I could not help but feel as I used to when my father told me

that to punish me hurt him worse than it did me. I just did not believe it.

Professor AVINS. Thank you, Senator. Before I go further, I want to introduce for the record my colleague, who has been assisting me, Mr. Sam Crutchfield of the District of Columbia bar.

I am going to start by indicating for the record that I have submitted or will submit memorandums solely on the question of constitutionality for each of the titles other than title I, which is a Federal problem and is therefore a problem of policy. I intend to direct myself this morning solely to the questions of constitutionality and not to questions of policy, which I think we could argue at length before the committee.

In respect to title II, I have submitted a memorandum entitled "The 14th Amendment and Jury Discrimination: The Original Understanding." That covers questions of title II.

In respect to title III, I have submitted two memorandums, one entitled "De Facto and De Jure School Segregation: Some Reflected Light on the 14th Amendment From the Civil Rights Act of 1875," and "Racial Segregation in Public Accommodations: Some Reflected Light on the 14th Amendment From the Civil Rights Act of 1875."

In respect to title IV, there is in my book, "Open Occupancy Versus Forced Housing"——

Senator ERVIN. Let the record show that all the observations by Professor Avins will be printed in the body of the record immediately after his oral testimony.

Professor AVINS. Thank you, Senator.

There is in my book an article entitled "The 14th Amendment and Real Property Rights," which starts at page 68.

In addition to that and respecting certain special problems of State action, I would like to refer to my article in the most recent issue of the Columbia Law Review, volume 66, at page 873, entitled "Civil Rights Act of 1875: Some Reflected Light on the 14th Amendment in Public Accommodations," which appears in the most recent issue of the Columbia Law Review. I will, I hope, before the hearing closes, have an opportunity to submit a supplemental memorandum on this particular point also. It is a question of State action.

In respect to title V——

Senator ERVIN. I would like here, for the purpose of the record, to say that the subcommittee will obtain a copy of the article in the Law Review and print that in the body of the record, immediately after your testimony, with your permission.

Professor AVINS. Yes, thank you, Senator.

In respect of title V, I am submitting two memorandums, one entitled "Federal Power To Punish Individual Crimes Under the 14th Amendment: The Original Understanding," which carries legislative history up to 1870, and the second entitled "The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the 14th Amendment."

Then, finally, I have a generalized discussion entitled "Fourteenth Amendment Limitations on Banning Racial and Religious Discrimination: The Original Understanding."

Senator ERVIN. All the documents referred to will be printed at the end of your testimony.

Professor AVINS. Before going any further in summarizing some of this material and what its significance is, I would like to direct my

attention first to the question of the general significance of legislative history in interpreting constitutional law and, in particular, in interpreting the 14th amendment. I say this because I think it rather crucial to the entire question of the constitutionality of these titles, titles II, III, IV, and V of the bill, as to the manner in which the 14th amendment should be interpreted. I also say this in light of your remarks about Supreme Court decisions, and a rather fundamental question as to the weight to be given Supreme Court decisions versus the weight to be given to the original understanding of Congress in proposing a constitutional amendment. I leave off entirely the question of ratification and assume for the purposes of this discussion that no problem exists in that quarter.

Now, I received from the editor of the Virginia Law Review, a Mr. Earl Dudley, a series of questions on this point in respect to an article of mine which I considered to be rather astute questions, and which lead me naturally into answering this matter. I should like to read each of these questions and answer them, because they will, in effect, answer this question as to what the effect should be of the legislative history in interpreting the 14th amendment.

His first question is: How do we select from the debates on a given piece of legislation those statements which capture the "intent" of the legislature when supporter and opponents of the bill make conflicting statements concerning its import and when there is a variation of opinion among the supporters themselves, to whose statements do we attach the greatest weight? What happens if one of the people whom you chose as qualified to speak for the legislature itself makes contradictory statements at different times, or logically inconsistent statements within the same set of remarks?

Applying this question to the 14th amendment, the question is really one of determining the intent of a body which can only be determined, of course, from the public statements made by the members of the body primarily on the floor of Congress somewhat secondarily in a committee report. There was a fairly brief report of the Joint Committee on Reconstruction and then, of course, certain supplemental material is always helpful, such as speeches they may have made to their constituents to report in the local press. Of course, these speeches are far more generalized than the ones made on the floor, and therefore it is worthwhile to pay attention to the statements made in the Congressional Globe, which are fairly voluminous.

I might say that in preparation of this memorandum, I read, I suppose, about 15,000 pages of speeches made during this period, plus statements and various other material.

Now, of course, prime attention should be given to, first, the draftsmen of the measure. In the case of the first section, it was Representative John A. Bingham, a Republican Representative from Ohio, a good lawyer though somewhat given to a bit of rhetoric and in respect to the floor leader in the House, Representative Thaddeus Stevens of Pennsylvania, a radical Republican: in the Senate to the opening remarks of Senator Jacob M. Howard of Michigan; secondarily, to lawyers speaking in support of the amendment, most particular these general views of those lawyers——

Senator ERVIN. I am going to have to ask you to excuse me just one moment.

Professor AVINS. By all means. May I continue my remarks?

Senator ERVIN. Yes, that will be fine.

Professor AVINS. Especially to lawyers who are what I may call the marginal proponents of the measure. By marginal proponents, I mean those lawyers in the rather narrowly divided Senate, who chose to vote for the measure and yet just wanted to go a little distance, not as far as the radicals.

There were some very well-defined views on different matters during this particular period. Some Senators and Representatives were what was known as radicals. Others were known as moderates in the Republican ranks, and then there were conservatives who voted against the 14th amendment, and of course, the Democrats were all against the 14th amendment.

I have not found in the remarks any really contradictory statements. In fact, they are really quite consistent, the whole body of them. There are a few contradictions in some political speeches by incumbent Democrats, obviously made for political effect, and these I discredited. As a matter of fact, Representative James A. Garfield in 1871 and Representative John Farnsworth of Illinois, in reviewing speeches themselves, discredited these political remarks by Democrats.

But the 14th amendment was basically, especially the first section, intended to be a very modest and moderate measure. And the statements are quite consistent from all the Representatives. Some wanted to go further than the amendment did, but accepted it simply because it was the best thing they could get.

Going on now to the second question that he poses, once we have identified what the legislature intended to be the interpretation of this bill on any given question, is there any point at which we should deviate from the letter of this interpretation to serve the larger purposes of the legislation in the context of changed circumstances? If so, what are the criteria for selecting those points which we will discard? Should we approach this problem differently depending on the nature of the legislation? That is, should a constitutional provision, because of its simple and fundamental character, be read more flexibly than a piece of very particularized legislation designed to deal with a specific problem?

My answer to that question is that every constitutional provision, like every legislative provision, must, as a matter of constitutional law, be interpreted in accordance with the intent of people framing it and passing it, and that there is absolutely no authority whatsoever for deviating from what the original intent was. That is the point at which I part company from the U.S. Supreme Court in a number of its recent cases.

Senator ERVIN. If that were not so, the men who drafted and ratified the original Constitution would never have provided article V, would they?

Professor AVINS. No, there would be absolutely no point. You could let the Supreme Court do all the amending. You could write a generalized section that would say, let the Supreme Court fill in the blanks where they find blanks to fill in.

Senator ERVIN. If they had intended for the Supreme Court to amend the Constitution, they would have put in article V something

like this: "The Constitution of the United States shall automatically change its meaning from time to time without any change being made in its phraseology, and a majority of the Supreme Court shall have the absolute power to determine when such automatic amendment occurs and the nature and scope of such automatic amendment."

Professor AVINS. Yes, and the result would be, of course, that the U.S. Supreme Court would be a permanent floating constitutional convention. I am not sure that is not true today.

Senator ERVIN. And we would lose all the benefit inherent in the written Constitution, would we not?

Professor AVINS. Right. There is no point to having a written Constitution.

Senator ERVIN. To put it in plain English instead of being ruled by a written Constitution, we would be ruled by a judicial oligarchy, would we not?

Professor AVINS. Any group of judges who could be collected who would feel at any particular time that any particular thing is good for the country. My original feeling is that no such original intent was admitted. I believe the Senator from Indiana, who is a member of the subcommittee, spent a lot of time recently working on a constitutional amendment. It seems to me he wasted a great deal of time. The Supreme Court could have done the job by a mere judicial opinion. He certainly could have said, well, let them do it, and he could have saved himself a great deal of time and trouble and spent the time on vacation.

My position is that there is no point to having a constitution or constitutional amendments if the Supreme Court—or the Congress, and I now refer particularly to section 5 of the Voting Rights Act in the *Morgan* case—either the Congress by ordinary bill or the Supreme Court by ordinary opinion—or by extraordinary opinion—could simply change the Constitution any time it felt this would be good for the country.

Senator ERVIN. Now, is it not your interpretation of the Constitution that the only power the Supreme Court of the United States has concerning the Constitution is the power to interpret it?

Professor AVINS. Yes.

Senator ERVIN. And that this power consists solely in ascertaining and giving effect to the Constitution in accordance with the intent of those who drafted and ratified it?

Professor AVINS. Precisely. And therefore, a case in the U.S. Supreme Court ought to be a mere historical inquiry.

Now, occasionally, the U.S. Supreme Court does use history to dress up its opinions. They did in the *Price* case, or, rather, the conclusion I came to in one of my memorandums was that I did not think they really understood what the significance of some of these debates was. But on other cases, in the *Poll Tax* case I now think of particularly, they simply rejected it as being not applicable to the present day, or we-need-a-new-model-automobile-this-year type of opinion.

Senator ERVIN. I was much intrigued as well as much distressed by the decision in the *Poll Tax* case. I read it and I saw only one thing in the majority opinion that was relevant to the decision. That was a statement of Mr. Justice Douglas, and I can quote it exactly,

"Notions of what constitutes equal treatment under the equal protection clause do change," and he underlined the word "do."

Professor AVINS. Yes.

Senator ERVIN. That gave me enough trouble, but I was more concerned when I looked up in the dictionary what a notion was and it said that notions are general, vague, and imperfect conceptions or ideas of something.

Professor AVINS. Yes.

Senator ERVIN. So I drew the conclusion that the majority opinion held in that case that when notions of judges change, the Constitution changes accordingly.

Professor AVINS. Yes; and I might say that in arguing my case, I found that Mr. Justice Douglas was very interested in Indian law. He raised the fact, as he said in his opinion, that the Indian electoral system worked very well, having Indian speeches translated into the local native languages. Since I published a book on Indian labor law, I had a very deep interest in this matter and offered to give him citations of Indian cases which said that an Indian native could not be transferred from his area to another Indian area unless he spoke English, because he could not understand the native language, certainly basic in a situation like that.

I felt that if one were writing briefs for the Supreme Court, one should intersperse those briefs with Indian cases, and I hope you will hire one or two Indian lawyers to get some decisions from the Sudder Dewanny Adawlut and the Sudder Foudjaree Adawlut and some others which I suppose will now replace debates by James Madison and such other sorts of irrelevant material.

Going back to the third question, what do we do when the discovered intent of the legislature is simply not consonant with the wording of the legislation itself, when Congress has done a bad job of drafting legislation? Should the courts step in to say what it understands to be the congressional purpose, or should it limit itself to such an interpretation as the words of the statute will bear?

I might say this in answer to that, that the 14th amendment, in my estimation, is quite adequately drafted to make the point it is intended to make. Some of the later reconstruction legislation I have concluded was rather badly drafted, but it was drafted under very great time pressure. But the 14th amendment is quite clearly drafted in terms that it was intended to convey. There were three clauses that I am referring to, other than the declaration of citizenship. Of course, I am talking about the first section; first, the privileges and immunities clause which simply enforces the declaration of the article IV, section 2, which says citizens of all the States shall be entitled to privileges of citizenship—it was simply an enforcement mechanism for that.

Secondly, the due process clause, which is nothing but an application of the Federal due process clause to the States, in effect overruling Barron against Baltimore, and carrying all the old judicial decisions, and Bingham himself said it was simply designed to carry the old decisions over with it.

As for the equal protection clauses, the Supreme Court has read the word "protection" right out of the equal protection clause and interpreted it to mean rights, benefits, et cetera, whereas, in fact, it was intended to give all persons, even aliens, the right to equal protection of

life, liberty, and property, which simply said nobody was entitled to chop your head off if you were a traveler or stranger, or rob you of your property. This has become the fifth section of this bill, so I am going to save my point for a little bit later to discuss this question, because, of course, it is relevant to that section.

But in terms of this general question, I might say that I find no difficulty in understanding that the original intent was, or at least where the ideas came from by the 39th Congress in drafting and proposing this particular legislation whatsoever.

The fourth question is, how does the constantly changing content of language impinge upon this entire process when we are dealing with legislation drafted and debated in the vocabulary of an earlier day? When most people of today would naturally read the words of a statute or constitutional amendment to mean one thing and people of an earlier day to mean another thing, is the Court bound by the etymology of an earlier day? This problem seems to be particularly acute where the Congress reads such language as "equal protection of the law" or "due process of law" deliberately so broad as to demand considerable interpretation in light of changing circumstances.

Where would the antitrust laws be today, for example, if the Court had interpreted restraint of trade as limited strictly to those restraints considered illegal at common law, mostly agreements not to compete between masters and their former apprentices, and to those which the framers of the Sherman Act in 1890 actually foresaw? We would be today in the process of amending the bill, which is really the purpose of having a legislature; that is to say, there is no purpose to having a legislature unless it legislates, and if modern experience shows that a particular provision, be it a constitutional provision or a legislative provision, is inadequate in the light of changing circumstances, there is absolutely no reason in the world why an amendment cannot be passed to take care of changing circumstances, which is what I rather think the reason for having article 5 in the Constitution is and why Congress spends a great deal of time discussing amendments to prior legislation or legislation to substitute for old legislation, et cetera.

So that there is no problem, really, except the problem of amending a particular provision, be it a constitutional or legislative provision, if changing circumstances indicate that it is necessary.

And I think experience shows that if the people of a country are really agreed on the need for a constitutional amendment, it can be done rather rapidly. As I recall, the 21st amendment, to repeal prohibition, went through rather speedily, in a period of 10 months, I think, or at least, fairly rapidly. If the people of a country are not agreed that an amendment is necessary, we should not have one. If the Congress or even the Court feels that changing circumstances need new provisions, then I think it should be done in the proper constitutional fashion, and this does not militate in the slightest against retaining the old Constitution in accordance with its old interpretation.

So I would say to that that I am not terribly worried about having a constitutional amendment once in a while to take care of new changing circumstances, and new legislation to take care of new, changing circumstances, rather than to try to stretch and pull and haul old pieces of legislation to cover it. Because I really do not feel that the Supreme

Court is in as good a position to take a general consensus of the country as the Congress is in terms of a legislative bill, or as the Congress and the States combined are in terms of a constitutional amendment.

Senator ERVIN. I find a very striking similarity between your observation and that made by James Madison in the Federalist on the question of the fifth article. He said the reason they adopted that is they realized that experience would show that some changes would be needed in the Constitution, and therefore, they put in a method of amendment by the two-thirds vote of Congress and three-fourths of the States because it kept the Constitution from being too mutable on the one hand, and on the other hand, it prevented the Constitution from perpetuating what might be discovered to be defects. They certainly intended the Constitution to be our most stable legal document, but they intended it to be changed when the needs for changing arose.

And of course, the court usurps the authority to amend the Constitution every time it sits, and instead of being the stable document intended, it has become about as stable as a quivering aspen leaf.

Professor AVINS. It is like the value of fluctuating currency. It depends on—you need a telegraph to find out what the Constitution is from day to day. I might say I did teach constitutional law, and I found my case books were constantly obsolete. Finally, I had to use the New York Times—that was about the only thing I could use.

The fifth question is, what happens when a specific question arises which the framers did not address themselves to at all? Is the Court free to read the words of the statute in their normal, modern meaning, and thus, perhaps, to create a body of law broken backed out of joint with itself, or must it in every case limit itself to the concepts which had currency in the period when legislation was framed?

Well, then answer to that really follows the answer to the prior question. If, of course, the framers had no conception of a problem simply because it is a new gadget or something of the type—airplanes, et cetera—what you have to do is take the general principles which the framers intended and simply apply them to a new concept. This is really not as hard as one imagines, because I think the framers realized that there would be at least new inventions. They provided for new inventions in the Constitution itself, in a patent clause. I think they realized the country might change in territory, because they provided for the addition of States. They realized, I am sure, that the economy of the country might change.

So I think if this question is addressed to the commerce clause, that really no great problem exists because the framers realized that the economy may change, the land area may change, there may be new inventions, and in that case, you take the generalized principles of the Constitution and apply them to the new situation.

Senator ERVIN. I believe some of the cases say that the grants of constitutional authority to the National Government extend into the future.

Professor AVINS. Yes.

Senator ERVIN. That is the point you are making?

Professor AVINS. Yes, quite.

However, I might make this point, that after reading, I guess, about 15,000 pages of debate, I have come to a conclusion, what I might say almost undercuts what I am going to say, that nothing really new has been said in the last hundred years on the subject of race relations or human relations or suffrage, or the right to vote or who should vote, or protection, or various problems of that character. Therefore, I do not really think there is anything new on the subject, really. There is new phraseology and longer footnotes and probably longer articles today, but I do not really think there is anything new that anybody has really conceived of in the last hundred years that has not been said, really, in perhaps different language, 100 years ago. So really, it is applying old principles to old situations rather than old principles to new situations.

In addition to which I might say that I really find no significant difference between the terminology used 100 years ago and the terminology used today, nor do I find any great difference in the concepts. So I come to the conclusion that in fact, there really is nothing new as respects at least the 1st section of the 14th amendment, and therefore, there is no problem it interpreting it in accordance with its original meaning.

Senator ERVIN. Do you not believe the original meaning is pretty clearly stated in the 1st section of the 14th amendment?

Professor AVINS. Yes, I think the original meaning is fairly clear.

Senator ERVIN. As you pointed out, it puts three prohibitions on the States; they shall not deprive any person of the privileges and immunities of citizenship, they shall not deprive any person within their jurisdiction of due process of law, and they shall not deprive any person of the equal protection of the law.

Professor AVINS. Right.

Senator ERVIN. The only reference in that section, which is the section that is invoked, are three prohibitions on State action.

Professor AVINS. Yes, and three rather narrow prohibitions on State action. They are not really all that broad.

Senator ERVIN. And it shows an intent on the part of Congress and the States which ratified it to compel States to observe certain definite, fundamental principles in respect of the people within their jurisdiction.

Professor AVINS. Yes, quite.

Senator ERVIN. And there is not a single syllable within the 14th amendment that has any reference whatever to individual action, is there?

Professor AVINS. No; there is not a single reference to individual action, so when I get to title V, which I come to in a moment, there is a rather peculiar concept that was floating around.

Senator ERVIN. Yes.

Professor AVINS. I want to discuss that because I consider this probably the most difficult from a legal point of view, the precise extent to which the Federal Government could go in respect to what they could do in regard to individuals.

Senator ERVIN. I think you have one of the finest analysis from the standpoint of legislative history that I have ever read, and I have done a tremendous amount of reading on that subject.

Professor AVINS. Thank you, sir. There are a few new ones floating in.

Senator ERVIN. Of course, and test cases, as Justice Harlan said, are quite extraordinary.

Professor AVINS. Yes.

Let me go to title V, first, because I think there is a great deal of current interest in that, and second, because I think it is probably the most difficult from the legal point of view. Let me see if I can summarize the basic points of these memorandums. One is a 42-page one which I will submit today, and then the earlier one, which I have submitted.

Prior to the Civil War—the War between the States, if you will—there was a case decided in 1842, a rather well-known case by Mr. Justice Storey, entitled "Prigg against Pennsylvania." The question involved the interpretation of Congress' power under the fugitive slave provision of the Constitution, now, of course, obsolete, which provided for the rendition of fugitives from service in other States, which is bracketed in article IV, section 2, of the original Constitution. The question arose as to whether, under the necessary and proper clause, Congress had any power to create machinery for the enforcement of this section, or whether it was solely directed to States who are obligated as a matter of good faith to enforce this particular section.

Now, the section does not address itself to the States at all in terms—I do not have it before me, but in substance and effect, it says that fugitives from one State who flee into another State, fugitives from service and labor—I am not now talking about the criminal extradition cases—shall not be permitted to throw off their obligations of service, but rather shall be returned to the State from which they came. Now, in fact, it did not only apply to Negro slaves, it also applied to white apprentices. There were a number of cases—not in the courts, but they are in committee reports—indicating a number of cases of rendition of white apprentices who were under obligation to serve and fled into another State. Apprenticeship was at one time enforcible by criminal statutes in the United States, and by various other statutes.

Mr. Justice Storey held that this right imparts a remedy, that since it is in the Federal Constitution, it necessarily implies that Congress would have the power to create the remedy and that it would in fact be a violation of the separation of powers between the Federal Government and the States to require the States to give this remedy.

Now, this case was very important both politically and legally in the period. It was the foundation basis for the fugitive slave law of 1850, which, as part of the compromise of 1850, is important as a historical matter and naturally, impinged itself very much on northern thinking.

In addition, it was important because similar language is found in that section of article IV, section 2, which provides that citizens of each State shall have the privileges and immunities of citizens in the several States, which also, in terms, is not directed at State action as such.

Now, the first Civil Rights Act of 1866 was passed under this privileges and immunities clause. I believe Professor Howe has indicated he thinks it passed under the 13th amendment. This is an in-

teresting theory, and there is some language in the debates which is confusing on this, but in fact, it had nothing to do with the question of slavery but the rights of citizenship, the rights to buy and sell property.

The theory was that the case of *Prigg* v. *Pennsylvania* implies that Congress could directly provide an agency for enforcing the constitutional provision against individuals; and that it applied as much to the privileges and immunities clause under the fourth article as it applied to the fugitive slave clause.

Representative Bingham of Ohio and a small group of other Republicans thought that this was incorrect, that in effect, Congress had no power to enforce these provisions in the fourth article, second section. They rested on the good faith of the States. But he did think the privileges and immunities clause ought to be enforced by Congress because the States were ignoring it.

Therefore, what he did in February 1866 was introduce an amendment which gave the Congress the power to enforce the privileges and immunities clause, which would in effect embody in the Constitution the theory of Prigg against Pennsylvania.

Well, a number of Republicans objected. For example, Senator William Stewart of Nevada objected that this would obviate the need for State legislatures, because Congress could go around protecting everybody. So Bingham was forced to withdraw this and to drop the amendment by putting in one which was a limitation on the actions of States exclusively, which is the exact text today in the first section of the 14th amendment, other than the declaration of citizenship which was added by the Senate afterward, when the House draft came to the Senate.

Now, what happened was, however, that a number of the Senators and various other people of the period who were in Congress were not familiar with, or not familiar with the history and significance of this redraft in the House. Therefore, they continued to think that the case of Prigg against Pennsylvania was applicable to the 14th amendment. That thought persists because the Justice Department, in the Guest brief, continued to cite *Prigg* v. *Pennsylvana* as applicable to the 14th amendment, whereas, in fact, it had been taken out by the redraft.

This is where a lot of the erroneous theories that were floating around at the time came from, particularly the Enforcement Act of 1870. Senator John Pool of North Carolina, who introduced this provision, tied it to the fugitive slave law enforcement sections and to Prigg against Pennsylvania. But he had not been in the 39th Congress, because, as you may remember, North Carolina was not represented in the 39th Congress. Therefore, he was not, apparently, familiar with this redraft. He was laboring under a mistake.

When, however—this is the memorandum I have not yet submitted—Congress came to the Ku Klux Klan Act of 1871, a number of Representatives got up and said, in respect to the first Shellabarger provision, you cannot do this, you cannot make a provision which says if the States deny protection, Congress may afford it by punishing A, B, C, D, and E crimes—murder and so forth, arson, what have you. You cannot do that because there was this redraft, the Bingham redraft in the House. You could have done it under the first draft, but you cannot do this under the second draft.

Both Garfield—I am now referring to Representative James A. Garfield of Ohio, who later became President of the United States—Representative John Farnsworth of Illinois—very good Republicans, I might say, and very much in favor of reconstruction measures generally—said, you cannot do this constitutionally. However, the House did say this. They said that the equal protection clause, which is a double negative—no State shall deny equal protection—is the equivalent of saying the State shall afford equal protection and that if an individual interferes with a State officer in providing protection, then Congress may punish him on the same theory that it may punish interfering with a letter carrier delivering a letter. That is the absolute limit under the 14th amendment, interfering with a State officer in affording equal protection, or a local officer, local sheriff, for example, or inducing him not to afford protection. You may recall that the companion *Price* case in the U.S. Supreme Court was somewhat decided on this theory, but it went further.

Let me explain this. The district judge in the southern district of Mississipi said, under the 14th amendment and under section 241, I believe, of the Criminal Code, these private people, who allegedly shot the three civil rights workers in Mississippi in 1961 or 1962 were punishable for conspiring with the local deputy sheriffs, but they were not punishable for the substantive offense of depriving these civil rights workers of life, liberty, or property. They were punishable for inducing the sheriff and the deputies, the policemen, to deny protection, but they were not punishable for the substantive offense of the crime itself—not the crime of murder, but the crime of denying life without due process of law. But the sheriff was punishable for breaking his oath to support the Federal Constitution by denying life without due process of law.

Now, when the case came to the U.S. Supreme Court, this was reversed in the Supreme Court unanimously, and I think erroneously; it held that the individuals were punishable for the substantive offense of denying life without due process of law if they were conspiring with the local deputy sheriff, I think that is wrong. What that does, in effect, is say if the local sheriffs deny you protection, Congress may step in and, through the agencies of the Federal courts, afford equal protection directly. This is simply going back to *Prigg* v. *Pennsylvania*, and I think this is erroneous, and I think on the legislative history, it is erroneous.

The *Guest* case goes a long bowshot beyond that, because the *Guest* case provides that even if the State provides equal protection, Congress may provide protection as well through its own agencies through the Federal court. This was a theory that everybody rejected during the period, because the basic predicate, by both Senator Pool and everybody else during the period, was that if a State affords protection, then Congress has no power under the 14th amendment to do anything. It is only when the State denies protection that the Congress may step in; some people said it could afford it directly and other people said it could prevent intervention from protecting—under a latter view, the private persons could only be restrained if they interfered with State officials from affording protection. For example, if you shoot a revenue collector, you can be punished. You

are interfering with the revenue collector from doing his Federal duties. Only under that theory could the affording of protection be punishable—could a private individual be punishable.

So I think therefore, in conclusion, that even the *Price* case is too broad. The *Guest* case—the opinions of six judges in the *Guest* case, I think, are wholly unsupportable under any theory I can imagine, and it would necessary follow, of course, that since title V, first of all, is not predicated on a State denial of protection, and secondly, has nothing to do with interfering with State officials, it is beyond anything that I can find in Congress' power under the 14th amendment to do anything with.

Senator ERVIN. Could it not be said in an attempt to justify the *Price* case that it constitutes a misapplication of a sound principle? One of the Justices said this:

> We are here concerned with allegations which squarely and indisputably involve State action in direct violation of the mandate of the 14th amendment that no State shall deprive any person of life or liberty without due processes of law.

Of course, the facts did not quite fit that, but I would say you might reconcile it to some extent with the previous decisions on the ground that it is an incorrect application of a sound principle.

Professor AVINS. There are various statements made throughout the opinion. Some of the principles in the opinion are, I think, quite sound and I think some of them go too far. They are beyond the original intent as reflected in the Ku Klux Klan Act, which I might say I consider to be a very bad case of drafting, based on legislative history, and I have come to the conclusion that *U.S.* v. *Harris*, which held the statutes which were obtained from that to be unconstitutional, was an inevitable result by a group of Republican judges, radicals of the period, based simply on the fact that the statute was abominably drafted. It was a very vague section, that particular section, and the result is that the judges had no alternative but to hold it unconstitutional because it was not made clear that the conspiracy must be directed at compelling or inducing a State official to violate his Federal constitutional duties. In other words, a State official takes an oath to support the Constitution of the United States. One of the obligations is to provide each of these people with equal protection. I am not going to go into this question at this moment. I will go into it just a wee bit later as to whether all these things mentioned in V are equal protection. That is another question. I am right now on the particular question of when you can hit a private individual. The point I am making is you can only hit him for inducing a State official to violate his Federal oath, because the original theory of the 14th amendment was that this crime hit State officials who violated their Federal constitutional oath to afford the privileges and immunities of protection and due process to citizens; his theory was that if a private citizen compels an official, be it Federal or State, to violate his Federal constitutional oath, the private citizen is punishable for inducing or compelling an official to violate his oath. It would be the same theory as trying to bribe a Representative in Congress, or something like that. You induce him to violate his oath of Federal obligation, so even as a private citizen, you are punishable. It is really

just a principle that has been applied since the foundation of the Government.

Now, as far as the simple question of State action is concerned, in my estimation, there is absolutely nothing in title V which is supportable in any way whatsoever. This is entirely aside from the other matters in question.

I would like to jump to title II, which is the State jury section. This is something which I did submit a memorandum of law on. In my estimation, the Federal Government has absolutely no power whatsoever to have anything to do with State juries. I am sure that if one of the gentlemen in support of the bill were here, the first thing I would hear is *Strauder* v. *West Virginia*. In my analysis, I have come to the conclusion that in *Strauder* v. *West Virginia* the dissenting opinion of Justices Field and Nelson are correct, rather than the other opinions, for this reason: The right to serve on a State jury is not a privilege or immunity of national citizenship. The privileges and immunities of national citizenship were deemed to be those which were fundamental and embodied the old privileges and immunities clauses of article IV, section 2, such as the right to travel in another State, the right to do business in another State, to make contracts in another State, to buy land, assuming you had a willing seller, not to be subject to the disabilities of alienage, and various others, plus certain Federal constitutional guarantees. There has been a lot of question as to exactly how much the Bill of Rights applies. Without getting into this dispute, I would say that some of that, certainly the privilege, for example, of freedom of speech, is deemed to be a privilege and immunity of national citizenship and therefore, no State can deprive you of it.

In fact, one of the purposes of the 14th amendment was to prevent any State from kicking a person out because he printed or said something which the people in the State did not like. One of the attacks made, for example, on the Southern States before the war was that they used to ride people out who spoke against slavery. This was one of the things that constantly irritated the North, the so-called Hoar incident of 1844 which was something that very much irritated the North at the time. A former Representative and a Massachusetts lawyer who wanted to bring a lawsuit in South Carolina which was not popular was booted out of South Carolina by the legislature.

But the right to serve on a State jury was never considered to be a privilege and immunity under the old section of article IV, section 2, because article IV, section 2, guaranteed what were known in antebellum days as civil rights.

Now, there is a clear distinction drawn between political and civil rights. This is the point I argued in *Morgan* v. *Katzenbach*. I might say I am not saying anything here that I did not tell the U.S. Supreme Court in my argument which I have a transcript of.

I might say this is equally applicable to the question of civil rights and political rights. I drew a sharp distinction between the question of civil rights and political rights before the Court. The only thing the Court could say was they would have to overrule all their recent amendments holding the 14th amendment to include political rights. I said I thought it would be a fine idea.

The privileges and immunities clause, which is far broader, of course, protects only what were known as civil rights. Let me read just one little tidbit from the argument:

Civil rights at that time were believed to be what are known today as natural rights. Today, the concept of natural rights might be a good deal different, but they were intended to protect what were known at that time as natural rights. They were derived from two sources: one, a decision of Mr. Justice Washington on circuit in 1823 in *Corfield* v. *Coryell*, which I assume Your Honors are all familiar with, and two, protections existing already in the Constitution itself; that is, protections against bills of attainder and so forth.

Now, since the right to serve on a State jury is not a civil right, but rather a—and by civil right, it was what was known at the time as natural right, God given rights—but rather a conventional right which came from the political community, the result is that it was not protected when the privileges and immunities clause was taken bodily into the 14th amendment. No political right, be they voting rights, right to hold office, right to serve on juries, was protected.

Now, the equal protection clause is even narrower, because the equal protection clause applies not only to citizens but to all persons and was primarily, or in no small part, intended to protect aliens. One of Bingham's objections to the Civil Rights Act of 1866 was that aliens were not protected. He said that was absolutely outrageous, that in the fifth amendment, the word "persons" protected even strangers, travelers, and therefore, aliens should be taken by the meaning of the word "persons." So he drafted the word "person" into the protection clause, the due process clause, to protect aliens.

I have written a memorandum, a long discussion of the Civil Rights Act of 1875, which the original jury statute is derived from, showing that logically, it is absolutely impossible to conceive of the equal protection clause having anything to do with the protection of juries, because if a person is excluded, if a person is not protected because somebody in this clause is excluded from jury service, it could follow you should have babies on juries, you would have to have aliens on juries, illiterates on juries, mental incompetents on juries. In other words, every person is entitled to equal protection. The word "protection," I might say, at the time meant protection of life, liberty, and property. There are long colloquies between various Senators of the time, including Senator Augustus Merriman of North Carolina a very astute lawyer, who pointed this out in great detail and showed that logically, it was absolutely impossible that the equal protection clause should have anything to do with the right to serve on the jury. There were several Republicans who opposed it, such as Carpenter of Wisconsin, one of the best lawyers of the day. I think it shows very clearly that it is absolutely untenable under the original understanding. And the Civil Rights Act of 1866, from which a lot of the first section of the 14th amendment was taken, was not intended to include any political rights, including specifically in the debates, the right to serve on a jury. Representative Wilson of Iowa, the chairman of the House Judiciary Committee, said that political rights were not included in civil rights and he said the right to serve on a jury was not included in civil rights or in the civil rights bill.

Senator ERVIN. It is always dangerous to quote another man's statement, but I asked the Attorney General if under the phrase-

ology, a millionaire could not claim that he did not have a properly constituted jury list if there were not enough paupers and hobos in there. He agreed with me, which is carrying it far beyond any of the decisions.

Professor AVINS. Yes. I am not addressing myself, I want to make this point very clear, to the question as to what the desirable policy should be as to questions of jury. I am solely addressing myself to questions of constitutional law and interpretation, and not at all to what a State should do in respect to its own jury. I am simply saying that the Federal Government controls the composition of Federal juries and the State government controls the composition of State juries. What those compositions should be is a matter which I am not discussing at all.

Senator ERVIN. You are discussing power to legislate.

Professor AVINS. That is right.

Senator ERVIN. And not the question, if the power existed, whether it would be desirable or not?

Professor AVINS. That is right, I am discussing solely the question of distribution of constitutional power between the Federal Government and the States.

Turning to title III, title III involves basically the interpretation of the meaning of the word "protection." That is, the whole question is what does the word "protection" in the 14th amendment equal protection clause, mean. I have submitted two memorandums showing that, at least in my opinion, the recent decisions of the Supreme Court are incorrect and that the word "protection" had nothing to do with any sort of segregation or discrimination in public facilities or any other kind of facilities. Originally, the theory was that a State was obligated to protect everyone in life, liberty, and property. In fact, the first draft of the 14th amendment made that clear. Bingham says in the second portion, Congress shall have the power to enforce equal protection of life, liberty, and property. It was redrafted to say "nor shall any State deny to any person within its jurisdiction the equal protection of the laws." But the word "protection" should retain its original meaning. It should not mean benefit or right or equality. It means protection of life, liberty, and property.

Of course, if you look at it that way, it is obvious that the whole theory of classification does not have to be used. The language, for example, of a clause does not permit any classification at all. It is an absolute requirement that every State shall give every person equal protection. It does not say some shall get more protection and others get less protection.

Now, of course, once the language is interpreted to mean benefit, you cannot give everyone equal benefits. Therefore, you have to start classifying people. Some get more benefits and others get less benefits.

Then of course, you have to determine who shall get what benefits and whether the classification is reasonable or unreasonable, et cetera.

But if you go back to the original language, and my interpretation is that that is the only interpretation of constitutional language, it is that every person, traveler, stranger, baby, alien, or what have you, is entitled to be equally protected in the life, liberty, and property which he has, which is what the original debate was. If you carry property

with you—let me take a 1-year-old baby. Nobody would dream of putting a 1-year-old baby on a jury. Yet I think if anybody came along and stole something from a 1-year-old baby, a toy or some property, or assaulted the baby or killed the baby, then I think everybody would agree that the baby was entitled to protection by the State.

I think everybody would agree that an alien—a tourist, I think, is a good example. I do not think anybody would contend that anybody who came to the United States as a tourist is entitled to be put on a jury. Yet on the other hand, I think everybody would agree that a tourist was entitled to be protected in life, liberty, and property. I think any country would be uncivilized if it did not protect a tourist and what he brought with him.

So if we understand the word to mean protection, the result is that the entire third title has no legs to stand on because it is not a question of protection at all. It is a question of various benefits that the State may choose to give or may not.

Again, I say I am not discussing the question of whether it is a good, bad, or indifferent idea. I am discussing the question simply as a matter of constitutional power. The third section is entirely beyond Congress' power under the privileges and immunities clause because it was not what was known as a civil right in 1866. Certainly nobody contends it is a matter of due process.

I might say there were good reasons for providing the equal protection clause, because in some States, Negroes were not permitted to be witnesses in a court. In other words, if you came up behind a Negro and clubbed him over the head, he could not get equal protection of the law, he could not sue you for damages. There was a long debate in 1859 on the admission of the State of Oregon because Oregon had a provision in its statute which said no Negro could emigrate to Oregon or be a witness in a court of law. The Republicans said, "This is outrageous. Suppose a man is shipwrecked on the coast of Oregon. He comes in involuntarily by being shipwrecked. Somebody says, 'Ah, there is a fellow I can steal some property from,' clubs him over the head and robs him and the man cannot even bring a lawsuit or be a witness in court." So there was very good reason for putting in the equal protection clause at that time. Of course, no State has been in violation of it for many, many years, but there was perfectly good reason for it at the time.

Senator ERVIN. The third seems to me to be subject to another objection. *Brown* v. *The Board of Education of Topeka* merely held that the equal protection clause forbade discrimination and that if a State opened all its schools to its children regardless of race and allowed them to select the school they saw fit to select, even under the interpretation of the equal protection clause as conferring benefits rather than meriting protection, the Constitution was satisfied whether one exercised the privilege of going to a particular school where the races were integrated. This seems to me to be fundamental to constitutional law, that if a person has a constitutional right or constitutional privilege, that is something which he as an individual can either avail himself of or waive. Title III would allow the Attorney General to make the determination, it seems to me.

Professor AVINS. Yes; of course.

Senator ERVIN. It seems to me that is a very drastic extension of Federal power, that one Federal official, the temporary occupant of the Office of Attorney General, should have within his power the privilege to deny a person the right to waive his constitutional right, if in fact such a constitutional right exists.

Professor AVINS. One of the results is that first you confer upon people constitutional rights that they do not have and second, you transfer those nonexistent rights to the Attorney General. It is like selling somebody the Brooklyn Bridge and then transferring the deed to somebody else, you see, when the first seller did not have the Brooklyn Bridge to sell.

Senator ERVIN. Certainly it is a negation of liberty to allow a decision of that kind to be made by one Federal official, even though he be the wisest of all men.

Professor AVINS. I tell you, I remember the Attorney General when he was a professor of law at the University of Chicago. I was taking my doctorate then. Whereas I have a great deal of liking for the University of Chicago law faculty, I would not be prepared to transfer this determination to the entire University of Chicago law faculty, sitting as a faculty, and therefore not to one of them in a slightly different atmosphere.

Senator ERVIN. I subscribe to the philosophy that if we are going to have liberty, we must have the right to make foolish decisions as well as wise decisions. If the power to make those decisions is taken away from us and the Attorney General or anybody else makes them for us, we have about destroyed the liberty of the people of this country.

Professor AVINS. And of course, you may be transferring to the Attorney General the power to make foolish decisions and substituting the right to make wise ones by individuals. I say this notwithstanding the fact that two of Mr. Katzenbach's assistants are classmates of mine. I suppose that constitutes——

Senator ERVIN. I am still going to fight for the liberty of the citizens of the United States to make foolish decisions by themselves rather than having wise decisions made for them by the most benevolent bureaucrat.

Professor AVINS. Most benevolent professor; yes.

Well, now, turning to title IV, I have had a great deal of difficulty in determining exactly where the constitutional power of title IV has come from. I find from the newspapers that I am not the only person in the United States who has had such difficulty. I have some material on this in the housing book, which I suppose would be of interest. The article in the Columbia Law Review reflects the question as to the meaning of State action in public accommodations, which, of course, means, a house, I suppose, is or will be under the bill. It is in some States now by State law. It will be under the bill.

Senator ERVIN. I think some Federal officials have had a delusion in which they saw land moving across State borders.

Professor AVINS. Yes; when a house goes across at 2 a.m. for a quickie and comes back before anybody has noticed it.

But I have, of course, not been able to determine how a house can go across a border in interstate commerce. But assuming arguendo that we have any houses going across State borders—I guess a house trailer

can go across—I might say I do not know how anybody reconciles this with the fifth amendment. I am not talking about the taking of property without due process of law. There is another section which says: "nor shall private property be taken for public use without just compensation." If private property can be taken for private use with just compensation, why limit the fifth amendment on public use? The fifth amendment says private property cannot be taken for public use unless you give just compensation. I suppose if the framers of the fifth amendment permitted property to be taken for private use, they would have drafted the amendment to say private property shall not be taken for public use or for private use without just compensation. So leaving out the word "private," I assume therefore private property cannot be taken for private use, full stop. And if the taking of one man's private property is not taking the house for private use, even with just compensation, I cannot understand what kind of use it is.

Senator ERVIN. Certainly it is a cannon of construction of all written documents, whether they be constitutions, statutes, or contracts, that expression of one thing means exclusion of another.

Professor AVINS. Yes. Therefore, it seems to me this has been around in the common law so long, it goes back to the old English common law, that I can't imagine how anybody could construe the fifth amendment any other way. It seems to me this is simply the taking of private property for private use and therefore is barred by the fifth amendment, even if it is in interstate commerce. If a house is not private property, it is hard to imagine what private property is. And if living in one's own house is not private use, it is hard to imagine what private use is.

Senator ERVIN. That bell is a preliminary to a vote. I have tried to get it postponed, because I am anxious to hear all your testimony, but, unfortunately, I am the floor manager of two bankruptcy bills. I wonder if it would meet your schedule if we recess until 2:30?

Professor AVINS. That is fine.

Senator ERVIN. I am going to try to get back. If I do not get back, it is because the floor managership of these bills detains me.

Professor AVINS. I understand.

Senator ERVIN. I would like to say, however, I have been rather illuminated by your discussion this morning.

Professor AVINS. Thank you, Senator, I will try to be brief at 2:30.

(Whereupon, at 12:20 p.m., the subcommittee recessed, to reconvene at 2:30 p.m. on the same day.)

AFTERNOON SESSION

The CHAIRMAN (presiding). You may proceed, sir.

STATEMENT OF PROF. ALFRED AVINS, ACCOMPANIED BY SAM CRUTCHFIELD—Resumed

Professor AVINS. Thank you, sir.

When the committee broke off this morning, I had finished discussing all of the sections of the bill except a title dealing with housing. Title IV, and I had discussed a little bit of that. So I will be very brief in finishing my discussion of title IV, which will be all,

and then I will rely upon the memorandums that I had submitted to the committee and will submit further memorandums on the constitutional history.

Now, I understand that a good deal has been made of the precedent or alleged precedent for the bill created by the Civil Rights Act of 1866, which was passed in effect to enforce the old privileges and immunities clause of article IV, section 2, which provides that the inhabitants of every race and color shall have the same right to make and enforce contracts, to sue, to be parties, to inherit, purchase, lease, sell, hold, and convey real and personal property.

Now, I think it quite obvious that this section, this statute, which was the forerunner of the 14th amendment, 1st section, simply gives every citizen the same right to buy and sell property that every other citizen has from a willing purchaser or to a willing purchaser has from a willing seller. That is to say, all it does is to abolish State laws preventing people from buying and selling property. It gives no right to anybody to buy and sell property from a person who is not willing to buy or sell; that is to say, you cannot force somebody else under the theory of this bill to be a party to a transaction he does not want to be a party to. It would be inconceivable, for example, to suggest that one had the right to inherit property from an unwilling testator and the bill would have to bear that construction. If one were to say the 1866 act meant that one had a right to buy property from an unwilling seller, by a parity of reasoning, and within the very same statute, one would be entitled to inherit property from an unwilling testator, who did not make a will cutting you in. I think the result would lead to an absolute manifest absurdity.

It would also give you the right to sell property to a purchaser who did not want to buy it, because you have the same right to buy that you have to sell, which I believe everybody would agree is a manifest absurdity.

Moreover, I have a great deal of difficulty, and this is the matter in my final memorandum, which relates to all sections of the bill, though I think this one in particular, in determining what basis, what constitutional basis—I am now talking solely on constitutional law and not on policy whatsoever—there is for singling out racial and religious discrimination without other kinds of discrimination. I have submitted a memorandum on this point, "14th amendment limitations on banning racial and religious discrimination, the original understanding," which points up this problem. But I should like to make this point, and that is that the equal protection clause that protects against one kind of discrimination must necessarily protect against all kinds of discrimination.

Now, the immediate question that is raised by that is it must protect against economic discrimination. Are you therefore entitled as a matter of constitutional law to buy property you do not have the money for? It seems to me that is absurd.

Moreover, it should protect against political discrimination. Now, for example, one of the members, the nephew of one of the members of the subcommittee, Senator Javits' nephew, Eric, was a classmate of mine at Columbia, or rather a year before me. Supposing he should put a house on the market and he should say, "I am only going to sell

this house to liberal Republicans; no conservative Republicans need apply." What about a statutory remedy for that? I do not see any basis for saying that a person of one political persuasion is less entitled to protection than a person of another political persuasion.

And in fact, I might say that one of the prime purposes of the 14th amendment was to protect what were known as Unionists, or Loyalists, later known as Republicans, in the South against lack of State protection of their life, liberty, and property. There were a number of Unionists in the South, a number of antislavery men in the South, even before the War Between the States and in ante bellum days, and there were a considerable number of them, including white Loyalists and Unionists in the South, after the war and always have been, I think eastern Tennessee has always been Republican, and certain mountain counties in Alabama have been Republican over a very considerable period of time—they were first Whig counties and then Republican counties—and a certain number of counties in North Carolina and Virginia. The whole mountain area around the Appalachians was of a different political persuasion, I believe, historically, and remained of a different political persuasion, and still does. And the debates indicate very clearly that one of the purposes was to protect these people of a different political persuasion against State action or State statutes that would deny them remedies for wrongs committeed against them because of their poiltical persuasion by a majority of the people of the State.

There was some discussion in Congress that some of these people during the war were being hunted down like animals because they were against secession. One of the prime purposes was to protect these antisecessionist Loyalist in the South after the war.

The report of the Joint Committee on Reconstruction indicates that these people were not only socially ostracized, but in fact, crimes were committed against them and the local State authorities did nothing about it. Some of these people were of considerable prominence. The so-called southern Unionists—in Georgia, you had Representative Joshua Hill, who later became a U.S. Senator from Georgia. In Tennessee, you had Representative Horace Maynard, who remained in the House after the war. And, of course, there was Andrew Johnson, and various other people from eastern Tennessee.

So there is absolutely no historical basis for saying that the 14th amendment was especially interested in race or religion or any other particular aspect of discrimination. Rather, I think the history shows that the 14th amendment was at least as much interested in political discrimination. Yet I find absolutely nothing in the bill or in the 1964 act which protects people under the 14th amendment in relation to their political views, which certainly does not comport with the original understanding.

But my suggestion is that there is absolutely no basis for singling out in title IV or any other title, for that matter, racial discrimination or religious discrimination, as distinguished from political or any other kind of discrimination.

Therefore, my conclusion is that far from enforcing equal protection, the result must necessarily be that the Federal statute purporting to enforce the 14th amendment in fact denies equal protection, because it, in effect, denies protection to one class of people that it gives to another

class of people and therefore constitutes in itself a denial of equal protection even if Congress had the power to make this kind of protection.

Now, I do not understand, and never have, on what basis it could be alleged that it was within the Congress power under the 14th amendment to prohibit discrimination in private housing. I do not even understand what the argument is in favor of it. Therefore, it is very difficult to determine what the arguments could be against it, aside from the fact that it is very clear that if anything, the intent at the time was to protect private property. The Representatives in the Congress and the Senators being Republicans and being somewhat property-minded Republicans, people like Roscoe Conkling—I am now talking as a matter of pure history—were very much interested in protecting private property. My article in the Columbia Law Review indicates this clearly. Even in the 1875 statute, and I refer to pages 893 and 894 of my article, somebody had raised the point that the 1875 Civil Rights Act might infringe on private property because of one of the ways the original bill was phrased, and immediately Conkling got up and said, that is not right, you cannot do that. It is private property. You cannot do that. So the whole section went out. Everything that was not in effect, what was known at the time as, a public utility. The statute simply referred to what were known at that time as franchised businesses—that is, they were known as public accommodations. Theaters were franchised businesses and were, in effect, what you call today public utilities. But private business simply could not come under the bill. This was the 1875 bill, one that the Supreme Court declared was unconstitutional anyway.

But even people in Congress who passed this law said you cannot touch private property; all you can touch is public utilities, but not private business. So I find great difficulty in understanding what possible legal authority there can be for title IV.

I mentioned before that to me the theory that houses can tiptoe across State lines back and forth in the middle of the night without anybody looking so as to give Congress the basis for regulation is a rather interesting idea, more, it seems to me, in the realm of science fiction than in law. I must say I am living in Memphis now. I have never noticed that Memphis has tiptoed across the Mississippi line at any time, and I suppose that the gentleman presiding will be very interested to find out that it has, even if it does so in the middle of the night and comes back to Tennessee in the beginning of the morning. But I usually find that people in northern Mississippi who want to shop in Memphis have to cross the State lines themselves, because otherwise, if they wait for Memphis to come to them, they probably will not be able to buy anything.

So I have come to the conclusion, I am afraid, that there is absolutely no basis, that is to say, constitutional basis, for these titles and therefore, that there is really no point to discussing their question of policy anyway, because in view of the fact that they are without any constitutional authority, it seems to me that the policy is sort of superfluous.

I have discussed a little bit of the policy in my open-occupancy book and there are other discussions of policy there. I stand by the views expressed in that book. But it seems to me, at least for the purposes of

this bill, it is unnecessary, really, to discuss policy, because if you do not have the power to do something, why worry about whether it would be a good idea to do it or not? Since my position is that Congress does not have the constitutional power to pass the bill anyway in respect of the titles I have discussed, therefore there is no point to discussing whether it would be a good idea or not to do so if you had a right to do so. For that reason, I come to the conclusion that it is simply a question of constitutional law and there is a lack of constitutional power.

The CHAIRMAN. Any questions?

Mr. EVANS. No questions, sir.

The CHAIRMAN. Thank you, Professor Avins.

THE FOURTEENTH AMENDMENT AND JURY DISCRIMINATION: THE ORIGINAL UNDERSTANDING

(By Alfred Avins)

A. INTRODUCTION

The failure of several southern juries to convict white persons accused of crimes against Negroes and civil rights workers has renewed proposals for strengthening federal laws to deal with racial discrimination in the selection of juries.[1] In addition, last term the Supreme Court one again considered the question of racial discrimination in jury selection,[2] a problem which has engaged the Court's attention for many years.[3]

In all of these many cases which the Court has considered over the years, it has never reviewed the legislative history of the Fourteenth Amendment to determine the original understanding of the framers of that document as regards jury selection. Even the earliest of the cases failed to make any such review.[4] Considering the various proposals now being made, it is appropriate to review that history and to determine just what the intent of the framers covered. Both the original intent, as reflected in the debates preceding the proposal by Congress of the Fourteenth Amendment itself, and reflected light derived from subsequent debates during the reconstruction period, will be used in this analysis.

B. THE FOURTEENTH AMENDMENT DEBATES

In view of the fact that the general legislative history of the Fourteenth Amendment has several times been already covered,[5] it is not necessary to examine it in detail except as it may particularly bear on the right to sit on a jury. A brief mention may also be made of the right to be a witness, since such right played a prominent role in the subsequent debates on the right of Congress to forbid jury discrimination.

Under the general law as it existed at the time of the debates on reconstruction, the qualifications for jurors in federal courts was under the power of Congress to set,[6] while state constitutions or laws governed the qualifications for jurors in state courts.[7] The several states had a wide variety of limitations, even on the right of white males to sit on juries. Jurors might be disqualified if they were too old[8] or too young[9] or lacked knowledge of the language.[10] A

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[1] See, e.g. N.Y. Times, Oct. 31, 1965, p. 75, col. 8, Sec. 4, p. 6E, col. 1; N.Y. Times, Dec. 18, 1965, p. 1, col. 1; N.Y. Times, Jan. 4, 1966, p. 7, col. 1.

[2] Swain v. Alabama, 380 U.S. 202 (1965).

[3] The cases are reviewed in Eubanks v. Louisiana, 356 U.S. 584, 585, n. 1 (1958).

[4] Strauder v. West Virginia, 100 U.S. 303 (1879); Virginia v. Rives, 100 U.S. 313 (1879); Ex parte Virginia, 100 U.S. 339 (1879).

[5] See, e.g., Tansill et al., "The Fourteenth Amendment and Real Property Rights," in *Open Occupancy vs. Forced Housing Under the Fourteenth Amendment* 68 (Avins ed. 1963); Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1 (1955); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 Stan. L. Rev. 5 (1959).

[6] Cf. In re Charge to Grand Jury, 30 Fed. Cas. 1042, No. 18, 274 (D. Mass. 1864).

[7] See Maloy v. State, 33 Tex. 599 (1871).

[8] Williams v. State, 37 Miss. 407 (1859).

[9] Wassum v. Feeney, 121 Mass. 93, 23 Am. Rep. 258 (1876).

[10] Atlas Min. Co. v. Johnston, 23 Mich. 36 (1871).

juror might be disqualified for commission of a crime.[11] Want of required residence might bar a juror,[12] as might lack of citizenship.[13] New York required the ownership of a specified amount of real or personal property,[14] while other jurisdictions were only satisfied with ownership of a specified amount of real estate,[15] and Indiana also required that the juror be a householder as well,[16] while South Carolina was satisfied if the juror paid a specified amount in taxes.[17] Thus, each state limited the right to be a juror in accordance with its own notion of policy, just as it did in the case of voters. Indeed, this was the precise qualification in California.[18] Just as the right to vote and other political rights were not protected under the Interstate Privileges and Immunities Clause of the original Constitution,[19] so the right to serve on a jury was not protected under this clause, either.[20] This is of significance because Congressman John A. Bingham, the Radical Republican lawyer from Ohio who drafted the First Section of the Fourteenth Amendment, other than the declaration of citizenship, did not cover any rights not included under the old Interstate Privileges and Immunities Clause.[21]

By way of contrast, alienage, non-residence, poverty, sex, and sundry other limitations on the right to be jurors were not disqualifications of witnesses before the Civil War. Even children of tender years were admitted as witnesses if they knew the nature of an oath.[22] But there was a glaring exception. In many states, both in the North as well as South, a slave or even a free Negro could not be a witness against a white man.[23] This rule was not based on the inability of a Negro to observe or speak, but on caste, because a slave or Negro could be a witness against another Negro.[24] The Supreme Court of California held that this rule was applicable in a case where a white man stole a watch from a Negro, and there were no white witnesses, so that the thief as a result of the rule was freed.[25] The result of this rule was that Negroes were not protected in their person or property as a practical matter from white persons, because the law which protects a person against a crime, tort, or breach of contract by another is the law which deters the wrongdoer by punishment or an award of compensation as the law may provide. Although the substantive rule was the same for Negroes, since they were barred from testifying, they were frequently unable to prove the wrong because there were no white witnesses. Hence, the practical effect of the rule was to deny them the amount of legal protection in many cases equal to that of white persons, who could testify. In *Jordan v. Smith*,[26] the Supreme Court of Ohio observed:

"The object is to prescribe an additional rule as to the competency of witnesses. And, in prescribing that rule, no attention is paid to the moral character

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[11] Crockett v. State, 38 Ala. 387 (1862).
[12] Epps v. State, 19 Ga. 102 (1855); State v. Groome, 10 Iowa 308 (1860); State v. Bullock, 63 N.C. 570 (1869).
[13] Judson v. Eslava, Minor 2 (Ala. 1820); Keech v. State, 15 Fla. 591 (1876); Guykowski v. People, 2 Ill. 476 (1838); Borst v. Beecker, 6 Johns. 332 (N.Y. 1810).
[14] Kelley v. People, 55 N.Y. 565, 14 Am. Rep. 342 (1874); Valton v. National Loan Fund Life Assur. Soc., 17 Abb. Prac. 268 (N.Y. 1863); Fenwick v. Parker, 3 Code Rep. 254 (N.Y. 1851).
[15] U.S. v. Johnston, 26 Fed. Cas. 638, No. 15, 490 (C.C.D.C. 1805); Aaron v. State, 37 Ala. 106 (1861); Byrd v. State, 2 Miss. (1 How.) 163 (1834); Dowdy v. Commonwealth, 9 Grat. 727, 60 Am. Dec. 314 (1852).
[16] Carpenter v. Dame, 10 Ind. 125 (1858).
[17] State v. Massey, 2 Hill (Law) 379 (S.C. 1834).
[18] People v. Peralta, 4 Calif. 175 (1854); Sampson v. Schaffer, 3 Calif. 107 (1853).
[19] Art. 4, § 2. See Ward v. Morris, 4 Har. & McH. 340 (Md. 1799); Abbott v. Bayley, 23 Mass. (6 Pick.) 89 (1827); Chickasaw Constitution, 8 Ops. Atty. Gen. 300 (1857).
[20] Sheepshanks & Co. v. Jones, 9 N.C. 211 (1822).
[21] H.R. Rep. No. 22, 41st Cong., 3rd Sess. 1 (1871).
[22] State v. Morea, 2 Ala. 275 (1841); People v. Bernal, 10 Cal. 66 (1858); Johnson v. State, 61 Ga. 35 (1878); State v. Whittier, 21 Me. (8 Shep.) 341.38 Am. Dec. 272 (1842); Washburn v. People, 10 Mich 372 (1862); Den v. Vancleve, 5 N.J.L. 589 (1819).
[23] United States v. Birch, 24 Fed. Cas. 1148, No. 14, 596 (C.C.D.C. 1827); Thomas v. Jamesson, 23 Fed. Cas. 952, No. 13,900 (C.C.D.C. 1802); Smyth v. Oliver, 31 Ala. 39 (1857); Grady v. State, 11 Ga. 253 (1852); Graham v. Crockett, 18 Ind. 119 (1862); Motts v. Usher, 2 Iowa 82 (1856); Page v. Carter, 47 Ky. (8 B. Mon.) 192 (1849); Fox v. Lambson, 8 N.J.L. 275 (1826); Gray v. State, 4 Ohio Rep. 353 (1831); Jones v. State, 19 Tenn. (1 Meigs) 120 (1838). See also Cong. Globe, 39th Cong., 1st Sess. App. 158 (Delano, Niblock) (1866).
[24] United States v. Farrell, 25 Fed. Cas. 1051, No. 15,074 (C.C.D.C. 1837); United States v. Terry, 28 Fed. Cas. 41, No. 16,454 (C.C.D.C. 1806); United States v. Bell, 24 Fed. Cas. 1081, No. 14,564 (C.C.D.C. 1802); Elliott v. Morgan, 3 Har. 316 (Del. 1841); Woodward v. State, 6 Ind. 492 (1857); Tumey v. Knox, 28 Ky. (7 T.B. Mon.) 88 (1828); Ford v. State, 33 Miss. 364 (1857); Coleman v. State, 14 Mo. 157 (1851); State v. Ben, 8 N.C. 434 (1821).
[25] People v. Howard, 17 Cal. 68 (1860).
[26] 14 Ohio Rep. 199 (1846).

of the witness. No matter how pure the character, yet, if the color is not right, the man can not testify. The truth shall not be received from a black man, to settle a controversy where a white man is a party. Let a man be Christian or infidel; let him be Turk, Jew, or Muhammadan; let him be of good character or bad; even let him be sunk to the lowest depths of degradation; he may be a witness in our courts if he is not black. If a negro or mulatto, he must be excluded from giving evidence where a white man is a party * * *.

"It would more completely put the black man in the power of the white. The white man may now pluder the negro of his property; he may abuse his person; he may take his life. He may do this in open daylight, in the presence of multitudes who witness the transaction, and he must go acquitted, unless perchance there happens to be some white man present. But, so construe this statute as that a black man can not, when sued upon a written instrument, swear to the truth of his plea, and you call in the courts of justice to aid and assist in carrying out a system of oppression. A white man would have nothing to do but to forge the note and commence his suit. The laws says he shall not be bound to prove it, unless the plea is sworn to. But the plea can not be sworn to, because the defendant is a black man, and no other but the defendant himself can swear to the plea. The consequence is, the forger, through the instrumentality of a court of justice, reaps the fruits of his villany, not in punishment, but in a judgment which enables him to deprive his neighbor of his property. * * *

"In all my experience, both at the bar and as a member of this court, I can not recollect a single case in which this law has been found subservient to the ends of justice. On the contrary, its uniform effect has been to prevent justice, both public and private." [27]

Moreover, in *People* v. *Hall* [28] the Supreme Court of California held by analogy that Chinese were "Indians" within the meaning of a statute barring members of that race from testifying against white persons, the decision being based primarily on the theory that Chinese were an inferior caste. Senator John Conness, a California Republican supporter of the Fourteenth Amendment, described the result as follows:

"* * * let me give an instance * * * to illustrate the necessity of the civil rights bill in the State of California; * * * [By statute] negroes were forbidden to testify in the courts of law of [California] * * *, and Mongolians were forbidden to testify in the courts * * * until 1862, the State of California held officially that a man with a black skin could not tell the truth, could not be trusted to give a relation in a court of law of what he saw and what he knew. In 1862 the State Legislature repealed the law as to Negroes, but not as to Chinese. Where white men were parties the statute yet remained, depriving the Mongolian of the right to testify in a court of law. What was the consequence of preserving that statute? I will tell you. During the four years of rebellion a good many of our 'southern brethren' in California * * * became * * * highway robbers * * *. The Chinese were robbed with impunity, for if a white man was not present no one could testify against the offender. They were robbed and plundered and murdered, and no matter how many of them were present and saw the perpetration of those acts, punishment could not follow, for they were not allowed to testify." [29]

Even before the Fourteenth Amendment, Congress considered the question of the right to be a witness and a juror. In 1864, a bill was proposed to permit Negroes to carry the mails, and to testify in federal courts so that they would be able to give evidence in cases of mail robbery. [30] Senator Thomas A. Hendricks, an Indiana Democratic lawyer, opposed this enactment. He pointed out that in his state Negroes were not permitted to testify where white persons were parties. He further declared that if Negroes were so trustworthy as to be permitted to contradict the testimony of white persons in federal courts, there was no good reason why they ought not to be made jurors in federal courts. Senator James Harlan, an Iowa Republican lawyer, answered him as follows:

"But then the Senator argues that if you permit a colored man to testify you ought to permit him to sit as a juryman. How so? I believe you allow females

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[27] *Id.* at 201-2, 204. See also Sen. Sumner's discussion of the exclusion of Negro witnesses in S. Rep. No. 26, 38th Cong., 1st Sess. (1864).

[28] 4 Cal. 399 (1854). Accord: Speer v. See Yup Co., 13 Cal. 73 (1859).

[29] Cong. Globe, 39th Cong., 1st Sess. 2892 (1866).

[30] Cong. Globe, 38th Cong., 1st Sess. 337 (1864) (hereinafter referred to as Globe 38/1).

to testify before the courts. Does it follow as a logical necessity that women must be authorized to sit as jurymen? You allow minor children to testify before the courts. Does it follow as a logical sequence that every child who is competent to testify as a witness ought to be authorized to sit as a juryman, and aid in trying cases?

"I can perceive no connection between the facts alleged and the conclusion stated. The truth is they depend upon entirely different considerations. The child may at a very early period be capable of telling the truth, any rational human being may be capable of telling the truth, of stating facts that come under his observation, and yet incompetent to adjudicate a question of law or a question of fact. So in relation to the correlative questions, as the right to vote and the right to hold office. A very small proportion, comparatively, of any civil community are permitted to participate in managing its public affairs. A small proportion comparatively are permitted to vote and a very small proportion to hold office. These rights are not natural rights. . . . The right to vote, to hold office, to aid in making the laws, in adjudicating and enforcing them, is derived from the civil society of which the parties are members. They are not natural rights. . . . But when you proceed to bestow civil privileges, you must take into consideration the capacity of those who are to hold the trust." [31]

Senator Reverdy Johnson, the much respected Democratic lawyer and former Attorney General of the United States from Maryland, favored admitting Negroes as witnesses, but only when they were free. He, too, believed that when educated they could be trusted to tell the truth.[32] These exclusionary statutes also were attacked in the House of Representatives.[33]

At the opening of the Thirty-Ninth Congress in December, 1865, the condition of the newly-freed Negroes in the southern states was emphasized to Congress by the enactment of "Black Codes," designed to perpetuate their servile status.[34] Senator John Sherman, an Ohio Republican lawyer, urged the passage of a law to protect newly-freed Negroes in their right to sue, acquire property, and testify in court. He based Congress' constitutional power to do this on the Thirteenth Amendment, which in his view freed Negroes and made them citizens, read along with the Interstate Privileges and Immunities Clause of the original Constitution.[35] Senator Lyman Trumbull, the Illinois Republican Chairman of the Senate Judiciary Committee and a former state supreme court judge, arose to endorse these views.[36]

Meanwhile, the House of Representatives considered a bill giving Negroes the right to vote in the District of Columbia. One Democrat recoiled with horror at the thought that they might become judges and judge white persons,[37] but a Republican expressed acquiescence in this.[38]

Shortly thereafter, the Senate took up the Freedman's Bureau Bill and the Civil Rights Bill, both of which were drafted by Trumbull and both of which gave the newly freed Negroes the right to testify in the state as well as federal courts.[39] Hendricks contended that the phrase "civil rights" in the Freedman's Bureau Bill was so vague that it might include the right to sit on a jury, and opposed the bill for this reason, among others.[40] But Trumbull indicated in reply that the conception of "civil rights" was much more narrow.[41] Likewise, Sena-

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[31] Globe 38/1, 840. Cf. *id.* at 889.

[32] Globe 38/1, 841–2.

[33] Cong. Globe, 38th Cong., 2d Sess. 282 (1865). Congressman Wm. D. Kelley, a Radical Republican from Pa., and a former state judge, also made a speech in which he related how a white jury had acquitted a white man who murdered a Negro boy by deliberately pushing him into the river, in spite of the clear evidence against the defendant. Kelley also quoted from a Negro newspaper that until Southern juries were reformed, Negroes and southern white loyalists could expect no justice or protection against crime from Confederate sympathizers or juries and called for "a complete reform in our laws relating to the formation of the jury." *Id.* at 289.

[34] Cong. Globe, 39th Cong., 1st Sess. 39–40 (1865) (hereinafter referred to as Globe 39/1). See also Cong. Globe, 42nd Cong., 1st Sess. 426, 686, App. 255 (1871); 2 Cong. Rec. 424, App. 360–1, App. 460–1, App. 479 (43rd Cong., 1st Sess. 1874).

[35] Globe 39/1, 41–42.

[36] Globe 39/1, 43. See also *id.* at 474–5.

[37] Globe 39/1, 201. (Cong. Andrew J. Rogers, N.J.).

[38] Globe 39/1, 204. (Cong. John F. Farnsworth, Ill.).

[39] Globe 39/1, 209, 211, 318, 474.

[40] Globe 39/1, 318. He asked: "Is it a civil right to sit upon a jury? If it be a civil right to sit upon a jury, this bill will require that if any Negro is refused the privilege of sitting upon a jury, he shall be taken under the military protection of the Government."

[41] Globe 39/1, 322.

tor Samuel Pomeroy, a Kansas Republican, indicated that the right of Negroes to testify, which Kentucky denied, was an important "civil right."[42]

On January 29, 1866, Trumbull made a lengthy speech tying his Civil Rights Bill to the Interstate Privileges and Immunities Clause. He expressly disclaimed the idea of giving the freemen any political rights, but said that since the Thirteenth Amendment made them free they were entitled to the fundamental rights which that constitutional provision protected, and Congress could legislate to enforce the privileges and immunities of Article 4, Section 2, under the Second Section of the Thirteenth Amendment.[43] Several days later, he again emphasized that this bill was not concerned with political rights.[44]

Meanwhile, the House of Representatives also debated the Civil Rights Bill. Congressman Samuel S. Marshall, an Illinois Democratic lawyer and an opponent of the bill, said: "I suppose the right to sit upon juries is a civil right."[45] But his colleague, who supported the bill, Congressman Samuel W. Moulton, replied: "I deny that it is a civil right for anybody to sit on a jury * * *." He added:

"So far as the matter of sitting on juries is concerned, it is not a civil right, and why? Because you cannot enforce it by a civil writ. I understand that the civil rights referred to in the bill are not of the fanciful character referred to by the gentleman, but the great fundamental rights that are secured by the Constitution of the United States * * * the right to personal liberty, the right to hold and enjoy property, to transmit property, and to make contracts."[46]

The limited nature of the Civil Rights Bill and the companion Freedman's Bureau Bill even gained support for its objectives from a Democrat, Senator Johnson of Maryland, although he stated that he could not support it for want of power in Congress to pass it.[47] Trumbull also urged the passage of this legislation because in Kentucky, where Negroes could not testify against white men, they were murdered with impunity and the criminals escaped punishment because the evidence of Negro witnesses was not received.[48]

When Bingham introduced the first draft of an amendment which was later to become the First Section of the Fourteenth Amendment into the House of Representatives, he stated that the Privileges and Immunities Clause was simply designed to re-enact and give Congress the power to enforce the rights guaranteed by Article 4, Section 2, of the original Constitution, while the Due Process Clause gave Congress the power to enforce the similar provisions of the Fifth Amendment against the states.[49] Congressman William Higby, a California Republican lawyer, also endorsed this view.[50]

During the same period, Congressman James F. Wilson, an Iowa Republican lawyer and Chairman of the House Judiciary Committee, introduced Trumbull's Civil Rights Bill into the House. He said that the term "civil rights" in the bill did not include suffrage, nor "do they mean that all citizens shall sit on the juries * * *," but rather they included only the rights protected by Article 4, Section 2 of the original Constitution.[51] Likewise, Congressman Martin R. Thayer, a Pennsylvania Republican lawyer and a supporter of the bill, said that political privileges were not included in the term "civil rights."[52] In response to a question, Wilson later reiterated that the bill did not confer the right to be jurors on Negroes.[53]

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[42] Globe 39/1, 337.

[43] Globe 39/1, 474–5. Trumbull added in response to questioning: "This bill has nothing to do with the political rights or *status* of parties. It is confined exclusively to their civil rights, such rights as should appertain to every free man." See also *id.* at 600, 1835–6.

[44] Globe 39/1, 599, 606.

[45] Globe 39/1, 629. See also *id.* at 541.

[46] Globe 39/1, 682. Senator William P. Fessenden, Senate Chairman of the Joint Committee on Reconstruction and a Maine Republican lawyer, said that jury duty was a political right like holding office. Globe 39/1, 704.

[47] Globe 39/1, 747. Even Rogers said that Negroes should be allowed to testify in court, but he opposed allowing them to hold office. Globe 39/1, App. 134.

[48] Globe 39/1, 941.

[49] Globe 39/1, 1033–4, 1088–1090, 1095, 2542.

[50] Globe 39/1, 1054.

[51] Globe 39/1, 1117.

[52] Globe 39/1, 1151. See also *id.* at 1154 (Hill), 1159 (Windom), 1162 (Wilson), 1263 (Broomall), 1367 (Wilson). In a lengthy brief filed to support the bill, Rep. William Lawrence, a Republican ex-judge from Ohio, declared that, "It does not affect any political right as . . . the right to sit on juries, . . ." Globe 39/1, 1832.

[53] Globe 39/1, App. 156–7. He said: "I do not believe it confers that right upon the emancipated people, nor upon any portion of the people of the United States, who are not under the laws of the several states qualified to act as jurors." *Id.* at 157. Representative George F. Miller, a Pennsylvania Republican lawyer, noted that not even the right to vote carried with it the right to be a juror. Globe, 39/1, app. 305.

Wilson, however, justified the bill giving Negroes the right to be witnesses on the ground that it was necessary for the protection of his liberty, security, and property that he not be prevented from giving evidence in his own behalf. He declared that "this is one of the great protective remedies which must run with these great civil rights belonging to every citizen." [54] He asked rhetorically:

"Suppose that the only person witnessing a state of facts necessary to be given in court for the protection of life, liberty, and property should be a black man, has the State the right to say that that man, the only person living who has a knowledge of the facts to protect a citizen, should have no right to testify?" [55]

At the end of the debate, Wilson stated that when an opponent of the bill "talks of setting aside the . . . jury laws . . . by the bill now under consideration, he steps beyond what he must know to be the rule of construction which must apply here," because the bill was designed only "for the protection of rights." [56]

In his veto message of the Civil Rights Bill, President Andrew Johnson reasoned that if "Congress can declare by law * * * who shall testify, * * * then Congress can by law also declare who, without regard to color or race, shall have the right to sit as a juror or judge, to hold any office, and, finally, to vote * * *." [57] In answering the President for the Senate Republican majority, Trumbull observed:

"The granting of civil rights does not, and never did in this country, carry with it * * * political privileges. A man may be a citizen in this country without a right to vote or without a right to hold office. The right to vote and hold office in the States depends upon the legislation of the various States * * * so that the fact of being a citizen does not necessary qualify a person for an office, nor does it necessarily authorize him to vote. Women are citizens; children are citizens; but they do not exercise the elective franchise by virtue of their citizenship. Foreigners * * * before they are naturalized are protected in the rights enumerated in this bill, but because they possess those rights in most, if not all, the States, that carries with it no right to vote." [58]

When the final draft of the First Section of the Fourteenth Amendment was introduced into the House of Representatives by Congressman Thaddeus Stevens, the Radical Republican leader and Chairman on the part of the House of the Joint Committee on Reconstruction, wherein it was framed, [59] he advocated the Equal Protection Clause in the very words of the Civil Rights Bill, and by enumerating the rights set forth therein, including the right to testify in court. He said that the reason for proposing a constitutional amendment was that the bill might be repealed if the Democrats took control of Congress. [60] Other Congressmen likewise discussed the First Section as a constitutional embodiment of the Civil Rights Bill. [61]

In a long political harangue, Congressman Andrew T. Rogers, a New Jersey Democratic opponent of the bill, suggested that the right to be a juror, judge, or President of the United States was a privilege protected by the Privileges and Immunities Clause. But his bombast and exaggeration of the amendment, in asserting that it "saps the foundation of the Government," creates "one imperial despotism," "will result in a revolution," and will "rock the earth like the throes of an earthquake" by creating a "despotism and tyranny," was so wild that no Republican even bothered to answer him. [62] However, the next speaker, Congressman John F. Farnsworth, an Illinois Republican lawyer who supported the Fourteenth Amendment, noted that the Privileges and Immunities Clause and the Due Process Clause were already in the Constitution, and only the Equal Protection Clause was new. [63]

When the Fourteenth Amendment was introduced into the Senate by Senator Jacob M. Howard, a Michigan Republican member of the Joint Committee on

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[54] Globe 39/1, App. 157.
[55] Globe 39/1, App. 157.
[56] Globe 39/1, 1294. See also *id.* at 2505, where Wilson again said that the Civil Rights Bill did not include the right to be a juror or vote.
[57] Globe 39/1, 1680.
[58] Globe 39/1, 1757.
[59] Globe 39/1, 2286.
[60] Globe 39/1, 2459.
[61] See Globe 39/1, 2462 (Garfield); 2465 (Thayer); 2467 (Boyer); 2498 (Broomall); 2502 (Raymond); 2511 (Eliot); 2538 (Rogers); 2883 (Latham); 2961 (Poland). See also Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 47–8 (1955).
[62] Globe 39/1, 2538.
[63] Globe 39/1, 2539.

Reconstruction and a former state attorney-general, on behalf of that committee, he, too, said that the Privileges and Immunities Clause was designed to give Congress the power to enforce on the states the guarantees of Article 4, Section 2.[64] He also said that political privileges were not included in the First Section.[65] Senator Timothy O. Howe, a Wisconsin Republican and a former state supreme court judge, enumerated the rights in the Civil Rights Bill, including the right to testify, as the rights protected by the First Section of the Fourteenth Amendment.[66] Senator John B. Henderson, a Missouri Republican lawyer who supported the Fourteenth Amendment, likewise declared that it and the predecessor Civil Rights Bill were designed to enforce the old Interstate Privileges and Immunities Clause, which did not include political rights.[67]

C. EARLY RECONSTRUCTION PERIOD VIEWS

Debate on jury qualifications during the early reconstruction period was sporadic. For example, during the debate on Negro suffrage in the District of Columbia, Hendricks remarked that as a lawyer he had addressed a large number of jurors who, although illiterate were intelligent.[68] In the First Session of the Fortieth Congress, Senator Charles Sumner of Massachusetts sponsored a bill which was passed permitting Negroes to serve as office-holders and jurors in the District of Columbia. A point was made that these subjects were unrelated, but the Republicans rejected this point.[69]

Because the bill allowing Negroes to hold office and be jurors in the District of Columbia failed to become law because the President did not sign it, Sumner reintroduced his bill in the Second Session of the Fortieth Congress in December, 1867.[70] Hendricks objected that the people of various states had voted against even letting Negroes vote, while Johnson of Maryland also objected that Negro judges and jurors might subjudicate the rights of white persons. In his opinion, Negroes were too ignorant to be entrusted with such a responsibility. To this Senator Samuel C. Pomeroy, a Radical Republican from Kansas who supported the measure, replied that to Negroes "it may be quite as objectionable to them to have their rights adjudicated by twelve ignorant white men as it is for white men to have their rights adjudicated by twelve ignorant black men."[71] Pomeroy added that since Negroes could vote in the District, they ought to be eligible to office, because voters are generally eligible to office. But Hendricks replied: "Now, this bill proposes not only that negroes shall be allowed to hold office, and I suppose any office in the District of Columbia, but that they shall be allowed to sit upon the juries. Of course it will follow that they may be judges. The spectacle will then be presented of negro courts to try cases. It is not in accord with my taste * * *."[72]

However, the Senate passed the bill by a lop-sided party vote.[73] Somewhat later in the session, Senator James R. Doolittle, an opponent of the Republican majority from Wisconsin, quoted the late President Abraham Lincoln as being opposed to letting Negroes hold office or serve on juries.[74]

In the Third Session of the Fortieth Congress, an event occurred which was to alter considerably the Radical theory for giving Congress the power to provide that Negroes might sit on state juries. The original Senate draft of the proposed Fifteenth Amendment forbade racial discrimination not only in voting but also in the right to hold public office.[75] However, the House version did not cover the right to hold office,[76] a fact which caused much protest by senators.[77] Senator Henry Wilson, a Radical Republican from Massachusetts who was four years later to be Grant's Vice-President, and an ardent advocate of including

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[64] Globe 39/1, 2765–6. See also *id.* at 2961 (Poland); App. 240 (Davis).
[65] Globe 39/1, 2766.
[66] Globe 39/1, App. 219.
[67] Globe 39/1, 3035.
[68] Cong. Globe, 39th Cong., 2d Sess. 105 (1866).
[69] Cong. Globe, 40th Cong., 1st Sess. 677, 726–7 (1867).
[70] Cong. Globe, 40th Cong., 2nd Sess. 38–9 (1867).
[71] *Id.* at 39.
[72] *Id.* at 50.
[73] *Id.* at 51. Because of a pocket veto, the bill had to be passed again. See Globe 40/3, 1080. It finally became law when Grant became President. 16 Stat. 3 (1869). See Globe 41/3, 1055 (Sumner), 1056 (Carpenter), 1058 (Sawyer) (1871).
[74] Globe 40/2, 2869. (1868).
[75] Cong. Globe, 40th Cong., 3rd Sess. 854 (1869).
[76] *Id.* at 726.
[77] *Id.* at 1291–2.

the right to hold office in the proposed amendment, asked: "suppose we submit this imperfect proposition which says to seven hundred and fifty thousand colored men in this country, 'You shall have the right to vote, but you shall not have the right to sit upon a jury or the right to hold office,' how will they feel in regard to it?"[78] However, the conference committee between the two houses struck out the right to hold office.[79] Many senators were very dissatisfied,[80] but ultimately the House version was approved.[81]

The following year, an attempt by the Joint Committee on Reconstruction to attach a fundamental condition to the admission of Virginia, that all persons be allowed to hold office and be jurors without racial discrimination, at first failed but ultimately succeeded.[82] Aside from a few casual remarks on southern jurors,[83] that was all that was said relative to jury duty during this period.

D. SUMNER'S AMNESTY BILL AMENDMENT

On May 18, 1870, Senator Charles Sumner, the ultra-equalitarian Radical Republican from Massachusetts, introduced in the Senate a bill to supplement the Civil Rights Act of 1866.[84] One of the sections of Sumner's bill read as follows:

"That no person shall be disqualified for service as juror in any court, national or State, by reason of race, color, or previous condition of servitude: *Provided*, That such person possesses all other qualifications which are by law prescribed; and any officer or other persons charged with any duty in the selection or summoning of jurors, who shall exclude or fail to summon any person for the reason above named, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not less than $1,000 nor more than $5,000."[85]

The bill was referred to the Judiciary Committee, reported adversely for the committee by Senator Lyman Trumbull of Illinois, its chairman, and died.[86] On January 20, 1871, Sumner reintroduced his bill.[87] Again it was referred to the Judiciary Committee, and once more, on February 12, 1871, it was reported adversely by Senator Trumbull for the committee, and died.[88] In both cases, the adverse report, although oral, was unanimous. Some committee members thought that the bill was unconstitutional, while others thought it unnecessary.[89]

At the opening of the First Session of the Forty-Second Congress, Sumner introduced his bill for the third time. Having been twice rebuffed by the Judiciary Committee, he asked that it not be buried in that legislative graveyard again. However, no other senator indicated much interest, and the bill once more expired of its own accord.[90]

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[78] *Id.* at 1296. See also *id.* at 1080 (District of Columbia bill).
[79] *Id.* at 1623.
[80] *Id.* at 1623–29, 1639–41.
[81] *Id.* at 1641.
[82] The Joint Committee on Reconstruction reported out a bill readmitting Virginia on condition, inter alia, that it allow all persons to hold office and be jurors without racial discrimination. Cong. Globe, 41st Cong., 2d Sess. 362 (1870). Congressman John A. Bingham of Ohio, the Radical Republican lawyer who drafted the First Section of the Fourteenth Amendment, opposed it on the ground that the fundamental conditions were unconstitutional. *Id.* at 493. The House sustained Bingham's position by a narrow vote. *Id.* at 502. However, the Senate restored the condition as to the holding of office. Id. at 643–4. Congressman Samuel S. Cox, a New York Democrat, apparently equated this with the right to serve on juries. The House then passed the Senate version. *Id.* at 720. It was ultimately signed into law. See 16 Stat. 63 (1870). It might be noted that there were frequent references in the debate to the fact that Negroes in Virginia were excluded from juries. *Id.* at 490, 501. However, it should be noted that Congressman George W. Morgan, an Ohio Democrat lawyer, said that they were permitted to sit on juries there. *Id.* at 719. It is interesting to note that Bingham carefully refrained in his speech attempting to convince his fellow Republicans to rely on the Constitution without a fundamental condition from stating whether it protected the right to sit on a jury, a strong indication that in his view it did not, because if it did he would have said so. *Id.* at 495. Congressman Frederick Stone, a Maryland Democrat lawyer, said that Congress had no constitutional power to control juries. Id. at App. 58.
[83] See e.g., Cong. Globe, 41st Cong., 2nd Sess. App. 394 (1870), where Cong. John C. Conner, a Texas Democrat, decried the ignorance of Negroes on southern juries, and Cong. Globe, 42nd Cong., 2nd Sess., App. 394 (1870), where Cong. Pierce M. B. Young, a Georgia Democrat, protested against the exclusion of ex-confederates from juries on federal courts in the south.
[84] 14 Stat. 27 (1866).
[85] Cong. Globe, 41st Cong., 2d Sess. 3434 (1870). See also Cong. Globe, 42nd Cong., 2nd Sess. 244, 821 (1872) (hereinafter referred to as Globe 42/4).
[86] Cong. Globe, 41st Cong., 2d Sess. 5314 (1870).
[87] Cong. Globe, 41st Cong., 3rd Sess. 616 (1871).
[88] *Id.* at 1233. See also Globe 42/2, 822.
[89] Globe 42/2, 493, 781.
[90] Cong. Globe, 42nd Cong., 1st Sess. 21 (1871).

In spite of these rebuffs, on December 20, 1871, Sumner moved to tack his proposal on as a rider to the amnesty bill, a proposal authorized by the third section of the Fourteenth Amendment, to lift the remaining political disabilities of most of the ex-confederates, which that section had imposed.[91] This bill was approved of by the President, enthusiastically supported by Southern Republicans and all Democrats, and acquiesced in, at least half-heartedly, by most Republicans. Passage by the necessary two-thirds majority therefore seemed assured. During the ensuing debate in the Committee of the Whole, other sections were considered but this one was ignored, and ultimately Sumner's amendment lost by 30 to 29.[92]

Sumner renewed his amendment in the whole Senate.[93] He read letters from Negroes and other material supporting his bill. One Viriginia newspaper asked for "a measure to protect us, white and black, from a Ku Klux judge and jury."[94] Several senators attacked Sumner's bill generally as unconstitutional.[95] One of these was Senator Lot M. Morrill, a Radical Republican lawyer from Maine and an erstwhile ally of Sumner who had voted for the Fourteenth Amendment.[96] Sumner defended his amendment on the basis of the Declaration of Independence and the Thirteenth Amendment, along with almost every pore of the original Constitution, giving only scant consideration to the Fourteenth Amendment.[97]

The first major attack on the jury clause came from Senator Matthew H. Carpenter, a Wisconsin Republican lawyer of some note who had saved the Radical reconstruction measures from being declared unconstitutional by the Supreme Court by winning the celebrated *McCardle Case*.[98] He said:

"Now, I doubt at least the constitutionality of that provision. We have already provided that colored persons may serve as jurors in common with white persons in the Federal courts. Can we go further? Can we fix the qualifications for serving as a juror in a State court any more than we can fix the qualification for serving upon the bench of a State court? No amendment of the Constitution, it is to be borne in mind, has taken away from the States the power of determining the qualification of those who shall hold office in the State. A constitutional amendment has taken away from them the power to discriminate between citizens as to the right to vote on the ground of race, color, or previous condition of servitude; but that amendment does not extend to holding office. Now, I am inclined to think, although I may be wrong in this, that this provision determining who shall be qualified to serve as a juror in the State courts is beyond the province of this Government to enact. We can pay that for our own courts, and we have said it; so that, so far as our courts are concerned, there is no necessity for this amendment, and so far as the State courts are concerned I doubt at least the power of the General Government to pass it."[99]

Several days later, Senator Oliver P. Morton, an Indiana Republican lawyer, defended the constitutionality of the jury clause based on the Privileges and Immunities Clause of the Fourteenth Amendment. Morton said:

"If we have the power to pass any part of this bill, or to enforce any of the privileges or immunities that belong to citizens of the United States as such, we have the right to enforce the provision contained in this section. It is the right of the State to prescribe the qualifictions of jurors, that they shall be householders, if you please, that they shall be of a certain age, that they shall be taxpayers—the qualifications are different in different States— but it seems to me that it is a violation of the spirit and of the essence of the fourteenth amendment to say that a State may exclude a man from being a juror on account of his race or color; in other words, while he may be required to have all the other qualifications that the State has the right to prescribe in regard to white men, yet that he shall not be excluded if he has those qualifications because of his color."[100]

Carpenter interrupted Morton to ask what the difference was between fixing the qualifications of jurors and those of judges in state courts. Morton replied that

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[91] Globe 42/2, 237, 240.
[92] Globe, 42/2, 274.
[93] Globe 42/2, 278, 381, 488.
[94] Globe 42/2, 432.
[95] See, e.g., Globe 42/2, 495, 580–1, 703, 764–5.
[96] Globe 42/2, App. 1–5.
[97] See Globe 42/2, 727–730.
[98] Ex parte McCardle, 73 U.S. (6 Wall.) 318 (1867); 74 U.S. (7 Wall.) 506 (1868).
[99] Globe, 42/2, 760.
[100] Globe, 42/2, 820.

he doubted the power of the states to exclude Negroes from the bench, because if a state could not discriminate in voting qualifications, it could not make race or color "a test for office under the amendments to the Constitution." [101] Morton failed to mention that such a provision specifically prohibiting racial discrimination in public office was defeated in the Third Session of the Fortieth Congress when the Fifteenth Amendment was debated, after a bitter fight, in which he took a prominent part.[102] Morton analogized the right to serve on a jury with the right to testify, which was protected by the Fourteenth Amendment and the Civil Rights Act of 1866. Once again, he referred to the Privileges and Immunities Clause as the source of Congress' power.[103] To this Carpenter replied:

"The right to serve in the jury-box strikes me as a political right like that of serving on the bench. It is not inherent in a citizen. If it was, a woman would have as much right to serve in the jury-box as a man. A woman is as much a citizen as a man, and always has been under this Government. The political right to be a judge, the political right to be a sheriff, the political right to be the clerk of a court, the political right to serve as a juror, seem to me to fall into the same class and belong to those political rights as to which the States always have discriminated and may still discriminate. The right to testify in court is undoubtedly one of those inherent privileges that belong to a citizen which the State cannot impair; but that is different from the political right to serve as a juror or judge; * * *."[104]

Sumner then arose to deny Carpenter's distinction between civil and political rights as far as jury service was concerned. He said that "the distinction is obvious" between judges and jurors. Sumner reasoned:

"He knows well the history of trial by jury; he knows that at the beginning the jurors were witnesses from the neighborhood, afterward becoming judges, not of the law, but of the fact. They were originally witnesses from the vicinage, so that if you go back to the very cradle of our jurisprudence you find jurors nothing but witnesses, and now I insist that they should come under the same rule as witnesses. If the courts are opened to colored witnesses, I insist by the same title they must be opened to colored jurors. . . . The right to be a juryman is identical in character with the right to be a witness. I know not if it be political or civil; it is enough for me that it is a right to be guarded by the nation.[105]

It might be noted that Sumner was building on the function of a jury which had long since ceased. A jury is supposed to render its verdict based on the evidence placed before it,[106] and while at that time a juror was not incompetent merely because he was a witness in the cause,[107] a rule which still obtains unless changed by statute,[108] if the juror had formed a fixed or settled opinion in the case he could be challenged for cause.[109] Today, it is not improbable that the Supreme Court would hold that a jury which obtained its information from outside sources was so biased that a trial held on this basis would deny due process of law.[110]

Sumner also declared that justice could not be obtained for Negroes in the South unless they were placed on juries. He stated that he was constantly receiving letters from the South complaining that because Negroes were excluded from juries, they could not obtain justice.[111]

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[101] *Ibid.*

[102] Cong. Globe, 40th Cong., 3rd Sess. 1628–29, 1639–41 (1869).

[103] Globe 42/2, 820.

[104] Globe 42/2, 821.

[105] Globe 42/2, 822.

[106] State v. McClear, 11 Nev. 39 (1876); State v. Voorhies, 12 Wash. 53, 40 Pac. 620 (1895). See also Lamb v. Lane, 4 Ohio St. 167, 179 (1854).

[107] Bell v. State, 44 Ala. 393 (1870); Rondeau v. New Orleans Improvement & Banking Co., 15 La. 160 (840); In re. Fellows, 5 Me. (5 Greenl.) 333 (1828); Howser v. Commonwealth, 51 Pa. 332 (1865). Cf. Commonwealth v. Jolliffe, 7 Watts 585 (Pa. 1838).

[108] 50 C.J.S., Juries, § 209.

[109] United States v. Burr, 25 Fed. Cas. 49 No. 14, 692g (C.C.D.Va., 1807); People v. Williams, 6 Cal. 206 (1856); Wright v. State, 18 Ga. 383 (1855); Willis v. State, 12 Ga. 444 (1853); State v. Shelledy, 8 Iowa 477 (1859); State v. George, 8 Rob. 535 (La. 1844); People v. Honeyman, 3 Denio 121 (N.Y. 1846); Oslander v. Commonwealth, 3 Leigh 780, 24 Am. Dec. 693 (Va. 1831); Sprouce v. Commonwealth, 2 Va. Cas. 375 (Va. 1823).

[110] See Turner v. Louisiana, 379 U.S. 466 (1965). See also the opinion of Chief Justice Marshall in United States v. Burr, *supra*, at p. 50: "I have always conceived, and still conceive, an impartial jury as required by the common law, and as secured by the constitution, must be composed of men who will fairly hear the testimony which may be offered to them, and bring in that verdict according to that testimony, and according to the law arising on it."

[111] Globe 42/2, 822–3.

A bit later on, Carpenter took the occasion to deride Sumner's constitutional base for the jury clause as well as the other clauses, which was the Declaration of Independence.[113] Carpenter said:

"The Senator from Massachusetts does not seem to be very anxious to secure civil rights unless it can be done in a way that will strike at the vital provisions of the Constitution. The dish of civil rights, in his estimation, is tasteless unless it be flavored with some unconstitutional ingredient. . . . A bill which does not provoke some one's fears that it is violative of the Constitution cannot in his opinion be very beneficial to colored citizens. If our colored citizens have no more respect for the Constitution than the Senator from Massachusetts has exhibited in this debate, then may God have mercy upon the Constitution and upon the people of this country." [114]

Carpenter also asserted that there was a large distinction between jurors and witnesses. He mentioned that jurors must be male citizens over twenty-one years of age in some states, while witnesses did not need to be male, or citizens, or over twenty-one. He stated that it was a privilege of all parties to call witnesses which a state could not abridge under the Fourteenth Amendment. Carpenter also noted that such a universal privilege had to be distinguished from political rights or franchise which a state was entitled to deny even after enactment of the Fourteenth Amendment. He averted to the fact that the original draft of the Fifteenth Amendment had included the right to hold office, a point which Sumner conceded. Carpenter therefore suggested that since Sumner was going to travel outside of the Constitution and rely on the "more general atmosphere of the Declaration of Independence," he should include the right to be a state judge along with a state juror in the bill. Carpenter concluded by once again pointing out that the Privileges and Immunities Clause of the Fourteenth Amendment drew a distinction between civil and political rights, including jury service in the latter.[114]

Senator John Sherman, an Ohio Republican lawyer who had voted for the Fourteenth Amendment, likewise justified the jury clause of the bill on the Privileges and Immunities Clause. He declared:

"He [Carpenter] says that the right to be summoned as a juryman is not a privilege and immunity of an American citizen. At first view that appears to be plausible. It may be difficult to distinguish between the right to vote claimed by some women of our country, because they are citizens, and the right to sit upon a jury, assumed to be a privilege under the fourth section of this amendment. Perhaps a right to be summoned on a jury is not in strict terms a privilege or an immunity which a man may claim as a matter of right; but that is not the question. The right to sit upon a jury is a right which no man will claim as a matter of right. It is rather a burden, rather a duty.

"But there is another view in which this section becomes to my mind clearly constitutional. The Constitution of the United States declares that every man shall have an impartial trial by jury. That is a constitutional right. . . . The very word 'jury' implies a trial by a man's peers of the vicinage, of the neighborhood. Now what kind of a trial would that be to which you would subject four millions of the people of the United States in the southern States, where by the law of some of them every man of that race is excluded from sitting as a juryman on a trial? Is that an impartial jury? . . . the right to be tried by an impartial jury is one of the privileges included in the fourteenth amendment; and no State can deprive any one by a State law of this impartial trial by jury." [115]

Carpenter stated that the right to trial by jury was simply a limitation in the Bill of Rights on the federal government, but Sherman replied that such a right was one of the privileges and immunities of every American citizen protected under the Fourteenth Amendment.[116] When Carpenter retorted that the right to be tried by a judge with life tenure was also a privilege of common law, Sumner chimed in by reading the Due Process and Equal Protection Clauses, and declaring that an exclusion of Negroes from juries violated these clauses. But Sherman adhered to his argument about privileges and immunities. He said that only Kentucky and Delaware excluded Negroes any longer from juries. Sherman said that excluding Negroes was against "fair play." He added:

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[113] Globe 42/2, 824–6.
[114] Globe 42/2, 826.
[114] Globe 42/2, 827. See also *id.* at 843.
[115] Globe 42/2, 844.
[116] *Ibid.*

"No man can defend the exclusion by law of black men from a jury-box when you try the black man by a jury. If the black man is too degraded to sit upon a jury, he is too degraded to be tried by a jury; he ought to be disposed of in some other way. . . . It does seem to me, not that it is the right of a man to serve on a jury, but that it is the right of all men to have a fair law and rule by which men of their own race and occupation and color may serve on a jury. It is the right of the accused and not the right of the trier; it is the right of the accused that is abridged by these State laws . . . . I put it rather on the right of the accused, than on the right of the juror." [117]

Morrill then interjected that Sherman was confusing the rights belonging to all men with the rights of American citizens. To this, Sherman replied that he claimed that the right to trial by jury was a right of American citizens. Morrill then brought up the fact that women were not allowed to sit on juries. Sherman declared this "a mere matter of municipal regulation." Morrill then pointed out that Congress could not, by a parity of reasoning, interfere when Negroes were excluded by juries because it, too, was a "matter of municipal regulation." Sherman could only reply that although he saw no reason to bar women from voting, holding office, or serving on juries, he would not vote to allow them to do so because it would disturb family relations. [118]

Next, Senator Allen G. Thurman, an Ohio Democrat and a former chief justice of the state supreme court, attacked Sherman's theory. Thurman said that the privileges of citizens protected by the Fourteenth Amendment were those in the original Constitution and the Bill of Rights, and asked: "Where is there any provision in the Constitution that gives him a right to sit upon a jury in a State court?" [119] Morton then arose to defend the jury clause once again under the Equal Protection Clause. He said that this clause did not require a state to institute jury trials, but if it did, "whatever law a State may have, the protection and benefit of that law shall extend to all classes." He contended that the word "protection" must be used in a broad sense to include any benefit provided by law. Morton then gave as an illustration a Negro in Kentucky being tried by a jury of white men "that have prejudices of race against him," from which all Negroes are excluded, for a crime against another white man. Morton contended that such a Negro would not have "the equal protection, the equal benefit of the law." Morton concluded:

It is not sufficient to say that the right to sit upon a jury is not a privilege that belongs to a citizen of the United States. That is not the question that we are discussing now. . . . If you say that a man shall not sit upon a jury unless he has so much property, you have a right to say that, because that applies to men of all races alike; but if you say he shall not sit upon a jury because he is a colored man, that becomes class legislation at once, and that class of people are not entitled and do not receive the equal protection or benefit of the laws." [120]

At this point, Thurman asked whether Morton was relying exclusively on the Equal Protection Clause of the Fourteenth Amendment, and the latter replied in the affirmative. The following colloquy then occurred:

"Mr. THURMAN. Then I ask the Senator whether the law of Ohio and the law, I believe of his own State, which requires that a juror shall be an elector is a denial of the right of the persons in Indiana and Ohio who are not electors? Is it a denial of the right of aliens who are not yet naturalized and who cannot sit on a jury?

"Mr. MORTON. No, sir.

"Mr. THURMAN. Then I wish to call the attention of the Senator to the fact that this right is not limited to persons who are citizens. The clause reads: 'Nor shall any State deprive any person'—whether a citizen or not—'of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction'—whether citizen or not—'the equal protection of the laws.' How, then, on the Senator's argument does he keep an alien or a woman off a jury?

"Mr. MORTON. The Senator misses the very idea involved in this amendment; he misses the idea of class legislation. Persons may suffer disabilities; they may sometimes suffer disabilities under a State law for want of property; they may

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[117] Globe 42/2, 845.
[118] *Ibid.*
[119] Globe 42/2, App. 26. Senator George Vickers, a Maryland Democratic lawyer, also said that the Privileges and Immunities Clause did not include the right to sit on a jury. Globe 42/2, App. 41.
[120] Globe 42/2, 847.

suffer it for want of legislation; but still there is no class legislation about it; there is no inequality about it. If we read the history of this amendment we shall understand precisely what was meant by it, that it was intended to promote equality in the States, and to take from the States the power to make class legislation and to create inequality among their people. Therefore it provides that no person shall be deprived in the jurisdiction of the State of the equal protection of the laws, of the equal benefit of the laws.

"So far as rights depending upon citizenship are concerned, that is another question not involved at all in this discussion. . . . There are certain rights that do depend upon citizenship, political and civil rights; but they are not involved in this matter, nor do they amount to class legislation . . . where a quarter of a million of people in a State are deprived of the right to sit upon a jury because of their color, are excerted from the equal benefits of the law because of race, I ask whether it would not be broad nonsense to say that they have the equal protection of the laws?" [121]

Senator Frederick T. Frelinghuysen, a New Jersey Republican and a former attorney general of that state, also supported the jury clause, adding: "I do not understand that it is the right of a man to be a juror, but that it is the right of a large class that their whole class shall not be excluded from the jury box." [122]

The next day, Senator Joshua Hill, a Georgia Republican lawyer, objected to the jury clause on the ground of the penalty. He stated that in his state jurors were selected by local judges, court clerks, or sheriffs, from "upright and intelligent persons," and in some counties there were colored jurors, while in other counties there were none, depending on the opinion of the local officials as to whether there were competent colored persons in the county. He feared that colored persons would sue sheriffs if the judge told them not to summon them as jurors. [123] Carpenter also once again reiterated his constitutional objections to the jury clause. [124] He received support from Senator Henry W. Corbett, an Oregon Republican who wanted to keep Chinese in the West Coast off juries. [125] But Morton once again reiterated his view that Congress could constitutionally prevent racial discrimination in jury selection, which he described as "class legislation" denying equal protection of the laws. [126]

Senator George F. Edmunds, a Radical Republican lawyer from Vermont who had voted for the Fourteenth Amendment, then joined the fray with a rebuttal of Carpenter. He said that it was immaterial that the Fifteenth Amendment had omitted the right to hold office because a juror was not an office-holder, but rather one who performs a public duty like working on highways. [127] Edmunds also analogized the right to be a juror with the right to be a witness, protected under the Civil Rights Act of 1866. He mentioned both the Privileges and Immunities Clause and the Equal Protection Clause of the Fourteenth Amendment as justification for the jury clause. He said that such a law was necessary in southern states because otherwise the jurors who would judge the Negroes would be hostile to them. [128] He also declared that it was not necessary for the federal government to organize the state juries itself, in order to enforce the bill, since under the Supremacy Clause of the Constitution a defendant in a state trial where the judge disregarded the law could have his conviction overturned on appeal. Edmunds finally observed:

"I agree that a colored man has no right because he is a colored man, and that a white man has no right because he is a white man, to be called on a particular jury, for one reason which I have already stated, that it is not a place that anybody is entitled to hold; but the point is this: that every citizen otherwise qualified has a right to stand in that class where the law may call him to perform the duty of a citizen in the administration of justice. There is the distinction; and therefore this provision of the amendment of the Senator from Massachusetts does not declare that black men shall be jurors, but it declares that no statute, ordinance, or regulations whatever, shall exclude men because they are

[121] *Ibid.*
[122] Globe 42/2, 848.
[123] Globe 42/2, 880.
[124] Globe 42/2, 897.
[125] Globe 42/2, 898.
[126] *Ibid.*
[127] Globe 42/2, 899.
[128] Globe 42/2, 900. He said: "Where would be the value of declaring that a colored man should have equal rights of trial by jury and equal rights of judgment by his peers, if you are to say that the jurors are to be composed of the Ku Klux. . . . You are to put him into the hands of his enemies for trial."

black from the common right of all citizens otherwise qualified and in conformity to law to be called on a proper occasion."[120]

Edmunds was answered generally, and not in specific relation to the jury clause, by Senator Lyman Trumbull, the veteran Illinois lawyer and legislator who, as Republican Chairman of the Senate Judiciary Committee, had shepherded to passage the Civil Rights Act of 1866, the forerunner of the Equal Protection Clause of the Fourteenth Amendment, and had frequently acted as spokesman and leader of the Senate Republicans in the Thirty-Ninth Congress. Trumbull confined civil rights to those enumerated in the 1866 law.[120]

After some debate the next day on naturalization, during which some of Sumner's Republican supporters readily agreed that Chinese should be kept out at the request of Western equalitarian Republicans,[121] Senator John W. Stevenson, a Kentucky Democratic lawyer, chided his Republican colleagues for inconsistency. He said that the Senate proposed to make jurors of Negroes but not of Chinese immigrants, and that southern Negroes were lacking in the education, knowledge, experience, and intelligence sufficient to make competent jurors.[122] Stevenson also endorsed Carpenter's constitutional objections. He rejected Morton's Equal Protection argument, saying:

"The Senator from Indiana justifies the constitutionality of this amendment on the ground that the fourteenth amendment demands an equal protection of law to every citizen. He then asks, what show of justice could a black man in Kentucky expect from a jury of twelve white men? * * * The life, liberty, and rights of the Negroes have ever been safe in the keeping of Kentucky judges and Kentucky juries. No complaint can be justly had on this score. But if the argument of the honorable Senator be sound, what becomes of a Chinaman who commits murder to-day in San Francisco or Sacramento? What right of justice can he expect from twelve white men prejudiced against him and opposed bitterly to the immigration of his people? And yet the Senator from Indiana was unwilling to extend to the Chinaman the same need of justice which he insists shall be extended to the freedman. To make the honorable Senator's argument sound, there could be by his standard of construction no just protection of law unless white men were tried by white juries and colored men by colored juries; but experience shows the views of the honorable Senator to be unsound and fallacious."[123]

The Senate then rejected a motion by Stevenson to confine the jury clause to federal courts.[124] A vote on the Sumner amendment to the amnesty bill was then taken, and it resulted in a tie, 28 to 28. The Vice-president then cast an affirmative vote.[125] However, a member of the amnesty bill supporters considered Sumner's measure unconstitutional, and voted against the combined measure for that reason.[126] The ultimate vote on the combined measure was 33 to 19, less than the necessary two-thirds which amnesty required.[127]

On February 19, a bill similar to Sumner's amendment was introduced in the House of Representatives.[128] Congressman Henry D. McHenry, a Kentucky Democratic lawyer, protested the unconstitutionality of the jury clause on the ground that since a state had plenary power to prescribe the qualifications of jurors, it could limit them to white men.[129] Congressman John M. Rice, another Kentucky Democratic lawyer, in the course of a lengthy harangue, protested

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[119] *Ibid.*

[120] Globe 42/2, 901. Trumbull said:

"I believe that any freeman has a right to make a contract. The Senator has been reading from the civil rights bill. It was passed years ago. It was based upon this principle—confined exclusively to civil rights and nothing else, no political and no social rights. Here were millions of people in this country who by an amendment to the Constitution of the United States had been made free men. They had no right to buy or sell, to go or come, to contract or be contracted, and no right to enforce contracts; but they had been declared free. What was their condition? Is that a free man? I thought it was not, and I thought under the constitutional amendment which made these persons who had been mere chattels men, we were bound to give them the rights of men. But that did not extend to political rights or to social rights. It was confined exclusively to the rights appertaining to man as man."

[121] Globe 42/2, 909–912.

[122] Globe 42/2, 912.

[123] Globe 42/2, 913.

[124] Globe 42/2, 918.

[125] Globe 42/2, 919.

[126] Globe 42/2, 926–8.

[127] Globe 42/2, 928–9.

[128] Globe 42/2, 1116.

[129] Globe 42/2, App. 218–9.

placing Negroes on juries to try white persons because the Negroes were prejudiced against whites and the latter would not get a fair trial.[140]

On May 8, the Senate returned to amnesty,[141] and Sumner immediately moved to add his civil rights bill to the amnesty bill which the House had passed.[142] After Trumbull had declared that civil rights which Congress could protect were limited to those in the 1866 statute, Sherman reminded him that Sherman and others had followed Trumbull's lead in the passage of the 1866 Act which Trumbull had authored and shepherded to enactment, and stated that Sumner's bill simply carried out that act.[143] He declared that this bill was necessary because that act "does not protect the colored people in their right to have some of their own race, if necessary, sit in the jury; they claim that their own race should not be discriminated against in the selection of jurors."[144] Carpenter simply reiterated that the jury clause was unconstitutional, and that he had received letters from some of the ablest lawyers and judges in the country saying so.[145]

Carpenter then moved to strike out the jury clause. In reply to his constitutional scruples, Sumner asserted that it was constitutional, but added: "If it is not constitutional, then it cannot be in force." To this Senator Eugene Casserly, a California Democratic lawyer and former Corporation Counsel of New York City, replied: "He has just discovered the only reason I ever heard given that I thought had any soundness in it for passing an unconstitutional law, namely, that when it is passed it will be void; that is to say, it will be unconstitutional." [Laughter] To this Sumner reiterated that he thought the law constitutional, but: "Even suppose this is unconstitutional * * * as I say, it will not be enforced; it will fail." Carpenter answered that he had sworn to support the Constitution and could not vote for anything unconstitutional. Sumner had the last word: "I have also sworn to support the Constitution, and it binds me to vote for anything for human rights." A vote was then taken, and Carpenter's union failed by 33 to 16. The majority were all Republicans. Carpenter carried five other Republicans with him; the rest in the minority were Democrats.[146] Trumbull, who had been absent on the vote but who returned, also asserted a dim view of the jury clause.[147] At length, when a vote was taken on annexing Sumner's bill to the amnesty bill, it resulted in a tie, 29 to 29. The vice-president broke the tie in Sumner's favor.[148]

After a second vote on annexing Sumner's measure to the amnesty bill resulted in a 28 to 28 tie, the vice-president once again voted in Sumner's favor.[149] However, a number of supporters of the amnesty bill, including Trumbull, who thought that Sumner's bill was unconstitutional, voted against the combined measure, and the vote of 32 to 22 was enough to defeat the measure because it required a two-thirds vote.[150]

Several days later, Trumbull declared that Sumner's bill was "unconstitutional in its provisions."[151] He also added:

"But these are rights that are created by legislation in the various localities and States, if you please, just like the right to sit upon a jury. That is not a civil right, and it is a misnomer to call these civil rights, because civil rights are the rights which appertain to the individual as a citizen, and which he has wherever he goes."[152]

Carpenter finally broke the deadlock by bringing up an independent civil rights bill during an evening session while Sumner was out of the Senate chamber.[153] He moved an amendment eliminating the jury clause.[154] One Republican opposed the Carpenter substitute as "entirely emasculated and rendered practically useless," but Senator John A. Logan, an Illinois Republican, noted that "a provision

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[140] Globe 42/2, App 598–9.
[141] Globe 42/2, 3179.
[142] Globe 42/2, 3181.
[143] Globe 42/2, 3191–2.
[144] Globe 42/2, 3192.
[145] Globe 42/2, 3196. See also the general attack of Senator Eugene Casserly, a California Democratic lawyer, on the constitutionality of the bill. Globe 42/2, 3196, 3249.
[146] Globe 42/2, 3268.
[147] *Ibid.*
[148] Globe 42/2, 3264–5.
[149] Globe 42/2, 3268.
[150] Globe 42/2, 3270.
[151] Globe 42/2, 3361.
[152] Globe 42/2, 3426.
[153] Globe 42/2, 3727.
[154] Globe 42/2, 3780, 3784.

in reference to jurors in the other bill . . . probably prevented several Republicans from voting for the bill," and supported the Carpenter substitute because "that would not have interfered with the laws of the States." The Carpenter amendment was carried by a vote of 22 to 20, with a bare quorum of the Senate present. Voting in the majority were thirteen Democrats, one southern Republican, and eight northern Republicans, from California, Illinois, Iowa, Kansas, Maine, Oregon, Pennsylvania, and Wisconsin. Probably the most significant vote for the substitute was cast by Morrill of Maine, a Radical who had voted for the Fourteenth Amendment. The minority were all Republicans.[155] The Carpenter bill, shorn of the jury clause, then passed by a strict party-line vote of 28 to 14.[156]

The Senate then renewed consideration of the amnesty bill and debated it until the next morning when Sumner reappeared. He moved to attach his bill to the amnesty bill, protesting the "emasculated civil rights bill" adopted while he was absent the previous night. He protested that "justice will find a new impediment in the jury-box," and pleaded against "that injustice which is now installed in the jury-box." But his plea went unheeded. The Senate voted down his amendment by 29 to 13, and then passed the amnesty bill by 38 to 2, with only Sumner and a western Radical voting in the negative.[157] Sumner's disappointment was keen, and he proclaimed that his Republican colleagues had sacrificed the rights of the Negroes. But they told him plainly that the limited bill was all that he could expect at that session,[158] and the bill died for that session and Congress.

E. SUMNER'S BEQUEST

In the fall election of 1872, the pressure was taken off Congress to obtain the Negro vote by the re-election of President Grant. Moreover, in 1873 the Supreme Court decided the *Slaughter-House Cases*,[159] which reminded the lawyers in Congress that the Fourteenth Amendment, and especially the Privileges and Immunities Clause, did not radically expand the federal government's powers. Since the jury clause of the civil rights bill required judicial enforcement, its constitutionality would be subject to Supreme Court review. Sumner's Declaration of Independence arguments would no longer work; a better constitutional basis had to be found.

At the opening of the session, Sumner once again introduced his bill. Once again Morrill of Maine, and Senator Orris F. Ferry, a Connecticut Republican lawyer, attacked it as unconstitutional generally.[160] In the House of Representatives, where the Judiciary Committee reported out a civil rights bill without a jury clause, Congressman Alonzo J. Ronsier, a South Carolina Negro Republican ex-shipping clerk moved to amend it by adding a section forbidding racial discrimination in juries.[161] Congressman James H. Blount, a Georgia Democratic lawyer, declared that jurors in federal court were ignorant and prejudiced against white persons in his state.[162]

Congressman William H. H. Stowell, a Virginia Republican carpetbagger and non-lawyer, demanded "equality" in the "jury-box." He said:

"Every colored man suing for his wages brings his case before a jury who are prejudiced against him because of his color. Every colored man tried as a criminal appears before a jury who are inclined to believe him guilty because of his race, and in both cases the fear of an adverse judgment may be held over him to force him to vote with that party which has been his constant and implacable foe. Such cases are by no means rare and their influence upon a poor friendless man recently a slave, and coming from the former master, can be readily imagined. The moral courage displayed by the colored man under these persecutions has been wonderful. They have lived in the constant faith that the republican party would give them exact justice and enable them to make

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[155] Globe 42/2, 3735.
[156] Globe 42/2, 3736.
[157] Globe 42/2, 3737–8.
[158] Globe 42/2, 3739.
[159] 16 Wall. 36 (1873).
[160] 2 Cong. Rec. 10–11 (43rd Cong., 1st Sess., 1873) (hereinafter referred to as Cong. Rec. 43/1).
[161] Cong. Rec. 43/1, 407.
[162] Cong. Rec. 43/1, 411. He also said: "how is it to be expected that if juries will not convict in State courts, they will be more virtuous in Federal courts? Is the manner of selecting jurors to be so devised as to secure men in sympathy with these prosecutions?"

a fair trial, free from persecutions . . . This bill will enable them to make that trial." [163]

Debate began on Sumner's bill on January 27, 1874 in the Senate, and several Senators expressed doubts about the constitutionality of portions of it, including some Republicans who had voted with Sumner previously.[164] Edmunds asked what would happen if a person were convicted of murder by a jury which was drawn in a discriminatory manner, and whether the verdict could be set aside, or if a person were indicted by a grand jury chosen contrary to the bill's provisions. Sumner said this did not have to be considered because the officer choosing the jury would be penalized, but Senator Timothy O. Howe, a Radical Republican of Wisconsin who had been a state supreme court justice, interjected: "it would be cause for challenge to the array." [165] Sumner then stated that although other Senators might doubt the constitutionality of the jury clause, he did not. He once again drew an analogy between Congress' right to open the courts to colored witnesses, and its right to require non-discrimination in juries.[166]

Edmunds then warned:

"No doubt Judge Trumbull saw, as I think any Senator who has been bred to the practice as well as the theory of the law would see, on looking at the fourth section of this bill in particular . . , that if you were to pass that as it stands as a law, you would furnish a cause for challenge to the array of every grand jury in the country where the laws of the State do not harmonize with the laws of Congress; and even if it turned out that this fourth section were constitutional, there being no provision in the State law for drawing a grand jury otherwise than according to its forms, and there being no provision in the law for carrying out its principles in respect to calling a grand jury to try crimes, you would have cut off both the hands of justice in protecting the very people you desire to defend. I am not in favor of legislation of that kind." [167]

He added that he believed that Congress had power under the Fourteenth Amendment "to require that colored men shall sit upon juries." But he wanted not merely a penalty imposed on state officers who disobeyed the law, but also some machinery to make certain that proper juries are called. He said: "It is no comfort for a man to be hanged by a jury which is not composed as the law and Constitution require it to be composed, supposing this to be constitutional, and then to be told afterward that the law had omitted the necessary machinery to make that right effectual. That is my point." [168] After that, the bill was referred to the Judiciary Committee, with Morrill of Maine still reaffirming his belief that it was unconstitutional.[169]

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[163] Cong. Rec. 43/1, 427. He also said:

"Our Sate constitution provides that every voter shall be eligible as a juror; yet a democratic Legislature has for four years so perverted the spirit of that constitution that the colored man has been practically excluded from the jury-box. . . . Although our State constitution has been adopted for four years, yet ninety-nine out of every hundred colored men have never been summoned upon a jury." Id. at 426.

Congressman Richard H. Cain, a South Carolina Negro Republican, also observed that "our rights will [not] be secured until the jury box, . . . those great palladiums of our liberty, shall have been opened to us." Cong. Rec. 43/1, 566.

[164] Cong. Rec. 43/1, 945–7.

[165] Cong. Rec. 43/1, 947.

[166] Cong. Rec. 43/1, 948. Sumner said:

"The original civil-rights bill, . . . declares that no evidence shall be excluded from any court of justice, national or State, on account of color. The nation has undertaken to regulate the testimony not only in its own courts, but in State courts; and will any one pretend that it may not regulate the jury in State courts, when it may regulate the testimony in State courts? Why, sir, there is nothing in the Constitution touching testimony, but there are no less than three distinct provisions relating to trial by jury; and among other terms employed is 'an impartial jury,' which is among the privileges and immunities of the citizen. And is it wrong for Congress . . . to declare that there shall be an impartial jury in all tribunals, whether national or State, without regard to color? Having begun by regulating the testimony, where is the argument which is to prevent us from regulating the jury? I need not remind my excellent friend that originally the witnesses and the jury were almost one and the same.

"Mr. EDMUNDS. They were precisely the same.

"Mr. SUMNER. Very well; so much the better; and the Senator knows that there is a phrase handed down to us from English courts by which we are reminded constantly of the 'witness-box' and the 'jury-box.' So closely were they together, that they come under a common nomenclature. Now I insist that they shall come under a common safeguard."

[167] *Ibid.*

[168] *Ibid.*

[169] Cong. Rec. 43/1, 949, 951. See also Thurman's assertion that the whole bill was unconstitutional. *Id.* at 3455.

On March 11, 1874, while the Judiciary Committee was considering the bill, Sumner died. His last words asked for the passage of the civil rights bill.[170] On April 29, Frelinghuysen reported the bill on behalf of the Judiciary Committee, and narrowed its constitutional basis to the Equal Protection Clause of the Fourteenth Amendment. He three times emphasized that the "bill therefore properly secures equal rights to the white as well as to the colored race."[171] He pointed out that jurors were not officers, historically in England or in the United States, and then declared:

"A law which should exclude all naturalized citizens of the United States from the jury-box would deny to naturalized citizens the equal protection of the law. Is it equal protection, that from the tribunal that is to pass on one's life, liberty, and property those who would naturally have an interest in him shall be excluded?

"A State may make such qualifications of jurors as it pleases. It may require that they be freeholders; that they read and write; that they submit to an examination in the rudiments of law. But when a State says one class of citizens of the United States shall be tried by a jury which is or may be composed in part or in whole by those of their own blood, and that another class of citizens of the United States shall never be tried by a jury that has one of their race upon it, I submit the discrimination violates a fundamental right of a citizen of the United States, and denies them the equal 'protection of the laws.'"[172]

On May 20, the Senate resumed consideration of the civil rights bill, and Senator James W. Flanagan, a Texas Republican lawyer stated that many Texas judges were prejudiced against Negroes, and would not rule fairly, and without the bill "You would never hear of a colored man sitting upon a jury in a Southern State. . . ."[173] Senator Lewis V. Bogy, a Missouri Democratic lawyer, however, protested inclusion of the jury clause.[174]

During the last day of debate, May 22, in an all-night session, Senator William T. Hamilton, a Maryland Democratic lawyer, in the course of a long speech also attacked the jury clause. He first pointed out that voters could refuse to vote for candidates for public office based on race or color without violating the Fourteenth Amendment, and asked why those in charge of selecting juries, by the same reasoning, could also not discriminate. He then noted that state governors and even the President of the United States could refuse to appoint officers on racial grounds without penalty.[175] Coming to proof of discrimination on the part of the local state judge who selects jurors, he explained:

"We have colored men in my county, but the judge has not selected any for jurors. White men are selected. The judge has the right under the limitations of [state] law to select whom he pleases, and without regard to color or race . . . how are you to convict him under this provision? Upon what evidence is it to be done? There are seventy-five hundred voters in my county, and a thousand or twelve hundred of them perhaps are colored men. How are you to sustain the charge? The judge of course in making his selection will not announce that he selects the jurors for the reason that they are white men, or does not select others because they are black men. How are you to get up a case? Is it to be based upon the one single fact that you did not select colored men when you could have done so? No; the only result of all is that you may get him into trouble, and without any avail to your theories . . . It will be said—no, it is to be inferred—when a judge selects man for the jury, and does not select any colored men, that it was because they were colored men. You have colored men in your States. I will not be so uncharitable as to infer that the honorable Senator does not give them office, or help send them to Congress . . . because they are colored men . . . Shall I infer against you, or shall I rather decide, that you have better white men and enough of them to fill all positions? How are you to carry it out with any decent regard for the right of judgment? . . ."[176]

Carpenter reiterated his oft-stated objections to the constitutionality of the jury clause. He observed: "I know of no more power in the Government of the United States to determine the component elements of a State jury than of a

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[170] Cong. Rec. 43/1, 4786. See also Cong. Rec. 43d Cong., 2d Sess. 952 (Cong. Thomas Whitehead).
[171] Cong. Rec. 43/1, 3451.
[172] Cong. Rec. 43/1, 3455.
[173] Cong. Rec. 43/1, App. 375.
[174] Cong. Rec. 43/1, App. 321.
[175] Cong. Rec. 43/1, App. 369–370.
[176] Cong. Rec. 43/1, App. 370.

State bench or of a State Legislature." [177] However, when a motion was made to strike out the jury clause from the bill, only two Republicans voted with the Democrats, and it lost, 28 to 15.[178] The bill then passed, 29 to 16, with only three Republicans voting with the Democrats in the negative.[179]

The House took no action on the bill for that session. A Tennessee Republican lawyer, however, questioned the constitutionality of the jury clause.[180]

F. THE CIVIL RIGHTS ACT OF 1875

The elections of 1874 were an absolute disaster for the Republican Party. Although the Senate remained Republican by a much reduced margin, the House of Representatives completely changed political complexion and became overwhelmingly Democratic.[181] Although the opposition made major gains on issues of the depression, fraud, corruption, and other scandals,[182] it also was much assisted by widespread opposition to the civil rights bill, and especially the school clause.[183]

When the "lame-duck" Second Session of the Forty-Third Congress met in the early part of 1875, it was the House that first took action on the civil rights bill.[184] Congressman John R. Lynch, a Mississippi Republic Negro photographer made a lengthy speech, in the course of which he attacked Carpenter's views, and defended the constitutionality of the jury clause, with some observations which could not but have exhibited his photographic talents by comparison. He said that Congress could prohibit any state from discriminating based on race or color in voting, holding office, or serving on juries, without mentioning that the provision respecting officeholding was specifically stricken from the draft of the Fifteenth Amendment.[185] Congressman J. Ambler Smith, a Virginia Republican lawyer who opposed the bill, briefly challenged the constitutionality of the jury clause.[186] But because of the controversial school clause, little attention was paid to the jury clause in the House. Ultimately, the school clause was struck out, and the bill passed the House by a vote of 160 Republicans and two Democrats to 88 Democrats and 11 Republicans, all but one of the latter being from a southern or border state.[187]

Debate in the Senate began with an attack by Thurman on the constitutionality of the jury clause. Taking the provisions of the First Section of the Fourteenth Amendment up one-by-one, he first declared that the provision defining who were citizens did not confer the right to sit on juries, because otherwise women, minors, and persons unable to understand English could serve on a jury. From this it followed that it was not a privilege of national citizenship to sit on a jury, and the Privileges and Immunities Clause did not apply. He also asserted that a person not allowed to sit on a jury is not deprived of either due process of law or equal protection of the laws.[188]

Senator George S. Boutwell, a Massachusetts Republican lawyer, then indicated disagreement with the limited interpretation given to the Privileges and Immunities Clause by the Supreme Court in the *Slaughter-House Cases*.[189] He pointed out that the federal government did not have the power to prescribe the qualifications for jurors in state courts and did not attempt to do so in this bill, but merely asserted that there was to be no color bar in jury service. Thurman interrupted him to point out that the 14th Amendment said nothing about race and color, and if Congress could prevent discrimination based on this,

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[177] Cong. Rec. 43/1, 4166.
[178] Cong. Rec. 43/1, 4175.
[179] Cong. Rec. 43/1, 4176.
[180] Cong. Rec. 43/1, 4598. Congressman Roderick R. Butler said: "I might question the right of Congress to define who may be jurors in a State court, but as the State law of the State that I in part represent have made no distinction on account of race or color, I will not stop to discuss that proposition. Nevertheless it will strike many, even republicans, with much doubt, to say the least, of its constitutionality." See also *id.* at 385 (Cong. Mills).
[181] U.S. Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1957*, 691 (1960).
[182] 27 Encyclopaedia Britannica 720 (11th ed. 1911).
[183] Congressional Record, 43rd Congress, Second Session, 951, 962, 978, 982, 1001, App. 17, 20, 113 (1875) (hereinafter referred to as Cong. Rec. 43/2).
[184] Cong. Rec. 43/2, 938.
[185] Cong. Rec. 43/2, 944.
[186] Cong. Rec. 43/2, App. 159.
[187] Cong. Rec. 43/2, 1011.
[188] Cong. Rec. 43/2, 1791–2.
[189] *Ibid.* See also Cong. Rec. 43/1, 4116.

it could, by a parity of reasoning, prevent discrimination based on ignorance of English.[190] This Boutwell admitted, and pointed out that the bill was limited to racial discrimination because that is what was complained of. He placed the constitutional power to pass the bill squarely on the Privileges and Immunities Clause, saying that one of the privileges of national citizenship was the equal right to sit on a jury. He concluded:

"all that is claimed under the fourth section of this bill is that you shall not . . . say that a man shall not sit upon a jury because he is a black man or because he is of the German race or because he has been held in slavery, and I might say for other reasons. If for other reasons discriminations were made by the law of any of these States, we might under the 14th Amendment protect men from such discrimination."[191]

Morton then answered Thurman by contending that a state could fix any qualifications it wanted for jury duty, but that if it excluded Negro jurors when a Negro was on trial it denied him equal protection of the laws which the 14th Amendment guaranteed because a white jury would be biased against him.[192] Under questioning, Morton said that a colored man would not be denied equal protection if a state by law provided for an all-colored jury, and a foreigner would not be denied equal protection if tried by a jury of foreigners. But he emphasized that all of the Negroes of a state do not enjoy the equal protection of the laws if a Negro is tried by a jury under a law which excludes Negroes from jury duty. He illustrated the point by reversing the proposition, and saying that if South Carolina excluded all whites from jury duty where white men were defendants, they would likewise claim a denial of equal protection because of prejudice against them on the part of Negroes.[193]

Thurman then rebutted Morton's argument by noting that all persons whatsoever were entitled to equal protection, including women, minors, aliens, Chinese, Indians not taxed, the insane, ignorant, and criminals, but that none of these were allowed to sit on juries. Thurman pointed out:

"The Senator says that no class of persons receive equal protection of the laws if they are excluded from the jury-box. Now, the first thing that I have to say to that Senator is that not one woman in all the United States or the Territories thereof, outside of Wyoming Territory, is qualified to sit in a jury-box. Are they not equally protected? . . . When did it come that our mothers and wives and sisters were deprived of the equal protection of the laws? But that is not all. Do not our children under the age of twenty-one years receive the equal protection of the law? Yet not one of them is qualified to sit in a jury-box, . . .

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[190] Cong. Rec. 43/2, 1792–3.

[191] Cong. Rec. 43/2, 1793.

[192] *Ibid.* Morton said:

"A State may provide that no man shall sit upon a jury who is not thirty years old, or if you please fifty years old. The State may provide that no man shall sit upon a jury who cannot read or write; that no man shall sit upon a jury who is not worth $500 or $5,000. The State is left perfectly free to fix the qualifications of jurors as she sees proper; but by this bill she is restrained from prohibiting any man from sitting upon a jury simply because of his race or color if he has all the other qualifications required by law. If the State requires a juror to be able to read and write, to have been a citizen of the State for two years, to be worth $1,000 in money, this bill would prevent that State from excluding a colored man from sitting upon a jury if he possessed all the other qualifications. That is the point. . . .

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". . . No State shall deny to any person the equal protection of the laws. Does that simply mean that each man shall be equally protected or have an equal right to be protected from an assault and battery, from assassination? Is it confined to that? Not at all. It means in its broadest sense . . . that no State shall deny to any man the equal advantage of the law, the equal benefit of the law, ... Does a State that gives the exclusive right to sit upon juries to white men, give the equal protection of the laws of that State to colored men? I say no. I say no upon the broadest principles of common sense.

"Why, Mr. President, one of the most important principles of the common law that has come down to us from our fathers, established in England long ago, was that every man had a right to be tried by his peers. What is meant by that? Tried by his equals, those in the same general condition of society; that you cannot give a higher class the exclusive right to pass upon the rights of a lower class; that they have the right of trial by their peers. And we see how carefully this principle of trial by jury is guarded. We see that no man who has expressed an opinion is allowed to sit upon a jury, and sometimes weeks are spent in getting juries which are perfectly unprejudiced, who have never given an opinion on the case, who have no notion in regard to it.

"Now, I ask if with the prejudices against the colored race entertained by the white race, even in some of the Northern States and certainly in all of the Southern States, the colored man enjoys the equal protection of the laws, if the jury that is to try him for a crime or determine his right to property must be made up exclusively of the white race?"

[193] Cong. Rec. 43/2, 1794.

"I will convince the Senator out of his own mouth. The Senator says that it is perfectly competent for the States to require a property qualification for the jury-box . . . . that they may require, as was formerly required in many of the States and in England, a freehold qualification. But I take the Senator's own illustration: they may require a property qualification of $5,000 in order to entitle a man to be a juror. If they can do that, what becomes of the Senator's argument? Are all men who do not own $5,000 worth of property deprived of the equal protection of the laws?" [194]

Thurman noted that if a $5,000 property qualification could be placed on the right to sit on a jury, 99% of the Negroes would be excluded, yet Morton admitted the right of states to do this. He concluded that the right to sit on a jury was in the nature of a political privilege which could be limited to residents or in other ways. Senator William T. Hamilton, a Maryland Democratic lawyer, also interjected that the overwhelming majority of Negroes were illiterate, and since Morton admitted that a literacy qualification could be imposed for jury duty, he wanted to know whether such illiterates were denied equal protection.[195]

Morton replied that these points begged the question because property and literacy qualifications had to be imposed without racial discrimination under the 14th Amendment. Hamilton responded that race and color is not mentioned in the amendment.

Morton then asked whether colored men had equal protection when the power to try them was placed in the hands of another race, and Thurman answered that they did, just as they had in England or France.[196] To this Morton replied:

"I ask him whether the colored men of North Carolina have the equal protection of the laws when the control of their right to life, liberty, and property is placed exclusively in the hands of another race of men, hostile to them, in many respects prejudiced against them, men who have been educated and taught to believe that colored men have no civil and political rights that white men are bound to respect. And yet the Senator would tell me that that is giving them the equal protection of the laws. I say no; the common sense of mankind will revolt at that proposition." [197]

Morton went on to ridicule the argument of Thurman that because women and children were excluded from juries, Negroes could also be excluded. However, his only reasoning was that it "only requires that proposition to be stated in order that it may be decided." But when Morton turned to a suggestion that a state might prevent a man of foreign birth from sitting on a jury, he said:

"And suppose a State should pass a law that no man of foreign birth shall sit upon a jury, what would be the outcry? It would be said that you were denying to men of foreign birth the equal protection of the laws; that you placed the juries exclusively in the hands of native Americans who have prejudices against foreigners, just as white men have prejudices against black men. Would it not be said in that case that you were denying to men of foreign birth the equal protection of the laws because their rights would be liable to the exclusive determination of native-born Americans who had some lingering prejudices against men of foreign birth?" [198]

Thurman took Morton to task for being illogical and for making a stump speech instead of analyzing the Constitution. He once again pointed out that women, aliens, travelers, and even poor people could be excluded from jury duty, and yet they are constitutionally entitled to receive equal protection of the laws. He further emphasized that the 14th Amendment does not single out racial discrimination for any special condemnation.[199]

Senator Augustus S. Merrimon, a North Carolina Democrat and a former state judge, then entered the fray by observing that no question of policy as to whether Negroes ought to be allowed to sit on juries was involved, but rather a "dry question of constitutional law" as to whether "the Government of the United States [has] any power to regulate the right and authority of the States to determine who shall sit upon juries in the State courts." He declared that Morton's argument did not even tend to establish federal power to prevent jury discrimination, because the right "to sit upon a jury is not a civil right, in a tech-

[194] *Ibid.*
[195] *Ibid.*
[196] Cong. Rec. 43/2, 1794–5.
[197] Cong. Rec. 43/2, 1795.
[198] *Ibid.*
[199] *Ibid.*

nical sense, any more than to hold an office is a civil right." Merrimon noted that the right to protection of life, liberty, and property was a civil right. Turning to Morton's argument that Negroes would not receive such protection from all-white juries because of prejudice, Merrimon declared:

"But then the Senator asks, will it be pretended if juries are composed exclusively of white men that the colored people of the South have the equal protection of the laws? I answer without hesitation, 'yes.' What is meant by 'the equal protection of the laws' is this: That whoever administers the law through the courts or anywhere else must administer it to all people without distinction for any ease, according to the constitution and laws of the State where he does administer it. It is no matter whether the officer is a white man or a black man, he is bound to administer it fairly to every man, woman, and child, of every race and color, of every condition in life; and when the law is so administered by the judge or by the jury or by the other officer, whatever kind of officer he may be, that the persons to whom he administers have the equal protection of the law in the sense of the Constitution.

"The Senator puts this case: He says suppose in South Carolina, where the colored race have the majority and can control, the Legislature should see fit to pass a law providing that none but negroes should sit on the juries, would there not be a great outcry on the part of the white people? I admit that there would be a great outcry in that case, and there ought to be. I think it would be a great outrage, because the white people are the more intelligent race and they are better qualified to administer the law or power. But if the Senator asks me whether they have power to do so, I answer yes, they have such power. They have the constitutional power to do it. They have not probably the moral right to do it; but they have the constitutional power to do it. Why? Because the right to sit in the jury-box is a political right; it is of that class of rights deemed political, it is in aid of the general administration of the Government.

"But suppose that every judge in South Carolina was a negro, suppose that every officer in South Carolina was a negro, every white man would have the equal protection of the laws in the contemplation of the clause of the Constitution under consideration; and why? Because every negro judge, because every negro officer in the State would be bound to administer the law protecting life, liberty, and property to the white man just as he would be bound to administer it to the negro; and if he did not do that he would be guilty of a prostitution of his office, and would be subject to impeachment under the constitution and laws of that State." [200]

Merrimon went on to point out that the Fourteenth Amendment protects civil rights but not political rights, and that the failure of the Fifteenth Amendment to protect the right to hold office means that a state may discriminate in the right to hold high state offices, and accordingly can "make a like discrimination as to the office or place of juror." He said that he personally did not believe it prudent to exclude Negroes from jury duty, and his state and most other southern states made no such distinctions. He further declared that Morton's concession that a state could try a Negro with an all-Negro jury or a foreigner with an all-foreign jury admitted the constitutionality of distinctions based on race or nativity. Merrimon concluded that if a colored judge alone could sit on a bench the Equal Protection Clause would not be violated if he administered impartial justice to all.[201] Senator Thomas F. Bayard, a Deleware Democratic lawyer, briefly concurred that the jury clause was unconstitutional.[202]

The next day, February 27, 1875, was the last day of Senate debate. Carpenter arose to attack Morton's argument that exclusion of a class from jury

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[200] Cong. Rec. 43/2, 1796.

[201] Cong. Rec. 43/2, 1796–7. He said:

"It means that whoever administers the laws through the political instrumentalities of the Government, in administering the laws shall give him that equal protection for his life, his liberty, and property which every man is entitled to; and if the judge is a negro, he is bound because he is a judge—not because he is a negro—if I shall be brought before him to be tried in the matter of my life, liberty, or property, to administer the law to me just as he would to one of his own color or any other color. . . . the white man could not say that he did not have the equal protection of the law in contemplation of law because all the officers were negroes. . . . All he could ask would be that the negro judge should administer the law to him fairly and justly and if he should allow his color or a white man's color to prejudice his judgment unjustly, he would be a false officer and would be subject to impeachment and to be degraded from office and deserve the execration of every good man." *Id.* at 1797.

[202] Cong. Rec. 43/2, App. 105.

service violated the Equal Protection Clause of the Fourteenth Amendment. He, too, pointed out that if Morton's argument were valid "then this bill ought to be so amended as to provide that women and babes at the breast should be so eligible; because they are *persons* equally with colored citizens entitled under these two clauses of the amendment to everything secured to colored citizens."[203] Carpenter explained the distinction between privileges derived from national citizenship and those derived from state citizenship, and quoted with approval from the *Slaughter-House Cases*. He cited the then recently decided case of *Bradwell* v. *State*[204] for the proposition that one has no right by virtue of being a citizen to practice law, and therefore be contended that one had no right to serve on a jury by virtue of his citizenship. Moreover, he pointed out that no residence requirement could be imposed for jury duty by the states if such right was derived from national citizenship.[205] As for the Equal Protection Clause, he endorsed Thurman's argument that aliens and convicts are also protected by it and would have to be allowed to serve on juries if Morton's argument were sound. In concluding that the bill was unconstitutional, Carpenter observed:

"And if the Senator's argument establishes the right of every person in the State to serve as a juror, is it not manifest that it also establishes his right to participate in making and construing the laws? And yet it is well known that in proposing the fifteenth amendment, * * * Congress purposely excluded the right to hold office * * * I can conceive of no argument based upon the fourteenth amendment establishing the right to serve as a juror which does not also establish the right to serve in the Legislature and hold any State office. And this, in view of the fifteenth amendment, must be regarded as a perfect *reductio ad absurdum*."[206]

Morton then retorted that he did not mean that every man was entitled to sit on a jury, or was denied equal protection if he was barred. He said that states could prescribe such qualifications as they might choose, as long as no discrimination was based on race or color, because that would place "the adjudication of their rights exclusively in the hands of another race, filled with a prejudice and passion in many States that would prevent them from doing justice." Morton noted that formerly in England Jews were not allowed to sit on juries, and they suffered great wrongs in the courts. He asserted that this denied English Jews the equal protection of the laws. He re-emphasized that states could prescribe such qualifications as they desired, as long as they applied to all racial groups.[207] Morton observed in conclusion:

"I simply want to make one remark about the history of this question as applied to the Jews in England. The adjudication of their rights was placed exclusively in the hands of the Christians, at that time bitterly prejudiced against the whole Jewish sect and persecuting them upon all occasions. If they had had the right to sit upon juries, then indeed they would have had, so far as that was concerned, the equal protection of the laws. My friend said that my position required babies at the breast to be authorized to sit upon juries. I do not know how to answer an argument of that kind. I do not know how to meet that; but if there is any force in it, I may be allowed to say that if you allow a white baby to be placed upon a jury and do not allow that to the black baby, you are thereby creating an inequality.

"But what force is there in such an argument about minors when it all countries there are laws fixing the time when they shall come to their majority and exercise civil and political rights? That results as of necessity from nature. Consequently there is no force in an argument of that kind. I come back to the simple proposition that in the State of South Carolina, with all the prejudice and passion of the whites against the colored men, to place the administration of the law exclusively in the hands of white men is to deny to colored men an equal protection of the laws. It is an argument so clear that it seems to me no argument whatever can be made against it."[208]

Next, some colloquy occurred between Morton and two Democratic lawyers, Senators William W. Eaton of Connecticut and John B. Gordon of Georgia.

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[203] Cong. Rec. 43/2, 1861–2.
[204] 16 Wall. 130 (1872). Carpenter noted that he had been the unsuccessful attorney in this case.
[205] Cong. Rec. 43/2, 1862–3.
[206] Cong. Rec. 43/2, 1863.
[207] Cong. Rec. 43/2, 1863–4.
[208] Cong. Rec. 43/2, 1864.

Gordon asserted that the Privileges and Immunities Clause inhibits only state laws, and none discriminating against Negroes were in existence in Georgia. Morton said that under the Fifth Section of the Fourteenth Amendment Congress could prevent them from being enacted. Eaton observed that in Connecticut local officials could select such jurors as they pleased, and hence the civil rights bill was valueless. Morton replied that they might select some Negroes if a state law did not prevent them from doing so.[209] Senator John A. Logan, an Illinois Republican lawyer who supported the bill, also told Eaton that if his state had no law preventing Negroes from serving as jurors, the bill "would have no effect in his state at all."[210]

Senator William T. Hamilton, a Maryland Democratic lawyer, then spoke on the confusion in constitutional theory behind the bill. He noted that the first section used "citizen" and "person" interchangeably. Moreover, referring to the jury clause, he observed that Boutwell relied on the Privileges and Immunities Clause while Morton relied on the Equal Protection Clause. Averting to Boutwell's stand that Congress could prevent any discrimination in jury selection aside from race or nativity, Hamilton pointed to numerous grounds for discrimination, such as age, sex, education, commission of crime, and residence. The result of this reasoning would be that Congress could demolish all state laws, a power not contemplated by the Fourteenth Amendment according to Hamilton.[211]

He then proceeded to refute Morton's equal protection argument by noting that the latter had conceded that discrimination in jury selection may be based on poverty, illiteracy, citizenship, and residence, even though some of these grounds were "most obnoxious and unjust," and would eliminate the vast majority of Negroes. Hamilton reasoned that since the Fourteenth Amendment does not mention color, there is no more reason why racial discrimination in jury selection should be banned than any other form of discrimination. He concluded that jury selection was exclusively under state control.[212] He also declared that if Congress could punish discrimination by sheriffs or judges in selecting jurors it could punish a voter who cast his ballot for racial reasons. Hamilton argued that the Fourteenth Amendment gave Congress no such power.[213]

Edmunds then arose to rebut Thurman. He said that if a juror was akin to a public officer then the latter's constitutional argument would have merit, but since a juror was like a witness, "called in on the spur of the moment to perform a particular duty," the argument based on analogy to the right to hold office failed. Edmunds said that the right to be a juror was analogous to the right to be a witness, which was protected by the Civil Rights Act of 1866, and that if "a man has no right to stand equal with his fellow citizens in respect of taking the chance under the law that he may be drawn as a juror because he is of a particular race or of a particular color," then "the same argument would apply to religion, to nativity, to political opinion." Accordingly, Edmunds reasoned that if a state could exclude Negroes from juries it could exclude Roman Catholics or Presbyterians, and bar Negroes or persons of German extraction from suing in court. Edmunds concluded:

"If it can be made out that a jury-man is an officer under the Constitution and the laws, then you can say under the fifteenth amendment principle that the right to hold office is not guaranteed to all citizens alike. But as I say . . . there has never been a time in the history of jury trials when a juror was anything like an officer. He is no more than a witness, and the first jurors . . . were witnesses, and they were summoned because they knew about the matter to be tried."[214]

Thurman replied by accusing Edmunds of dealing in generalities. He emphasized that the Republicans admitted that a state may discriminate on the basis of education, language, and property, but drew a line on race and color. He reiterated that the Fourteenth Amendment drew no such distinction, adding:

"Now, we are not on the question of whether such a discrimination is absurd or not. . . . We are not upon the question whether such a discrimination is

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[209] Cong. Rec. 43/2, 1864–5. Morton observed: "If we pass this law, then that part of the State law which prevents him from doing it [selecting Negro jurors] is overruled, and if the officer is disposed to act fairly he has the legal power to act fairly." *Id.* at 1865.
[210] Cong. Rec. 43/2, 1865.
[211] Cong. Rec. 43/2, App. 113–4.
[212] Cong. Rec. 43/2, App. 114.
[213] Cong. Rec. 43/2, App. 115–6.
[214] Cong. Rec. 43/2, 1866.

unjust or not. . . . We are upon the question whether the Constitution forbids that discrimination while it permits all others. That is the question, and no man has been able to point out one word in the Constitution which says you shall make no discrimination on account of race but you may discriminate on any other account you see fit. That is the vice of the whole argument. Those who advocate this bill admit that you may discriminate; you may discriminate against those who are ignorant of the English language, against those who are ignorant of their own language, against those who have not sufficient property, you may discriminate against those who have not resided a particular time, against a particular sect; you may discriminate in regard to all these matters; but the moment you discriminate on the ground of race or color, that moment you transcend the Constitution of the United States and Congress is authorized to interfere. Sir, there is not one word in the Constitution that authorizes any such argument.

". . . The Senator . . . yesterday said that this was not a bill to prescribe the qualifications of jurors in a State court. Why, sir, if Congress can pass such a bill as this, it can prescribe completely the qualifications of jurors in a State court, for if it may forbid one discrimination by a State Legislature it may prohibit another and thus by prohibition after prohibition it may make every person that it sees fit to say shall be a juror qualified to take a seat in the box; . . ."[215]

A vote was then taken on Thurman's motion to strike out the jury clause as it related to state juries. Forty Republicans voted against it, eight of whom had voted for the Fourteenth Amendment on its passage, as members of the Senate, and seven as members of the House. Twenty Democrats and six Republicans voted for Thurman's motion to strike. Included in the latter group were Carpenter and Senator William Sprague, a Rhode Island Republican who had voted for the Fourteenth Amendment.[216]

A few minutes thereafter Edmunds stated that he was in favor of discriminating against ex-confederates in juries.[217] The bill then passed, by a vote of 38 to 26, with the same senators against it and the same senators, less two absentees, for it.[218]

G. SUMMARY AND CONCLUSIONS

When the constitutionality of the congressional enactment reached the Supreme Court, a majority of the justices were Grant or Hayes appointees, fully in sympathy with the Radical position. In *Strauder* v. *West Virginia*,[219] Mr. Justice Strong, a Grant appointee writing the majority opinion, made a typical Radical argument. He started with some general declamation on prejudice and the "spirit" of the Fourteenth Amendment, dwelling on its general purpose to protect Negroes and ban discrimination, and avoiding its precise limitations. He declared that if Irish were excluded from juries, it would be inconsistent with "the spirit of the amendment."[220] He mixed the Privileges and Immunities Clause and Equal protection Clauses together, and conceding the rights of states to make discriminations based on sex, poverty, or education, he nevertheless concluded that they could not discriminate based on race or color. He did not address himself to the dichotomy between civil and political rights at all. In the companion case of *Ex parte Virginia*,[221] he reasoned that since the Fourteenth Amendment requires an "impartial jury trial," it requires that jurors not be selected based on racial discrimination.[222]

Mr. Justice Field, a Unionist appointed by Lincoln, along with Mr. Justice Clifford, a Buchanan holdover, dissented. Aside from a long essay on federalism,

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[215] Cong. Rec. 43/2, 1866–7.
[216] Cong. Rec. 43/2, 1867.
[217] Cong. Rec. 43/2, 1868. He said:
"The distinction between the case we have and the one to which the Senator so feelingly refers is that the statute which we refused to repeal endeavors to make a jury-box pure and to keep out of it the people who are interested in the question to be decided; that if a man is accused of treason the jury-box shall not be filled up with his fellow traitors; if a man is accused of being a conspirator, a Ku-Klux, that the jury-box shall not be filled up with his fellow Ku-Klux. On the Senator's argument, the true meaning of a jury would be, if a man is accused of anything, to send around everywhere and find somebody else who committed the same sort of crime to try him."
[218] Cong. Rec. 43/2, 1870.
[219] 100 U.S. 303 (1879).
[220] *Id.* at 308.
[221] 100 U.S. 339 (1879).
[222] *Id.* at 345.

he pointed out that the Privileges and Immunities Clause did not cover the right to be jurors because otherwise women, children, and those over sixty, who are also citizens, would have the same rights. He added that this clause was simply designed to embody the privileges and immunities covered in Article 4, Section 2 of the original Constitution, which did not cover jury duty.[223] Brushing aside the Due Process Clause, he came to the Equal Protection Clause. He pointed out that the majority's argument, if it proved anything at all, proved too much, for if a Negro was denied equal protection by jury discrimination, so would be a foreigner, woman, or child, by discrimination against them. Yet the clause protects even foreigners equally. Mr. Justice Field also noted that this amendment protected civil rights, but not political rights, in which he classified jury service, as being akin to the right to hold office. He declared that the logic which would forbid jury discrimination would also prevent discrimination in selecting not only trial but also appellate judges. He concluded:

"The position that in cases where the rights of colored persons are concerned, justice will not be done to them unless they have a mixed jury, is founded upon the notion that in such cases white persons will not be fair and honest jurors. If this position be correct, there ought not to be any white persons on the jury where the interests of colored persons only are involved. That jury would not be an honest or fair one, of which any of its members should be governed in his judgment by other considerations than the law and the evidence; and that decision would hardly be considered just which should be reached by a sort of compromise, in which the prejudices of one race were set off against the prejudices of the other. To be consistent, those who hold this notion should contend that in cases affecting members of the colored race only, the juries should be composed entirely of colored persons, and that the presiding judge should be of the same race. To this result the doctrine asserted by the District Court logically leads. The jury *de medietate linguae*, anciently allowed in England for the trial of an alien, was expressly authorized by statute, probably as much because of the difference of language and customs between him and Englishmen, and the greater probability of his defence being more fully understood, as because it would be heard in a more friendly spirit by jurors of his own country and language." [224]

It seems that Mr. Justice Field had much the better of the argument from both a legal as well as a historical point of view, since the law forbidding racial discrimination in jury selection falls between two legal stools. The Fourteenth Amendment was proposed by Congress to protect only civil rights and not political rights, and was designed, as far as the First Section is concerned, to give constitutional support to the Civil Rights Act of 1866, which clearly did not protect the right to serve on a jury. Moreover, the Privileges and Immunities Clause was intended to embody the guaranties of Article 4, Section 2, of the original Constitution, which likewise did not refer to political rights.[225] It is clear that in the period before the Fifteenth Amendment was proposed, the right to serve on a jury was equated with political rights, and particularly the right to hold office. If the right to serve on a jury were a privilege of national citizenship, or the right not to have one's class discriminated against when one was a litigant or defendant was a privilege or immunity, then discrimination based on age, sex, literacy and property would all have to be swept away, as was repeatedly pointed out. Hence, the federal law cannot be supported on this clause.

In the political maneuvering surrounding the Civil Rights Act of 1875,[226] the Radical Republicans found it necessary to construct a constitutional theory for banning jury discrimination without reference to the right to hold office, which the Fifteenth Amendment had washed away. Sumner's historical analogy between witnesses and jurors provided a link to the Civil Rights Act of 1866. However, the flaw in this theory was that the right to be a witness was specifically named in the 1866 statute while the right to be a juror was specifically repudiated in the debates. Moreover, the historical analogy was meaningless by 1866; by that time, and for centuries past, jurors and witnesses had performed essentially different functions. In addition, the right to be a witness had an essential connection with a litigant's right to equal protection of the law, for without the necessary testimony the litigant failed to obtain relief in a case where another

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[223] *Id.* at 365–6.
[224] *Id.* at 368–9. See also Virginia v. Rives, 100 U.S. 313, 335 (1879).
[225] See H.R. Rep. No. 22, 41st Cong., 3rd Sess. 1 (1871).
[226] See Kelley, *The Congressional Controversy over School Segregation*, 64 Amer. Hist. Rev. 537, 550 et seq. (1959), for the political background.

litigant obtained it. The measure of protection directly bore on the ability to adduce evidence.

The attempt of the Radicals to link this to the jury clause, if it proved anything, proved too much, as opponents constantly pointed out. If discrimination based on race denied Equal Protection, so did discrimination based on sex, alienage, age, and all other factors. Unlike the Fifteenth Amendment, the Fourteenth Amendment is directed, neither by language nor by history, solely towards racial discrimination.[227] Not even the more modern "reasonable classification" concept, developed by the Supreme Court to deal with some of the obscure contours of the Equal Protection Clause,[228] can save the Radical argument, because they freely conceded that the right to serve on juries might be limited to rich persons, and surely it is just as arbitrary to exclude a working man from a jury as to exclude a Negro.

The Radicals finally urged a violent presumption, that all white people were prejudiced against Negroes, to support the jury clause. Assuming this highly dubious premise, it proves too much, as Mr. Justice Field pointed out. If this were the case, merely giving Negroes a chance to serve on juries would not cure the problem, since by lot or other impartial method an all-white jury might still be drawn. A specific percentage of Negroes would have to be placed on the jury, a position from which even Mr. Justice Strong and the majority of the Court who sustained the federal law recoiled.[229] This would make constitutionally mandatory the ancient common-law jury of one-half members of one's own ethnic stock, in a modern setting, a rule allowed in several early American cases[230] but generally repudiated by American courts by this time.[231] Moreover, since an impartial jury means that all members must be impartial, an all-Negro jury would be required. And if it were presumed that Negroes were prejudiced against whites, an all-white jury would be required for the trial of a white man. Indeed, such a requirement would supersede state limitations of every character on jury selection. The right to an impartial jury is of such a fundamental character that it is probably protected not only by the Equal Protection Clause, but also by the Due Process and Privilege and Immunities Clauses. By analogy to the right to go out of the neighborhood or county to get an impartial jury,[232] a state might well be required to go outside of the racial group normally qualified for jury duty to obtain a fair jury, if necessary. But if such presumptions of racial antagonism were indulged in, a state would be left in a perpetual quandry when a Negro sued a white man, or vice versa.

Of course, no such presumption that all members of one racial group are prejudiced against other racial groups can be indulged in, and hence the whole basis for the Radical argument is swept away. If a person is tried by a fair jury, however composed, he is equally protected with all other defendants. Hence, it does not deny equal protection of the laws to select a jury of another racial, political, economic, religious, or other group than a litigant as long as the jury is an impartial one. Nor does a potential juror have a privilege of national citizenship to sit on a state jury. This result is that federal laws banning jury discrimination in state courts are in excess of Congress' constitutional power to enact.[233] The matter remains exclusively under state control.

The foregoing analysis should not be construed as meaning that this author approves, as a matter of state policy, of racial discrimination in jury selection. On the contrary, in this author's opinion, jury duty should be imposed without regard to race, religion, sex, economic status, or other factors unrelated to age, intelligence, experience, and similar qualifications relevant to ability to correctly try issues of fact. But the matter is one exclusively under state control, and it is more important that the United States Constitution be construed in accordance

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[227] See Tansill et al., "The Fourteenth Amendment and Real Property Rights," in *Open Occupancy vs. Forced Housing Under the Fourteenth Amendment* 68 84–5 (Avins ed. 1963).
[228] 3 Willoughby on Constitutional Law § 1278 (2nd ed. 1929).
[229] Virginia v. Rives, 100 U.S. 313, 323 (1879).
[230] See United States v. Carnot, 25 Fed. Cas. 297, No. 14,726 (C.C.D.C. 1824); Respublica v. Mesca, 1 Dall. 73 (Pa. 1783).
[231] United States v. McMahon, 26 Fed. Cas. 1131, No. 15,699 (C.C.D.C. 1835); People v. Chin Mook Sow, 51 Cal. 597 (1877); State v. Fuentes, 5 La. Ann. 427 (1850); State v. Antonio, 11 N.C. 200 (1825); Richards v. Commonwealth, 11 Leigh 690 (Va. 1841); Brown v. Commonwealth, 11 Leigh 711 (Va. 1841).
[232] See Bell v. Van Riper, 3 N.J.L. (2 Penn.) 510 (1809); Wormeley v. Commonwealth, 10 Grat. 658 (Va. 1853); Chahoon v. Commonwealth, 21 Grat. 822 (Va. 1871); Sands v. Commonwealth, 21 Grat. 871 (Va. 1872); Craft v. Commonwealth, 24 Grat. 602 (Va. 1873).
[233] See 18 U.S.C. Sec. 243.

with the intent of the framers, so that its meaning remain fixed, than that any temporary good may come from expanding or narrowing its meaning according to the shifting tides of public opinion, because without rigid adherence to original understanding, the rights of none are safe.[34a]

De Facto and De Jure School Segregation: Some Reflected Light on the Fourteenth Amendment From the Civil Rights Act of 1875.

(By Alfred Avins)

1. INTRODUCTION

More than ten years after *Brown* v. *Board of Education*[1] race relations and schools are still very much in the news. The continuing number of cases on de facto and de jure school segregation[2] has continued public interest in this area. A review of the original understanding of the framers of the Fourteenth Amendment as applied to school segregation is clearly appropriate at this time.

Ten years ago, an article reviewing the original intent as reflected in the debates on the Fourteenth Amendment itself concluded that direct light on the subject was quite scanty.[3] However, there is abundant reflected light from the debates on the proposed school clause of the bill which ultimately became the Civil Rights Act of 1875.[4] The fact that the school clause was ultimately stricken from the bill has no doubt discouraged research in this area. Yet the debates thereon are illuminating for the reflected light they cast on the intent of the Fourteenth Amendment as it relates to schools. This article will analyze that debate.

2. SUMNER AND THE AMNESTY BILL AMENDMENT

On May 13, 1870, Senator Charles Sumner, the ultra-equalitarian Radical Republican from Massachusetts, introduced in the Senate a bill to supplement the Civil Rights Act of 1866.[5] The first section of this bill covered a variety of matters, including common carrier, inns, places of amusement, churches, cemeteries, and benevolent institutions. In pertinent part, it read as follows:

"That all citizens of the United States, without distinction of race, color or previous condition of servitude, are entitled to the equal and impartial enjoyment of any accommodation, advantage, facility, or privilege furnished . . . by trustees, commissioners, superintendents, teachers, or other officers of common schools and other public institutions of learning, the same being supported or authorized by law . . . and this right shall not be denied or abridged on any pretense of race, color, or previous condition of servitude."[6]

The bill died after being sent to the Senate Judiciary Committee and reported adversely by its chairman, Senator Lyman Trumbull of Illinois, for the committee.[7] In the next session, Sumner once again introduced his bill,[8] and once more it was referred to the Judiciary Committee, from which Trumbull reported it adversely, and again it died.[9] In both cases, the adverse report, although not written, was unanimous. Some members thought that Sumner's bill was unconstitutional, and others thought that it was unnecessary.[10] For a third time, in the First Session of the Forty-Second Congress, Sumner introduced his bill. Again no other senator evinced much interest, and again the bill expired of its own accord.[11]

In the face of these rebuffs, Sumner moved, in the next session of Congress, on December 20, 1871, to tack his proposal on as a rider to the amnesty bill, a pro-

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[34a] See Avins, *Gray* v. *Sanders—A Constitutional Footnote*, 26 Ala. Law. 82 (1965).
[1] 347 U.S. 483 (1954).
[2] Many recent cases and articles are referred to in Dowell v. School Bd. of Oklahoma City, 244 F. Supp. 971 (W.D. Okla. 1965).
[3] Bickel, *The Original Understanding and the Segregation Decision*, 69 Raw. L. Rev. 1, 56–59 (1955).
[4] 18 Stat. 335 (1875).
[5] 14 Stat. 27 (1866).
[6] Cong. Globe 41st Cong., 2d Sess. 3434 (1870). See also Cong. Globe 42nd Cong., 2d Sess. 244, 821 (1872) (hereinafter referred to as Globe 42/2).
[7] Cong. Globe, 41st Cong., 2d Sess. 3814 (1870). See also Globe 42/2, 821.
[8] Cong. Globe, 41st Cong., 3rd Sess. 616 (1871).
[9] *Id.* at 1263. See also Globe, 42/2, 822.
[10] Globe, 42/2, 493, 731.
[11] Cong. Globe, 42d Cong., 1st Sess. 21 (1871). See also Globe, 42/2, 822.

posal authorized by the third section of the Fourteenth Amendment to lift the remaining political disabilities imposed by that section on many prominent confederates.[12]

When Sumner declared that his bill was designed to secure "equal rights," Senator Joshua Hill, a Georgia Republican, arose to deny this. He declared: "Nor do I hold that if you have public schools, and you give all the advantages of education to one class as you do to another, but keep them separate and apart, there is any denial of a civil right in that."[13]

Sumner denied that separation was equality, and maintained that both races were forced into inequality by being separated. He asserted that "equality is where all are alike. A substitute can never take the place of equality." Although discussion was principally centered on railroads, Sumner also applied the rule to schools. He observed:

"Show me, therefore, a legal institution, anything created or regulated by law, and I show you what must be opened equally to all without distinction of color. . . . notoriously, schools are public institutions created and maintained by law; and now I simply insist that in the enjoyment of those institutions there shall be no exclusion on account of color."[14]

Sumner then started reading letters from Negroes. One of them suggested that "In our public schools is the place to commence breaking down caste."[15] A resident of West Virginia protested that the local insane asylum would not accept her son, but Senator Arthur I. Boreman, a West Virginian Republican, replied that this was due to overcrowding and not racial discrimination.[16] Ultimately, Sumner's bill was ruled out of order.

The next day, Sumner again moved his amendment in the Committee of the Whole.[17] Debate centered around contentions that Sumner's amendment would destroy any chance for the passage of the amnesty bill.[18] Sumner modified the school clause to include those "being supported by moneys derived from general taxation." A vote was then taken, and Sumner's proposal lost by 30 to 29.[19]

Sumner renewed his amendment in the whole Senate.[20] When Congress returned from its Christmas holiday, he made a long speech urging his amendment on January 15, 1872. He first protested that "among us little children are turned away and forbidden at the door of the common school, because of the skin."[21] He also declared that "Equality in all institutions created or regulated by law, is * * * (not) a question of society," and therefore "no question of social equality" exists.[22]

Sumner decried separate schools and institutions of learning and science. He declared:

"It is easy to see that the separate school founded on an odious discrimination and sometimes offered as an equivalent for the common school, is an ill-disguised violation of the principle of Equality, while as a pretended equivalent it is an utter failure. * * *

"A slight illustration will show how it fails, and here I mention an incident occurring in Washington, but which must repeat itself where ever separation is attempted. Colored children, living near what is called the common school, are driven from its doors, and compelled to walk a considerable distance, often troublesome and in certain conditions of the weather difficult, to attend the separate school. One of these children has suffered from this exposure, and I have myself witnessed the emotion of the parent. This could not have occurred had the child been received at the common school in the neighborhood. Now, it is idle to assert that children compelled to this exceptional journeying to and fro, are in the enjoyment of equal rights. The superadded pedestrianism and its attendant discomfort furnish the measure of inequality in one of its forms,

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[12] Globe 42/2, 237, 240.
The political machinations over amnesty are described in Kelly, *The Congressional Controversy over School Segregation*, 64 Amer. Hist. Rev. 537, 550–2 (1959).
[13] Globe 42/2, 241.
[14] Globe 42/2, 242.
[15] Globe 42/2, 244.
[16] Globe 42/2, 245.
[17] Globe 42/2, 263.
[18] Globe 42/2, 272.
[19] Globe 42/2, 274.
[20] Globe 42/2, 278.
[21] Globe 42/2, 381.
[22] Globe 42/2, 382.

increased by the weakness or ill health of the child. What must be the feelings of a colored father or mother daily witnessing this sacrifice to the demon of Caste?

"* * * The indignity offered to the colored child is worse than any compulsory exposure, and here not only the child suffers, but the race to which he belongs is blasted and the whole community is hardened in wrong.

"The separate school wants the first requisite of the common school, inasmuch as it is not equally open to all; and since this is inconsistent with the declared rule of republican institutions, such a school is not republican in character. Therefore it is not a preparation for the duties of life. The child is not trained in the way he should go; for he is trained under the ban of inequality. How can he grow up to the stature of equal citizenship? He is pinched and dwarfed while the stigma of color is stamped upon him. This is plain oppression, which you, sir, would feel keenly were it directed against you or your child. * * *

"Nor is separation without evil to the whites. The prejudice of color is nursed when it should be stifled . . . the school itself must practice the lesson (of equality). Children learn by example more than by precept. How precious the example which teaches that all are equal in rights. But this can be only where all comingle in the common school as in common citizenship. . . . There should be no separate school. It is not enough that all should be taught alike; they must all be taught together. . . . nor can they receive equal quantities of knowledge in the same way, except at the common school.

". . . But even where a separate school is planted it is inferior in character. No matter what the temporary disposition, the separate school will not flourish as the common school. . . . That the two must differ is seen at once, and that this difference is adverse to the colored child is equally apparent. For him there is no assurance of education except in the common school, where he will be under the safeguard of all. White parents will take care not only that the common school is not neglected, but that its teachers and means of instruction are the best possible, and the colored child will have the benefit of this watchfulness. This decisive consideration completes the irresistible argument for the common school as the equal parent of all without distinction of color."[23]

Sumner analogized other institutions of learning or science, churches and cemeteries, "public in character and organized by law," to schools. He declared that separation would be insulting to Negroes.[24] He also scorned two Ohio decisions which held that a mulatto child would be entitled to go to school only if he had a sufficient amount of white blood in him to be generally recognized as white.[25] Sumner concluded with an extensive peroration on the Declaration of Independence and color prejudice. He reasoned that since the original Constitution did not mention color, "Equality is the supreme law of the land, 'and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.'" This he derived from "the original text of the Constitution, in the presence of which you might as well undertake to make a king as to degrade a fellow-citizen on account of his skin."[26] Not once in his lengthy discourse did Sumner mention the Fourteenth Amendment.

Two days later, Sumner was again engaged in advocating his bill by reading letters from Negroes and others supporting it. One letter from a school controller Reading, Pennsylvania, stated that the colored school was situated away from the populated part of the city, and their children had to walk several miles through inclement winter weather to go to school. The controller stated that he had ordered four colored children admitted to a neighborhood white school, but the school board threatened him with impeachment, and return of the colored children to their school. Sumner declared that this letter was evidence that separate schools were not equivalent, and placed a hardship on Negroes.[27] Likewise an article was read which described the burning of colored school houses in Texas. Sumner added: "A separate school becomes at once an indignity to the

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[23] Globe 42/2, 384. Sumner also stated:
"There can be no substitute for equality; nothing but itself. Even if accommodations are the same, as notoriously they are not, there is no Equality. In the process of substitution the vital elixir exhales and escapes." *Id.* at 383.
[24] Globe 42/2, 384.
[25] Globe 42/2, 385, discussing Lane v. Baker, 12 Ohio Rep. 237 (1843) and Camp v. Board of Education, 9 Ohio St. 406 (1859).
[26] Globe 42/2, 385.
[27] Globe 42/2, 432.

race, and also a mark and target for the arrows of their enemies." [28] He also read a letter from a Negro lawyer who was a professor at Howard University, which stated that no matter how good the educational facilities were, a Negro could not be properly educated "if he is not made to feel in the common school, the academy, the college, and the professional school, that his manhood * * * are recognized and respected." [29] Sumner read yet another resolution demanding equal treatment in public schools and other places of learning drawn up by professors and students at Howard University, which denied that this had any relation to social equality. He declared that the "separate school has for its badge inequality," and urged that this was contrary "to the promises of the Declaration of Independence." Sumner concluded by reading with approval from a report from the trustees of the colored schools in the District of Columbia, as follows:

"It is our judgment that the best interests of the colored people of this capital, and not theirs alone, but those of all classes, require the abrogation of all laws and institutions creating or tending to perpetuate distinctions based on color, and the enactment in their stead of such provisions as shall secure equal privilege to all classes of citizens. The laws creating the present system of separate schools for colored children in this District were enacted as a temporary expedient to meet a condition of things which has now passed away. That they recognize and tend to perpetuate a cruel, unreasonable, and un-Christian prejudice, which has been and is the source of untold wrong and injustice to that class of the community which we represent, is ample reason for their modification. The experience of this community for the last few years has fully demonstrated that the association of different races in their daily occupations and civic duties is as consistent with the general convenience as it is with justice. * * * Yet while the fathers may sit together * * * the children are required by law to be educated apart. We see neither reason nor justice in this discrimination. * * *

"Children, naturally, are not affected by this prejudice of race or color. To educate them in separate schools tends to beget and intensify it in their young minds, and so to perpetuate it to future generations. If it is the intention of the United States that these children shall become citizens in fact, equal before the law with all others, why train them to recognize these unjust and impolitic distinctions? To do so is not only contrary to reason, but also to the injunction of Scripture, which says, 'Train up a child in the way he should go, and when he is old he will not depart from it.'" [30]

Senator Frederick T. Frelinghuysen, a New Jersey Republican lawyer and a former Attorney-General of that state, next arose to suggest that many colored people had saved money and purchased churches, schools, and colleges for their use. He objected that Sumner's bill might allow the more numerous white population "to wrest this property from the colored people." On the other hand, Frelinghuysen noted that Sumner could not "make the amendment I propose without falling into the absurdity of discriminating against whites while attempting to abolish the distinction of races." Frelinghuysen therefore suggested the following exemption to "perpetuate to the colored people their own institution":

"*Provided*, That churches, schools, cemeteries, and institutions of learning established exclusively for either the white or the colored race, shall not be taken from the control of those who established them, but shall remain devoted to their use." [31]

Several days later, Sumner added the substance of this proviso to his bill, namely:

"But churches, schools, cemeteries, and institutions of learning established exclusively for white or colored persons, and maintained respectively by the contributions of such persons, shall remain according to the terms of the original establishment." [32]

When Senator Allen G. Thurman, an Ohio Democrat, and a former chief justice of the state supreme court, declared that the whole bill was unconstitutional, Senator James W. Nye, a Nevada Republican lawyer, belittled these objections. To this Thurman replied that "I am not accustomed to attempt

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[28] Globe 42/2, 433.
[29] *Ibid.*
[30] Globe 42/2, 434.
[31] Globe 42/2, 435.
[32] Globe 42/2, 487. The senators may have had Guard College in Philadelphia in mind. For an extensive account of the litigation concerning the Guard will and Guard College, see In re Guard's Estate, 386 Pa. 548, 127 A. 2d 287 (1956).

impossibilities . . . and therefore I would never attempt to make the Senator from Nevada understand a constitutional argument. (Laughter)"[33]

On January 25, 1872, Sumner's position received a grievous blow from an erstwhile ally, Senator Lot M. Morrill of Maine, a Radical Republican lawyer who had played a prominent part in anti-slavery measures during the Civil War,[34] and who had voted in favor of the Fourteenth Amendment in the Senate.[35] Morrill condemned the whole proposal as being in excess of Congress' power under the Fourteenth Amendment to enact. Averting to the school clause, Morrill declared:

"Sir, is it a right of the Government of the United States to take the direction of the education of the people? . . . But can they . . . (take) the direction of the common schools of the States? That is the proposition. That is invading a province, I repeat, which lies outside the domain of this Government. That is invading a province which is within that domain which is provided for in the Constituton of the United States, when it says that the powers not herein delegated are reserved to the people or to the States. That is a province which you cannot invade."[36]

Senator Eli Saulsbury, a Delaware Democrat, also attacked the bill, saying:

"If a man . . . of his own motion sends his children to the same school to be educated in the same class, . . . then he chooses social equality with negroes for himself and his children . . . But, if, on the other hand, he is compelled to . . . send his children to the same school, then it is enforced social equality. . . ."[37]

Saulsbury condemned compulsory school integration, and pointed out:

"the Senator from Massachusetts proposes to compel the white people of the country, who are dependent upon common schools for the education of their children, to send them there to associate with colored children, or to keep them at home without the advantages of acquiring an education.

"The rich man is not dependent upon common schools for the education of his children; even men in moderate circumstances may be able to send their children to select schools or colleges; but the poor man who labors from day to day for the maintenance of his family, with scarcely a dollar to spare for any other purpose, must educate his children at the common schools or they must go without an education. It is that class of men against whom this legislation is directed. The children of the poor men of the country must be educated with Negroes, while the children of the rich are to be placed in schools of a higher grade."[38]

Saulsbury then declared that any of the Senators voting with Sumner would not send his child to a mixed school in the South where there were a large number of Negroes. He pointed out that poor whites had just as much a desire to educate their children as did rich ones, and that they ought not to be deprived of the ability to obtain a segregated educated for their children because of lack of funds. He predicted that southern and border-state whites would boycott the mixed schools and that the school system would be destroyed there.[39]

Sumner could afford to ignore Saulsbury's protests, but Morrill's thrust, if unrebutted, might change votes in a closely divided Senate. Sumner's reply to Morrill's constitutional challenge was characteristic. He read more letters from Negroes asking that the bill be passed and complaining about discrimination.[40] Ultimately when Sumner came to constitutionality, he declared:

"the Constitution is full of power; it is overrunning with power. I find it not in one place or in two places or three places, but I find it almost everywhere, from the preamble to the last line of the last amendment."[41]

Sumner urged Morrill to "read between the lines" and to interpret the Constitution by the Declaration of Independence. He rested in addition on the Thirteenth Amendment. The Fourteenth Amendment was thro . . in as an afterthought

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[33] Globe 42/2, 495. See also *id.* at 530–1.
[34] Avins, *Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Anti-Discrimination Legislation*, 49 Corn. L. Q. 288, 233 (1964).
[35] Cong. Globe, 39th Cong. 1st Sess. 3042 (1866).
[36] Globe 42/2, App. 4.
[37] Globe 42/2, App. 9. See also Globe 42/2, 913: "the Federal Government shall, through United States courts, coerce social equality between the races in public schools. . . ."
[38] Globe 42/2, App. 10.
[39] Globe 42/2, App. 10–11.
[40] Globe 42/2, 726–7.
[41] Globe 42/2, 727.

because Sumner was "profoundly convinced that the conclusion founded on the thirteenth amendment was unanswerable, so as to make further discussion surplusage." [42] Sumner concluded by reading a constitutional rebuttal to Morrill in a letter written by a Negro whose analysis was as imprecise as Sumner's own thinking, and by threatening the Republicans with a loss of colored votes at the next election.[43]

Morrill was offended by the threat of withdrawal of colored votes, and unimpressed by Sumner's constitutional rebuttal. He ridiculed the arguments based on the Declaration of Independence and the Thirteenth Amendment. But Sumner stuck to the Declaration as a source of authority,[44] even when this theory was once again derided by Senator Matthew H. Carpenter, a Wisconsin Republican lawyer.[45]

Under questioning by Thurman, Carpenter supported the bill in respect to public schools. He said:

"I have no doubt of the power of this Government under the fourteenth amendment . . . to say that a colored man shall have his right in the common school; . . . The distinction seems to me to be broad and clear and well-founded between those voluntary institutions, whether incorporated or not, which we ought not to interfere with, and those great institutions which are supported by law and maintained by general taxation. . . . Now, to say that the children of one class of citizens shall not have the benefit of a common school supported at the public expense by general taxation . . . is a thing which I never will countenance or give the slightest support to." [46]

Thurman answered that this was not the question, that no one suggested that colored children be excluded from school. He said that the issue was whether the federal government could proscribe state regulation and require integrated schools. Carpenter replied that the bill did not interfere with state power to regulate schools except in the one instance authorized by the Constitution, namely, to prevent exclusion of colored children from school.[47]

On February 5, Carpenter proposed an amendment designed to limit the bill to schools maintained at public expense or endowed for public use,[48] and not merely those incorporated by state law.[49] The next day, Senator John Sherman, an Ohio Republican lawyer who had voted for the Fourteenth Amendment, defended the constitutionality of Sumner's bill, inter alia, to give to Negroes "the right to participate in your school fund, which is collected alike of black and white. . . ." [50] Sherman pointed to the Privileges and Immunities Clause as the basis for Congress' power, and then said that one of the privileges was the right to equal protection of the law. He confused the subject even more when he came to the school clause, saying:

"It is the privilege of every person born in this country, of every inhabitant of the country whether born here or not, of a certain age, to attend our public schools which by law are set aside for the public benefit. Boys and girls go to the schools. It is the privilege of all, and declared to be so. All contribute to the taxes for their support; all are benefited by the education given to the rising generation; and therefore all are entitled to equal privileges in the public schools." [51]

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[42] Globe 42/2, 728.
[43] Globe 42-2, 729.
[44] Globe 42/2, 73[illegible].
[45] Globe 42/2, 761. See also *id.* at 823–7.
[46] Globe 42/2, 763.
[47] *Ibid.* But see *id.* at 819: "You propose . . . to put the children together in the schools."
[48] Globe 42/2, 818. The following colloquy occurred with Senator John Scott, a Pennsylvania Republican lawyer:
"Mr. SCOTT. . . . It applies to schools or colleges which are supported by endowment for public use. Is the language such as to make it applicable to schools and colleges which have been endowed by private benefactions for the use of the public of any particular class that may be enumerated?
"Mr. CARPENTER. That is the intention of it, and I think it does. If the endowment is for public use, then the public are entitled to the benefit of it.
"Mr. SCOTT. Do I understand, then, that the proposed substitute would control the intention of the benefactor, if he, in making the endowment, has made it applicable only to certain classes and conditions?
"Mr. CARPENTER. No, sir, I should not understand that to be an endowment for a public use, but for a particular and specified use; and this would not override it."
[49] Globe 42/2, 843. See also Globe 42/2, App. 28.
[50] *Ibid.*
[51] Globe 42/2, 844.

Considering the fact that Sherman did not limit his discussion to citizens, and also considering the fact that the Privileges and Immunities Clause is limited not only to privileges of citizens, but privileges of national citizenship, it is clear that Sherman was talking in very imprecise terms about the Fourteenth Amendment.

Sherman's colleague, Thurman, then arose. After identifying the privileges and immunities protected by the Fourteenth Amendment as those found in the original Constitution and the Bill of Rights, Thurman declared that no "such right guaranteed to a citizen (existed) as that he shall go into a common school in company with every other child that goes to that common school." Senator George F. Edmunds, a Republican lawyer from Vermont, who voted for the Fourteenth Amendment, replied that the Equal Protection Clause of the Fourtenth Amendment is violated "when the law of the State . . . declares that a man of one color of hair or of skin may send his children, and the man of another color of hair may not send his."[52]

The following then ensued:

"Mr. THURMOND. . . . The substance of the Senator's position is simply this: that although a State may give to every child in it equal advantages of education, it shall have no power of regulation over its schools. That is what it comes to.

"Mr. EDMUNDS. Oh no.

"Mr. THURMAN. It does; let the Senator hear me and he will see. Let me turn the argument of the Senator. Is not a female child a citizen? Is she not entitled to equal rights? Why, then, do you allow your school directors to provide a school for her separate from a school for the male? Why do you not force them into the same school? Why do you allow the States to separate the sexes in the schools if every school that is set up and supported by public money is necessarily thrown open to every citizen of the United States? Will the Senator say that all the laws of the States providing for a division of the schools by sexes are unconstitutional and infringe the fourteenth amendment? He cannot say that; and if he cannot say that, his argument falls to the ground. Does not the separation exist by virtue of the power of regulation, which belongs to the States? All that can be claimed is this, that in regard to schools supported by the public money, that money shall be so applied as that each citizen shall have an equal advantage from its application. Therefore, preserving that equality, the State in the exercise of its power of regulation may apply a part it to support a school for boys, a part of it to support a school for girls, a part of it to support a school for white children, a part of it to support a school for colored children. That is not denying them the equal protection of the laws in any sense whatsoever. In no wise is it denying them the equal protection of the laws. In no sense is it denying their equality before the law."[53]

Thurman also said that the bill denies people "the liberty to choose their own associates . . . in the school," and that "if the supreme power in a State, in the exercise of a wise judgment and discretion, and for the interest of education and of its youth, sees fit to make a regulation that white children shall be in one school and colored children in another, I am not in favor of depriving them of that right, of denying them that liberty." Thurman endorsed Saulsbury's argument that the bill was actually aimed at poor whites. He noted that even in Ohio, which had separate Negro and white schools, supported more generously than almost any other state in the union, rich men sent their children to private schools. Thurman observed:

"When, therefore, you shall force colored children into the common school, you will not force them into an association with the children of the rich, (the children of the rich will not be there,) but you will force them into social intercourse with the children of the poor whites; and the tendency of your law, instead of being to elevate the colored race to the level of the white, will be to pull down the poor white child to the level of the black. . . . Instead of elevating the negro, it is to depress the white. The rich man's child goes to some seminary of learning supported by wealth and the contributions of the rich; he associates with no colored child. . . . but the poor man's child must have that social equality thrust upon him, or he must go without education. . . . I say from experience, first, that there is no necessity for this admixture in the schools; and, in the second place, that the worst enemy of the common-school system could not

[52] Globe 42/2, App. 26.
[53] Globe 42/2, App. 26–27.

devise a worse thrust at it than this very amendment of the Senator from Massachusetts."[54]

Senator Orris S. Ferry, a Connecticut Republican lawyer, attacked the school clause on other grounds. He stated that the bill did not affect his state, which always had integrated schools, but he opposed any federal interference in state control of its schools.[55] He declared that the legislation as a whole went beyond the Equal Protection Clause of the Fourteenth Amendment.[56] Senator James K. Kelly, an Oregon Democratic lawyer, added that "Most of the States have schools for colored children and separate schools for white children."[57]

Senator George Vickers, a Maryland Democratic lawyer, also spoke against the constitutionality of the school clause. He said it was not a privilege or immunity of national citizenship to attend school. He asked: "because he has a right to study a profession at his own expense, pursue an avocation at his own cost, does that give him the right to go into your public schools or into any of your schools and acquire information and education at the expense of the State or of other people?" Vickers said that Negroes paid very little school taxes, and that mixed schools would destroy the usefulness of schools. He reiterated Thurman's argument that public school integration would affect only poor whites, and that if the federal government had the power to interfere with a regulation requiring racial segregation, it could interfere with all other regulations. Vickers concluded:

"If you can legislate for the purpose of obtaining an education for the negro by the side of the white, you can do so also for the purpose of securing an equal proportion of the teachers, because it may be said that colored persons have not equal advantages unless they are taught by persons of their own hue. And if you can do it in reference to teachers, you can do it in reference to books, you may do it in relation to the subjects to be taught. It is, I repeat, a question of power. Once invade the sanctuary of the school, and you can assume entire control over the system and all its details."[58]

Vickers also declared that the states could better run the schools than the federal government since they were closer to the people.[59]

Senator Lyman Trumbull the veteran Illinois lawyer and legislator who, as Republican Chairman of the Senate Judiciary Committee, had shepherded to passage the Civil Rights Act of 1866, the forerunner of the Equal Protection Clause of the Fourteenth Amendment, and had frequently acted as spokesman and leader of the Senate Republicans in the Thirty-Ninth Congress, spoke next. He confined civil rights to those enumerated in the 1866 statute, and defended segregation by railroads. He opposed the whole of Sumner's amendment.[60] At length, a vote was taken on Sumner's rider to the amnesty bill, and it resulted in a tie, 28 to 28. All the Democrats, the liberal Republicans and almost half of the southern Republicans, opposed the amendment. The Radicals and half of the southern Republicans were with him. The vice-president then broke the tie in Sumner's favor.[61]

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[54] Globe 42/2, App. 27.

[55] Globe 42/2, 892. Ferry said: "It is because this amendment of the Senator from Massachusetts exerts Federal authority over the schools and the school officers of the States that the provision which the Senator has placed in it is most objectionable . . . if you give to the Federal Government power to interfere in the regulation of the schools of the different States upon one subject, I do not see how you are to restrain that power in reference to other topics relating to education; and so we see and hear now continually more and more of efforts made to bring the Federal Government into direct control of the school systems of the States."

[56] Globe 42/2, 893.

[57] Globe 42/2, 894.

[58] Globe 42/2, App. 42, where Vickers also said: "The children of the rich, of the middle classes, of all who have the ability to set up and sustain schools for their children, will not be affected, for they will not submit to the degradation which this amendment proposes; and the necessary result will be that the children of the poor, as dear to their parents as the children of the rich are to them, will be obliged to be educated side by side with the negro and mulatto or be reared in ignorance and vice. The friends of this measure are unwilling that separate schools for the races shall be provided, and 'equality' being their motto, they seem determined to force it upon the community, at the hazard of producing intense feeling and opposition, and the destruction of the school system.

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"Suppose it be thought proper to separate the sexes on the ground that the pupils will progress more rapidly and efficiently, that it will be more to their interest and advantage that this order or arrangement shall obtain; if the principle of this bill is sustained you have the power to change that regulation as well as any other."

[59] Globe 42/2, App. 48.

[60] Globe 42/2, 901.

[61] Globe 42/2, 919.

Senator Henry Wilson, Sumner's Massachusetts Republican colleague, warmly endorsed the combined bill, as "settling the question of equality in the primary schools of the country where so much is to be done to educate the rising generation of the country to forget caste and believe in the equality of our common humanity."[62] But a number of the strongest supporters of amnesty stated they would vote against the combined bill because they regarded Sumner's bill as unconstitutional.[63] Saulsbury also predicted it would break up the Delaware school system.[64] The vote on the combined measure was 33 to 19, less than the necessary two-thirds required to pass the amnesty bill.[65]

On February 19, a bill similar to Sumner's was introduced in the House.[66] Congressman James G. Blair, a Missouri Republican lawyer, attacked the bill as unconstitutional,[67] and particularly excoriated the school clause as one enforcing social equality. He noted that his state had segregated schools, and that since the facilities, books, and instruction was free and equal, Negroes lacked no rights possessed by whites, and the provision "to force Negro social equality upon the white children of the country" was obnoxious. He declared:

"As long as the white children are opposed to having negro children associate with them in our schools I will never force or coerce them to it, especially when the negro children can get the same education in separate schools. Nor would I . . . force the white children upon the negro children contrary to their will.

"The time never was, and I hope never will be, when any man, white or black, or any race or nation of people, will have the legal right to my society or the society of my children. The black and the white man alike, whether under the natural, civil, or common law, have ever had the Heaven-born privilege of choosing their own society, and I hope it may ever continue so."[68]

Blair predicted that white children would be driven to private schools if the schools were integrated, the school system would be abolished, and Negroes would be without education. He said that Negroes were not demanding integrated schools.[69]

Congressman Henry D. McHenry, a Kentucky Democratic lawyer, also decried the bill for "compulsory social equality and association with those whose company is distasteful to him."[70] He observed that since a "rich man can educate his children in private schools, . . . this law will be no great hardship upon him; but the poor man's child must look to the common schools or go without education, and this bill forces that child to sit on the same seat with the negro, and be raised up in fellowship with him."[71] McHenry predicted that the people would abolish the school system rather than submit to integrated schools. He added:

"It would not be right for a State to tax negroes to educate the whites unless they had the privilege of the schools, and in every State where they are so taxed they have that privilege. In my State we do not tax them for school purposes, nor have we undertaken to educate them, and we do not propose to be forced to do so by despotic laws. For many years we had no common-school system at all, and it is only of recent date that our system has become efficient, and after we have paid the enormous taxes imposed on us . . . (to) educate the white children, it is unreasonable to ask us to tax ourselves further to educate the negroes who pay no tax, comparatively speaking."[72]

Somewhat later, Congressman James C. Harper, a North Carolina Democrat, condemned the school clause. He read from a Virginia Republican newspaper predicting that integration would destroy the school system. He decried the harsh penalties against school officials,[73] and predicted: "Nor will the northern States be exempt from similar afflictions." He said that Negroes would try to force themselves into northern schools and colleges. He concluded that not even Negroes wanted mixed schools in the South, and that compulsory integra-

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[62] Globe 42/2, 921.
[63] Globe 42/2, 926–8.
[64] Globe 42/2, 928.
[65] Globe 42/2, 928–9.
[66] Globe 42/2, 1116.
[67] Globe 42/2, App. 142.
[68] Globe 42/2, App. 143. He also said: "It is not depriving the colored children of any legal right by sending them to separate schools. . . ." *Id.* at 144.
[69] Globe 42/2, App. 143–4. See also Globe 42/2, App. 18.
[70] Globe 42/2, App. 217.
[71] Globe 42/2, App. 218.
[72] *Ibid.*
[73] Globe 42/2, App. 370.

tion would destroy the school system.[74] Congressman John M. Rice, a Kentucky Democratic lawyer, also predicted that the school clause would destroy the school system in many states, and that people would use private schools.[75]

On May 4, 1872, Senator Thomas F. Bayard, a Democratic lawyer from Delaware, made a lengthy attack on proposed school integration in the District of Columbia. He first noted that colored schools in the District had been generously provided for out of taxes largely raised from whites, and that if colored schools were inferior with such a generous provision for their support, it was but "an admission . . . (of colored) inferiority, an absolute inferiority, a confession of some great defects which must exist by the law of nature, and against which these puny efforts of human legislation will prove utterly and absurdly fruitless."[76] After detailing the money spent on accommodations for colored schools, Bayard went on to urge the Senate to take into consideration the prejudices of the people. He stated that there was a division of opinion among the Negroes about school integration, and that the whites were overwhelmingly opposed to it. He added that the senators who intend to vote for this measure would not send their own children to integrated schools, although they intended to consign the children of poor whites to such schools.[77] Bayard also predicted that the rich would withdraw their children to private schools, and that school integration would drive white children out of the public schools of the District and would discourage skilled white workers from moving into the District. He closed with an attack on Sumner's proposal as one calculated to result in miscegenation by breaking down race prejudice in children while they were still young.[78]

Three days later, there was some further debate on Sumner's bill to desegregate schools in the District. Trumbull took a dim view of it, while Sumner and Edmunds strongly urged it.[79] Ferry urged a local referendum on school desegregation, calling Sumner's bill "a tyrannical rule from without."[80]

On May 8, the Senate returned to the amnesty question,[81] and Sumner immediately moved to annex his civil rights bill to the amnesty bill which the House had passed.[82] During the ensuing debate and parliamentary manuevering, Trumbull criticized his fellow Republicans with some warmth for saddling the amnesty bill with Sumner's measure. The following colloquy then occurred:

"Mr. EDMUND. How about the right to go to a public school?

"Mr. TRUMBULL. The right to go to school is not a civil right and never was.

"Mr. EDMUNDS. What kind of a right is it?

Mr. TRUMBULL. It is not a right.

"Mr. EDMUNDS. What is it?

"Mr. TRUMBULL. It is a privilege that you may have to go to school. Does the Senator from Vermont mean to force everybody to go to school?

"Mr. EDMUND. No, but I mean to force everybody to let anybody go to school who is a citizen of this country who wants to go.

"Mr. TRUMBULL. Well, I think you cannot do any such thing. . . . I deny his right as a member of Congress to force anybody into a school or to force anybody to take anybody in to a school. . . . The Senator . . . is not speaking of the District of Columbia, he is speaking of a bill for the country."[83]

Ferry then chimed in to say that Negroes were not denied any rights in the District of Columbia, and that it was "precisely the same for blacks as for whites in this District." Trumbull re-echoed this point and thanked Ferry

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[74] Globe 42/2, App. 371.
[75] Globe 42/2, App. 597–8. See also *id.* at 883.
[76] Globe 42/2, App. 353.
[77] Globe 42/2, App. 353–5. He said at 355:

"Senators, there is not a Senator on this floor who expects his children, . . . ever to go to those schools and to be subjected to this contact, who will vote for this bill; not one; not one. They may condemn the children of their brother white men, whose poverty compels them to send their children to public schools, they may seek to compel them to this contact, but they will be very careful that they are not personally the sharers in such results.

"No, sir, no blue-eyed, fair-haired child of any Senator on this floor, no little grandchild at that time of life when children are so open to mere impression, and especially to evil impression, will ever be permitted to suffer by this proposed contact. They may condemn others who are poorer, but they will be careful to save their own."

[78] Globe 42/2, App. 355–7.
[79] Globe 42/2, 3123.
[80] Globe 42/2, 3124–5.
[81] Globe 42/2, 3179.
[82] Globe 42/2, 3181.
[83] Globe 42/2, 3189.

for his remark, and pointed out "that there is no discrimination" in the District schools. Ferry added:

"The same facilities, the same advantages, the same opportunities of education are given to the white child and the black child in the District of Columbia to-day. The only difference is that they do not receive those equal facilities and advantages in the same school-room; and you might as well deny that equal facilities and equal advantages exist in the northern States to the two sexes where the sexes are by the action of the authorities taught in different school-rooms or school buildings, as to deny it here."[84]

Edmunds asked Ferry whether colored children could go to as high a grade of school as white children could, and the latter answered in the affirmative. Edmunds then asserted that it was no more equality before the law to segregate students by law than it would be to require Negroes to use one street and whites to use another street. Ferry then asked Edmunds whether segregation in schools by sex in New England was a denial of right, and the latter replied that he did not know, but analogized racial segregation to segregation by color of hair or nativity, which he declared was a denial of right. Ferry then asserted "that it is not a denial of equality of right" to "have different rooms for the education of the races."[85]

Trumbull then deiterated that "going to school was not a civil right, and that so far as I knew the colored people of this country had all the civil rights that the whites had, and is a misnomner to call this a civil rights bill." Trumbull declared that Edmund's "position about the schools was indefensible . . . ." He added:

"I do say, in reply to the Senator from Vermont, that the right to go to school is not a civil right, and that the schools are regulated all over the land, and must be, for the advancement of education. We have graded schools. Boys of one class are kept in one room; of another class in another; the girls are confined to one room and the boys to another; but this is not a denial of civil rights to either. If the facilities for education are the same nobody has a right to complain. This which the Senator speaks of as a civil right is no civil right at all."[86]

Senator Oliver P. Horton, an Indiana Republican lawyer, then asked Trumbull what kind of a right it was to go to school if not a civil right. Trumbull replied that it was "not any right at all" but a matter "to be regulated by the localities." Trumbull said that the states could abolish schools. He repeated that civil rights were only those protected by the Civil Rights Act of 1866.[87]

Morton then replied that Summer's amendment did not require free schools to be maintained by the states, but where such schools were "supported by taxes levied upon everybody without regard to color . . . there shall be an equal right to participate in the benefit of those schools created by common taxation. That is the point . . ." Morton added: "if a right to participate in these schools is to be governed by color or any other distinction, I say that is a fraud upon those who pay taxes." Morton concluded that it made no difference whether the right to go to school was deemed a civil right or not, but where taxes were raised from all persons for schools, "there is a civil right that there shall be equal participation in those schools."[88]

Senator John Sherman, the Ohio Republican lawyer who had voted with Trumbull for the Fourteenth Amendment, reminded the latter that he was author of and leader in the passage of the Civil Rights Act of 1866, and that the Fourteenth Amendment added to Congress' power since then.[89] Sherman pointed to the need to allow Negroes to share equally in school funds, and declared that

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[84] Globe 42/2, 3190.
[85] *Ibid.*
[86] *Ibid.*
[87] Globe 42/2, 3190–1. He said: "We have colleges in the country, and a student who applies there and pays his tuition fees, you may say, has certain rights there; but they are not what I understand to be embraced in the general broad term 'civil rights'" *Id.* at 3191.
[88] Globe 42/2, 3191. The following colloquy then occurred:
"Mr. MORTON. . . . The proposition that I made was that where schools were supported by taxation upon everybody, there must be equal rights to everybody in those schools. . . . Now, the substance of the Senator's position is this, and it needs but to be stated to be understood, and I think universally execrated, that there exists a right to levy a tax upon everybody, white and black, for the support of common schools, and at the same time to deny to everybody an equal right to participate in the benefit of those schools. . . .
"Mr. TRUMBULL. I never made any such statement."
[89] Globe 42/2, 3191–2.

Sumner's bill simply carried out the purposes of the 1866 act.[90] Sherman went on to point out that the bill permitted private schools to discriminate, but only required "that the children of negroes shall have an equal and fair share in the enjoyment of that which is collected by public taxation." Sherman then said:

"The supreme court of the State of Ohio have recently passed upon our own law in that State, which does in certain cases provide for separate schools for colored children, and have held it to be constitutional, and I believe they are right. There, in certain cases defined by the law, the colored people may have, when they are of a certain number, separate schools, and provision is made in such cases as that for a distribution *pro rata* of the funds. In ordinary cases, by the common consent and custom of every one there since the war was over, the whites and the blacks go to the same schools."[91]

We may pause here to note that Sherman was undoubtedly referring to the decision in *State* v. *McCann*[92] of the previous day. He had been a member of the Ohio bar for almost 30 years at this time, and had been in Congress for a total of 17 years. He was a regular, if not a Radical Republican. He had voted with the majority for all of its reconstruction measures, and even voted to impeach and remove President Andrew Johnson. He had participated actively in the debates on the Fourteenth Amendment, and voted for it when on its passage. He had just been speaking about the constitutionality of Sumner's bill under the First Section of the Fourteenth Amendment and defending it from Trumbull's attacks. Hence, when this veteran lawyer and legislator affirmed the correctness of the *McCann* decision, it adds the strongest possible weight to the case. In other words, Sherman affirmed the constitutionality of having local school boards set up segregated schools or desegregated schools, under authority of law, in accordance with local sentiment in the area.

Sherman reinforced this position by pointing out that in many Ohio communities there were integrated schools and that no problems resulted, as the white and Negro children got along well together. He said that in "northern States . . . not the social distinction but the distinction of rights" soon disappears. He added:

"In the southern State my opinion would be that for a time it might be a matter of municipal regulation, it might be a matter of convenience assented to both by whites and blacks to keep them in separate schools."[93]

Senator Arthur I. Boreman, a West Virginia Republican and former state judge, also denied that school segregation violated equal rights.[94] Senator Francis P. Blair, a Missouri Democratic lawyer, likewise advocated separate schools for Negroes.[95] Trumbull once again called Sumner's bill a "social equality bill," just what the Democrats were calling it.[96]

Ferry then moved to amend Sumner's by striking out the school clause. He first advocated local control over the schools.[97] He then noted that the Negro population of the District of Columbia was rapidly increasing, and that if schools there were integrated it would drive the whites out of the District. He referred

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[90] Globe 42/2, 3192. He said that the 1866 act "does not protect them in their right to the enjoyment of money collected from them and from other citizens of the United States for the education of their children, but that discrimination's are made on account of race, color and previous condition of servitude . . . in the right to have one's children educated at the common school."

[91] Globe 42/2, 3193.

[92] 21 Ohio St. 198 (1872).

[93] Globe 42/2, 3193.

[94] Globe 42/2, 3195. He said:

"It is said here we are denying equal rights to the colored and white people in the schools. I deny it. The same provision in regard to schools exists in reference to the white and colored children of the country in most of the States. It is so in my State. It is true that there are separate schools, schools for white children and schools for the colored; but nevertheless the provisions of the school laws from beginning to end apply precisely to the one as they do to the other; and it is just as much a violation of the right of a white child to keep him out of a black school as it is of a black child to keep him out of a white school, if we are narrowed down to such a proposition as that. The time will come, I have no doubt, when these distinctions will pass away in all the States, when school laws will be passed without this question appearing upon the face of those laws; but it is not so now, and for the present I am willing to allow the laws of the State to remain as they are where they provide schools for both classes."

[95] Globe 42/2, 3251. See also *id.* at 3253.

[96] Globe 42/2, 3254.

[97] Globe 42/2, 3257, where he declared: "And hence, when an effort is made directly by Federal legislation to dictate to the local communities what is most expedient as to the management of the particular schools under their care, you are commencing a species of legislation whose principle is in my judgment, fatal to the school system of the country."

to the law of Ohio, which permitted each district to have mixed or separate schools, and read from a newspaper account of the *McCann* decision. He said that the Ohio Supreme Court, a majority of whose members were Republican, had upheld separate schools under the Fourteenth Amendment, and added:

"I believe that that decision of the supreme court of Ohio is good law. There is nothing, then, in the establishment by different communities, as each may think it expedient for itself, of separate schools, in conflict with the fourteenth amendment; and the proposition with respect to schools therefore is simply by legislation by Congress, without any constitutional provision demanding it, acting compulsorily upon all the school districts in the United States."[98]

Ferry's amendment lost by the narrow margin of 26 to 25. Those for his motion included thirteen Democrats, three southern Republicans, and nine other Republicans, two from Connecticut and one each from Illinois, Indiana, Iowa, Nebraska, New York, Pennsylvania, and West Virginia. Trumbull probably cast the most significant affirmative vote. Eight southern Republicans voted in the negative, joined by eighteen northern Republicans. Ten of these had voted for the Fourteenth Amendment as a member of the Senate, and three as a member of the House of Representatives. Probably the most significant vote to retain the school clause was cast by Sherman, who had just affirmed the constitutionality of segregated schools.[99]

Blair then offered the following amendment:

"The people of every city, county or State shall decide for themselves, at an election to be held for that purpose, the question of mixed or separate schools for the white and black people."[100]

Senator James L. Alcorn, a Mississippi Republican lawyer, then spoke in favor of local control over schools. He stated that the legislature of Mississippi, controlled by colored people, have provided for segregated schools, which was satisfactory to both whites and Negroes. He added that separate white and Negro universities were established with equal endowments and concluded that the question had been settled by the legislature and he wanted no more trouble about it. Sumner replied to him by reading from a paper by Frederick Douglass which rejected the right of the people of the District of Columbia to vote on whether schools should be desegregated.[101] Sumner added:

"You are called on to decide whether you will give your sanction to a system of caste which so long as it endures will render your school system a nursery of wrong and injustice, when it ought to be of right. How can you expect the colored child or the white child to grow up to those relations which they are to have together at the ballot-box if you begin by degrading the colored child at the school and by exalting the white child at the school? Train up the child in the way he should go. There are Senators here who would train children in the way they should not go."[102]

Sumner then read from another paper by Douglass, as follows:

"'Throughout the South all the schools should be mixed. . . . Educate the poor white children and the colored children together, let them grow up to know that color makes no difference as to the rights of a man, that both the black man and the white man are at home, that the country is as much the country of one as of the other, . . . Now, in the South the poor white man is taught that he is better than the black man. . . .'"[103]

Blair answered Sumner by upholding the right of local self-government and the right of the people of the states who pay taxes to decide how their schools should be managed. He endorsed Alcorn's argument that Congress should not override state laws. He observed: "the associations of our children are to be dictated by a central oligarchy seated here in Washington." Blair said that most of the school funds were collected from taxes paid by whites, and that the rich people could send their children to private schools, while the poor whites would be deprived of any schooling because the schools would be closed if Sumner's amendment passed. Blair concluded that the school clause was unconstitutional anyway.[104]

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[98] Globe 42/2, 3258.
[99] *Ibid.*
[100] *Ibid.*
[101] *Ibid.* Douglass said: "Why should it (Congress) not abolish the teaching of caste . . . whether the people of the District would have it done or not?"
[102] Globe 42/2, 3259.
[103] *Ibid.*
[104] *Ibid.* Hill of Georgia added that most Negroes were content with separate schools.

Senator Timothy O. Howe, a Radical Republican from Wisconsin, replied to Blair by first agreeing with Sumner's caste argument, and then saying that segregated schools would require a double system of schools, which would be more expensive than a single system. Howe concluded that authority to pass the provision was to be found in one of the three recently ratified amendments, but he did not say which one.[105] Edmunds also arose to answer Blair. He said that if it was proper to segregate children by race it would be proper to segregate native-born children from foreign-born children, children of Catholic parents from those of Protestant parents, children of Methodist parents from those of Congregationalist parents, and children of Democrats from those of Republicans. He emphasized that "if color is a distinction which is fit to be left to the States and the communities to decide upon as the test of rights, then we ought no to interfere." But Edmunds added in reference to religious, nativity, and political segregation:

"the sense of all mankind would cry shame at such a thing, and yet this is precisely the same principle, unles you can maintain that this old notion of race . . . is one in which it is fit, under the constitutional principles of a free country, to base a distinction upon. The notion of sex or age, which the Senator from Connecticut alluded to, has nothing at all to do with the question; that depends upon questions of fitness and decency, as to cleanliness and good order and degree of education, and all that. That is a test which everybody can understand, and which you must leave to the local jurisdiction; but this in a matter of inherent right, unless you adopt the slave doctrine that color and race are reasons for distinction among citizens." [106]

Bayard then arose to denounce the bill as an unconstitutional usurpation of local self-government. Senator Eugene Casserly, a California Democratic lawyer who had once been Corporation Counsel of New York City, made the same assertion. To answer Sumner's argument about caste, Casserly read from the opinion of the Massachusetts Supreme Court in *Roberts* v. *City of Boston*,[107] which he said had first brought Sumner to public notice, and in which the court had rejected Sumner's argument and sustained public school segregation. Senator John P. Stockton, a New Jersey Democratic lawyer, whose expulsion or exclusion from the Senate in 1866 made possible Republican control of the Senate by a two-thirds majority, necesary to override President Andrew Johnson's vetoes and pass the Fourteenth Amendment, contented himself by urging popular referenda and denouncing the bill for violating personal liberty.[108]

A vote was then taken and Blair's amendment lost by 30 to 23. One Pennsylvania Republican changed to the negative from the previous vote, and three previously absent northern Republicans returned to vote with the majority. Three minority Republicans were now absent, but two previously absent Republicans returned to vote with the minority. One of them, Senator William Sprague, of Rhode Island, was a Radical who had voted for the Fourteenth Amendment and to impeach and convict President Andrew Johnson. The votes of Trumbull and Sherman remained unchanged.[109]

Alcorn then warned once again that Sumner's bill would destroy the Mississippi school system, and the Republican Party's majority as well.[110] Trumbull also disapproved of Sumner's bill for "forcing white and colored children into the same schools. . . ." [111] A vote was then taken on annexing the civil rights bill to the amnesty bill, and a 29 to 29 tie resulted. The vice-president then voted in favor of Sumner's amendment.[112]

At the urging of Senator Roscoe Conkling, the property-rights minded New York Republican lawyer, Sumner accepted an amendment and eliminate all private schools merely because they were incorporated, leaving only tax-supported schools or those "authorized by law." Vickers, a Democrat, and Senator John Scott, a Pennsylvania Republican lawyer, suggested eliminating those

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[105] *Ibid.*
[106] Globe 42/2, 3260.
[107] 59 Mass. (5 Cush.) 198, 209–210 (1849).
[108] Globe 42/2, 3261.
[109] Globe 42/2, 3262.
[110] *Ibid.*
[111] Globe 42/2, 3263. Edmunds also declared: "The real trouble is, as evinced by this debate, that the honorable Senator from Illinois does not believe that the right to go to a State school or to a District of Columbia school is a right that belong to a citizen of the United States independent of color." *Id.* at 3264.
[112] Globe 42/2, 3264–5.

"authorized by law." Sumner objected, and Boreman supported him on the ground that all persons were invited to use institutions of learning authorized by law. Sumner added that Harvard College and Amherst College in Massachusetts were not tax-supported, but since they were authorized by law, Sumner wanted to prevent them from discriminating.[113] Thereafter, a second vote on annexing Sumner's bill to the amnesty bill was taken. Again, a 28 to 28 tie resulted, and the vice-president voted in Sumner's favor.[114] But once again, the supporters of the amnesty bill, including Trumbull, who felt that Sumner's bill was unconstitutional, voted against the combined measure, and the vote of 32 yea to 22 nay was less than the requisite two-thirds.[115]

Several days later, Trumbull declared that "I want amnesty so much that I will vote for almost anything that is not unconstitutional to get it." But he added that Sumner's bill "has been misnamed a civil rights bill, proposing to establish social rights which is unconstitutional in its provisions, and which I shall not vote for."[116] Sumner replied to Trumbull by reading a speech by Frederick Douglass saying that Negroes wanted equal school rights but not social equality. Trumbull replied by reading a report of a speech by a Negro professor saying that he wanted social equality.[117]

Sumner then moved to tack his bill on to another piece of legislation, and Boreman moved to strike out the school clause.[118] The latter protested that "here it is proposed to require that all laws in the several States providing for common schools and separating the races shall be nullified; that all shall be allowed to associate together in the same schools." Boreman said that his home State of West Virginia had segregated schools, and that these were as good or better than mixed ones. Sumner answered, urging defeat of Boreman's amendment "to expel caste from the common schools of the country." Ferry in reply ridiculed the argument that segregated facilities denied equality.[119] Thurman re-entered the discussion to say that Sumner had never pointed to any constitutional provision giving Congress power to enact the school clause. He pointed out that in the *McCann* Case the Ohio Supreme Court, composed of five Republican judges, had unanimously upheld the constitutionality of a school segregation law. He concluded that "of its soundness I do not think any good lawyer can doubt for a moment, [and] there is an end of all pretense of constitutional foundation for this bill."[120]

Edmunds next accused University of Georgia officials of refusing to let colored students get the benefit of an agricultural college education under the federal land grant act, and said that Negroes should be entitled to equal rights to obtain a federally-financed education. Hill replied that the university had no time yet to use the fund.[121] Alcorn once again urged that Mississippi had segregated schools, and that the colored university was getting more money than the white university at Oxford (University of Mississippi), while Blair added another dire warning about school closing.[122] Trumbull and Edmunds then got into a dispute as to whether Georgia was giving white students education in a university while Negroes were deprived of such education. Trumbull also reiterated that going to school was not a civil right. He added:

"I think all persons should have the benefit of our appropriation, and I think, too, in regard to money raised for schools by taxation, colored people should have it as well as white people. I have always thought so. I entertain no different views about that. But I do not believe in legislation forcing them into the same schools, or in our undertaking to control how they should go to school by act of Congress. I believe myself that you should not tax the colored people for schools to educate white persons exclusively. I have no such idea as that."[123]

Edmunds replied that if the states could "establish separate schools you can estab-

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[113] Globe 42/2, 3266–7.
[114] Globe 42/2, 3268.
[115] Globe 42/2, 3270.
[116] Globe 42/2, 3361.
[117] Globe 42/2, 3362. Trumbull also called it a "social equality bill" the next day. Globe 3418, 3421.
[118] Globe 42/2, 3421.
[119] Globe 42/2, 3422, Ferry said:
"It is nonsense, sir, to talk of the necessity of educating youth in the same building in order to give them equal facilities, advantages, immunities, rights. What matter whether they be in the same building or in different buildings, so that the educational facilities bestowed upon them are identical?"
[120] Globe 42/2, 3423.
[121] Globe 42/2, 3424.
[122] Globe 42/2, 3425.
[123] Globe 42/2, 3426. See also Saulsbury's remark. *Id.* at 3428.

lish separate courts . . . for colored men so that they should not disturb the pride or the prejudice . . . of white people who choose to attend other courts as suitors." [124]

Carpenter of Wisconsin finally decided to break the deadlock by bringing up an independent civil rights bill during an evening session while Sumner was away from the Senate chamber and while barely a quorum was present.[125] He moved an amendment which eliminated the school clause.[126] Several Republicans objected. One considered Carpenter's amendment "emasculating the bill entirely." Frelinghuysen specifically disapproved of eliminating the school clause. But Senator John A. Logan, an Illinois Republican lawyer, endorsed Carpenter's amendment and argued for elimination of the school clause because "it interfered with State laws." The Carpenter substitute was ultimately adopted by a vote of 22 to 20. The majority included thirteen Democrats, one southern Republican, and eight northern Republicans, including one from California, Illinois, Iowa, Kansas, Maine, Oregon, Pennsylvania, and Wisconsin. Probably the most significant vote to eliminate the school clause was cast by Morrill of Maine. The Carpenter bill was then passed.[127]

The Senate then took up the amnesty provision, and debated it until the next morning, when Sumner arrived. He moved to tack his original bill to the amnesty bill, protesting the "emasculated civil rights bill" [128] adopted the previous night in his absence. He protested that "the spirit of caste will receive new sanction in the education of children." [129] But Sumner's entreaties were in vain. The Senate rejected his amendment by the lop-sided vote of 29 to 13, and went on to pass the amnesty bill by a vote of 38 to 2, with only Sumner and a western Radical voting in the negative.[130]

Sumner's disappointment knew no bounds, and he insisted that the rights of the Negroes had been sacrificed by his colleagues. But they told him that the limited bill "is all that can be accomplished at this session," [131] and his strictures achieved no more than to irk his colleagues.[132] Thus, Sumner's bill died for that session and Congress.[133]

Ferry of Connecticut and Morrill of Maine renewed a general attack on it as being unconstitutional.[134] Debate commenced in the House, where a copy of Sumner's bill had previously been introduced.[135] Congressmen Clarkson N. Potter, a New York Democratic lawyer, and Thomas Whitehead, a Virginia Conservative lawyer and veteran legislator, moved to allow separate accommodations for white persons.[136]

Congressman Benjamin F. Butler, Republican Chairman of the Judiciary Committee, commenced his advocacy of the bill by noting that it gave nobody any rights he did not already have by common law, in which he included the right to go to a school supported at public expense or endowed for public use. He referred specifically to the common law of New England, England, and the United States generally, and said that the object of the bill was to abrogate state laws which discriminated against any class in exercising these rights.[137]

We may pause here to note that Butler's position as to the common law was not accurate. In England, at common law no obligation existed for a parent to give his child an education,[138] and it was not until the twentieth century that it was finally held that a local school authority had a duty to admit children resident in the area.[139] In Canada, the obligation of local school authorities to admit children seems to have been recognized earlier.[140] In Ontario it had been

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[124] Globe 42/2, 3427.
[125] Globe 42/2, 3727.
[126] Globe 42/2, 3780, 3784.
[127] Globe 42/2, 3735.
[128] Globe 42/2, 3736.
[129] Globe 42/2, 3737–8. He added: "I ask the Senate to pet its face against that spirit of caste now prevailing in the common schools. . . ." *Id.* at 3738.
[130] Globe 42/2, 3738.
[131] Globe 42/2, 3739.
[132] Globe 42/2, 3739.
[133] 16 Wall. 36 (1873).
[134] 2 Cong. Rec. 10–11 (43rd Cong. 1st Sess., 1873) (hereinafter referred to as Cong. Rec. 43/1.
[135] Cong. Rec. 43/1, 97, 337–8.
[136] Cong. Rec. 43/1, 339.
[137] Cong. Rec. 43/1, 340. See also *id.* at 412.
[138] Hodges v. Hodges, Peake Add. Cas. 79, 1 Esp. (N.P.) 441 (1796).
[139] Gateshead Union v. Durham County Council, (1918) 1 Ch. 146 (C.A.).
[140] See Ex parte Miller, 34 New Bruns. R. 318 (1897); Ex parte Gallagher, 31 New Bruns. R. 472 (1892); Dunn v. Windsor Board of Education, 6 Out. R. 126 (1883).

held that separate schools might be established for colored children, in which case they would have no right to attend the common schools,[141] but if no segregated schools were set up, they would be entitled to go to the common schools.[142]

In the United States, there was never any general right apart from statute to attend school. The right to go to school was always restricted by such factors as residence.[143] In fact, at one time in some northern states free Negroes were not entitled to go to any school.[144] The school directors were deemed to have broad powers of deciding what students should be admitted to which schools,[145] including the right to segregate them by race.[146] In fact, that very year the Supreme Judicial Court of Massachusetts, Butler's home state, had held that the right to attend school was a "political right" and not a private or civil right.[147] This was precisely the distinction which Trumbull had repeatedly insisted on.[148] By way of contrast, although free Negroes had no common-law right to attend school, even in the slave states before the Civil War the courts had unanimously held that they had a right to obtain, hold, and dispose of property.[149]

Congressman James B. Beck, a Kentucky Democratic lawyer, opened the opposition attack by decrying compulsory school desegregation and asserting that under the decision in the *Slaughter-House Cases*, Congress lacked power to legislate respecting state schools.[150] He, too, observed that racial segregation was no different in principle from segregation by sex, that rich children could be sent to private school so that the bill would only affect poor whites, and the compulsory desegregation would destroy the public school system.[151] Congressman John T. Harris, an unreconstructed Virginia Democratic lawyer, added to a similar argument about the bill's lack of constitutional foundation a long pacan on the segregated public schools of Virginia and how integration would ruin them. He also read from letters by administrators that integration in insane asylums would aggravate the mental illnesses of people there, and that it would ruin the school for the deaf, dumb and blind. He concluded that it would even break up the University of Virginia.[152]

Another Democratic attack came from Congressman Alexander H. Stephens, a Georgia Democrat and the distinguished former Vice-President of the Confederacy. In addition to asserting the constitutional argument derived from the *Slaughter-House Cases*, he stated that Georgia Negroes were content with segregated schools and a segregated university.[153] He was answered by a South Carolina Negro Republican, Congressman Alonzo J. Ransier, who advocated the bill because "negro-haters would not open school-houses . . . to the colored people upon equal terms. . . ."[154] Representative Roger Q. Mills, a Texas Democratic lawyer, added an argument on the limited scope of the Privileges and Immunities Clause of the Fourteenth Amendment and Congress' lack of power to legislate regarding schools under it. He, too, issued dire warnings about school closing if the bill was enacted.[155]

The next day, Beck offered an amendment permitting segregation.[156] His colleague from Kentucky, Congressman Milton J. Durham, also a Democratic, after a stock *Slaughter-House Cases* argument, also warned that the school system there would be destroyed by integration. He noted that thousands of poor white children were for the first time being educated by a tax levied on white taxpayers.

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[141] Hill v. Carnden & Zone School Trustees, 11 Upper Can. Rep. 573 (1954).
[142] Re Stewart & Sandwich East School Trustees, 28 Upper Can. Rep. 634 (1864).
[143] See Wheeler v. Burrow, 18 Ind. 14 (1862); Inhabitants of Haverhill v. Gale, 103 Mass. 104 (1869); Opinion of Justices, 42 Mass. (1 Metc.) 580 (1841); School Dist. No. 1 v. Bragdon, 28 N.H. 507 (1851).
[144] Draper v. Cambridge, 20 Ind. 268 (1863); Lewis v. Henley, 2 Ind. 332 (1850); Clark v. Board of Directors, 24 Iowa 267 (1868); Van Camp v. Board of Education, 9 Ohio St. 406 (1859); Lane v. Baker, 12 Ohio Rep. 237 (1843).
[145] Grove v. Board of School Inspectors, 20 Ill. 532 (1858); People v. Easton, 13 Abb. Prac. (N.S.) 159 (N.Y. 1872).
[146] State v. Duffy, 7 Nev. 342, 8 Am. Rep. 713 (1872); Dallas v. Fosdick, 40 How Prac. 249 (N.Y. 1869).
[147] Learock v. Putnam, 111 Mass. 499 (1873).
[148] Globe 42/2, 901. See also n. 83, 86, 87, *supra*.
[149] Tannis v. Doe, 21 Ala. 449 (1852); Ewell v. Tidwell, 20 Ark. 136 (1859); Davis v. Elliott's Adm., 5 Fla. 261 (1853); Beall v. Crane, 25 Ga. 430 (1858); Bowers v. Newman, 2 McMul. 472 (S.C. 1838); Hardcastle v. Porcher, Harp. 495 (S.C. 1826); Winnard v. Robbins, 22 Tenn. (3 Humph.) 614 (1842); Hepburn v. Dundas, 54 Va. (13 Gratt.) 219 (1856).
[150] Cong. Rec. 43/1, 342.
[151] Cong. Rec. 43/1, 343.
[152] Cong. Rec. 43/1, 375–7. See also *id.* at 405.
[153] Cong. Rec. 43/1, 379–381.
[154] Cong. Rec. 43/1, 382.
[155] Cong. Rec. 43/1, 384–5. See also id. at 414–5 for a similar argument.
[156] Cong. Rec. 43/1, 405.

Since Negroes paid no school taxes, he urged that they should not go to white schools. Taxes levied on Kentucky Negroes were used exclusively to support colored paupers and to educate Negro children, but because of the large numbers of paupers in many counties there were no colored schools. He expressed the hope that eventually there would be colored schools in every part of the state, and offered a segregation amendment also.[157] Still a third school segregation amendment was offered by Congressman Lloyd Lowndes, a Maryland Republican lawyer.[158] Congressman James H. Blount, a Georgia Democratic lawyer, also added that in his state Negroes had equal school facilities, and added the usual warning about school closing if integration were required.[159]

Congressman William Lawrence, a former Ohio state judge and a Republican who had voted for the Fourteenth Amendment, was the next to speak. He read what was actually a legal brief in support of the bill, complete with citations to cases and other authorities supporting its constitutionality. He said:

"When it is said 'no State shall deny to any person the equal protection' of these laws, the word 'protection' must not be understood in any restricted sense, but must include every benefit to be derived from laws. . . . When the States by law create and protect, and by taxation on the property of all support, benevolent institutions designed to care for those who need their benefits, the dictates of humanity require that equal provision should be made for all. Those who share these benefits enjoy in them and by them 'the protection of the laws,' the benefit of all that results from the laws which create, protect, and support them. And by the fourteenth amendment, no state shall deny to any the equal benefit of these laws, and Congress is charged with the duty of enforcing this equality of benefits or protection. . . ." [160]

Lawrence went on to point out that the "design of the fourteenth amendment was to confer upon Congress the power to enforce civil rights." He quoted extensively from the debates in 1866 to show that the First Section of the Fourteenth Amendment was proposed by Congress because of doubts about its constitutional power to enact the Civil Rights Act of 1866, and cited cases and commentary on the constitutional right of Congress to re-enact the 1866 act in 1871, which it did. He concluded that under the Fourteenth Amendment the "power to secure equal civil rights by 'appropriate legislation' is an express power. . . ." [161]

An exhortation from Congressman Josiah R. Walls, a Florida Republican Negro farmer, contained a pot-pourri of constitutional tidbits followed by a plea for the bill to "open up the common schools. . . ." [162] Next, Congressman William S. Herndon, a Texas Democratic lawyer, again read copiously from the *Slaughter-House Cases* to show that the bill was unconstitutional, and likewise predicted the end of southern school systems. He noted that the whites paid the taxes for both colored and white schools, and that they would refuse to levy taxes if the schools were integrated.[163]

In the course of a long harangue, Congressman William J. Purman, a Florida Republican lawyer, gave the following hypothetical example of "conditions of inequality" imposed by a "states-rights legislature" which Congress could legislate to prevent:

"An act to exclude all children not clothed in velvet and such as have blue eyes from admission into any public school supported by public taxation." [164] Congressman William H. H. Stowell, a Virginia Republican carpetbagger, urged defiance of the threats to close the schools if the bill were enacted. He said that half of Virginia's population was illiterate, that schools are only open for five months a year, and that only fifteen per cent of the colored population attend school. He advocated the bill because "Our State constitution also provides for the education of all the children in the Old Commonwealth, and yet a democratic Legislature has practically excluded them from this privilege." [165] In reply, two Democrats read from Virginia Republican newspapers approving school integration and predicting elimination of public education as a consequence.[166] One of

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[157] Cong. Rec. 43/1, 406.
[158] Cong. Rec. 43/1, 407.
[159] Cong. Rec. 43/1, 411.
[160] Cong. Rec. 43/1, 412.
[161] Cong. Rec. 43/1, 412–4. Congressman James Monroe, an Ohio Republican but not a lawyer, also urged an equal protection argument well mixed with declamation. *Id.* at 414.
[162] Cong. Rec. 43/1, 417.
[163] Cong. Rec. 43/1, 419–422.
[164] Cong. Rec. 43/1, 423–4.
[165] Cong. Rec. 43/1, 426.
[166] Cong. Rec. 43/1, 427, 429.

them also pointed out that it was no more a violation of equality to segregate by race than by sex, that the bill was actually designed to impose social equality, and that under the *Slaughter-House Cases* Congress had no power to pass it.[167]

The next day, when House debate closed, Congressman Milton I. Southard, an Ohio Democratic lawyer, read from the McCann Case, noted that many states had school segregation laws, and pronounced the bill unconstitutional.[168] A Georgia Democrat declared that Negroes were being treated absolutely equal by school segregation laws, exhorted the House against forcing social equality, and issued the usual warnings about abandonment of public schools if the bill should pass.[169] A Missouri Democrat also defended school segregation, and added:

"When has President Grant chosen to take his children from a white school and send them to a colored school? . . . Why have we never witnessed the 'civil rights' advocates setting one solitary example of the propriety, the advantage, and the excellence of a law which they propose to enforce against their remonstrating countrymen with fire and sword? . . . Why do we not see them, by a delicious choice. . . . sending their children to negro schools? Why, sir, do they not do what they say is all right and proper, before they attempt to coerce us into compliance with an act the most monstrous. . . ."[170]

Butler closed the debate in his usual sarcastic manner. He said:

"Again, we are told that if we do pass this bill we shall break up the common-school system of the South. I assume this is intended as a threat. If so, to that I answer as Napoleon did, 'France never negotiates under a threat.' I regret the argument, if it was one, was put forward in that form. 'Break up the common-school system of the South!' Why, sir, until we sent the carpet-baggers down there you had not in fact a common-school system in the South. [Laughter.]."[171]

Butler then scorned the inadequacies of the southern school systems, and facetiously warned the southerners not to retaliate against Negroes because the latter did the labor in the South and if they left the southerners would be poverty-stricken. However, he remarked that retaining school segregation should be carefully considered because colored children were so eager for school that white truants might retard them in mixed classes.[172] The bill was then returned to the Judiciary Committee.[173]

Several days later, Congressman Robert Vance, a prominent Democratic ex-confederate renewed the debate. He observed that the whites in his State of North Carolina had cheerfully taxed themselves for separate colored schools, and that this bill was a social rights bill which would break up the school system for both races. He stated that since the University of South Carolina had been integrated it had only six to nine students, and advocated school segregation.[174]

Congressman Richard H. Cain, a South Carolina Negro Republican, replied to him. He said that although students had left the University of South Carolina, the buildings were still there and the professors still remained and taught the few who were there, so that the university was not destroyed. He added that integrated schools were being operated in a number of northern cities, without problems. However, he chiefly wanted the retention of the school clause because without it Negroes in many areas were being deprived of any schooling whatever.[175]

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[167] Cong. Rec. 43/1, 428.
[168] Cong. Rec. 43/1, App. 1–3.
[169] Cong. Rec. 43/1, App. 3–4. (Cong. Hiram P. Bell). See also Cong. Rec. 43/1, 4053–5 (Cong. John D. C. Atkins, D.—Tenn.) and Cong. Rec. 43/1, 726, Cong. Henry R. Harris (D.—Ga.).
[170] Cong. Rec. 43/1, App. 5.
[171] Cong. Rec. 43/1, 456.
[172] Cong. Rec. 43/1, 456–7.
[173] Cong. Rec. 43/1, 457–8.
[174] Cong. Rec. 43/1, 555–6.
[175] Cong. Rec. 43/1, 565–6. He also said at p. 566:
"I know that, indeed, some of our republican friends are even a little weak on the school clause of this bill; but sir, the education of the race, the education of the nation, is paramount to all other considerations . . . Sir, if you look over the reports of superintendents of schools in the several States, you will find, I think, evidence sufficient to warrant Congress in passing the civil-rights bill as it now stands. The report of the commissioner of education of California show that, under the operation of law and of prejudice, the colored children of that State are practically excluded from schooling. Here is a case where a large class of children are growing up in our midst in a state of ignorance and semi-barbarism . . . In Illinois, too, the superintendent of education makes this statement: that, while the law guarantees education to every child, yet such are the operations among the school trustees that they almost ignore, in some places, the education of colored children."

Several days later, Congressman Samuel S. Cox, a New York Tammany Democrat, opposed federal aid to education because it would be a lever for integrated schools.[176] He predicted that no matter what other rights were given to Negroes they would never be satisfied until they had this one.[177] He said that they wanted to educate white students against race prejudice.[178] Congressman William M. Robbins, a North Carolina Democrat, added that not only would the school clause destroy the southern school system, but it would eliminate southern white Republicans as well. He added that Negroes did not want mixed schools.[179] Cain answered him by pointing out that it was penal offense to educate slaves before the Civil War, and demanded that the school question be settled.[180] Ransier, his colleague, also answered the prior Democratic arguments that mixed schools would destroy the school system by pointing out that northern colleges, such as Yale, Harvard, Wilberforce, Cornell, and Oberlin, and Berea College in Kentucky, all admitted colored students without ill effects. He noted that when colored students were admitted to Berea College, a number of white students left, but soon they returned. He quoted a report saying: "There is nothing like such a school as this to teach mutual respect . . . and to take away some of the arrogant superciliousness of caste and race." He concluded by quoting another writer, as follows:

"In times past the negro race has been the exponent of labor at the South; and it is, for many years to come, to be closely associated with it. If, therefore, this race is to be separated from all others in the public schools, and even the youngest children are made to feel that the race is set apart for its special mission and destiny in society, how can we hope to make labor respectable? The old badge of servile degradation will attach to it not only for the black man but for the white man. To place blacks and whites in the same school is not to say that the races are equal or unequal. It is to animate all the individuals with a common purpose, with reference to which color or nationality has nothing to do. If color or nationality has anything to do with social affinities, nonproscriptive schools will not affect their natural and healthy influences. . . .

"The class distinctions perpetuated and taught by class schools infuse a detrimental influence into politics. Black men, no less than white men, should differ on public questions. But such difference cannot show itself in political action to any great extent as long as there is perpetuated a distinction so fundamental between the white man and the black as that the children of the latter cannot go to school with those of the former. In such a case class interests will predominate over those interests which are more general and less personal."[181]

Debate began in the Senate on Sumner's bill on January 27, 1874. A number of Senators had doubts about the constitutionality of various provisions, and Ferry of Connecticut and Morrill of Maine once again reiterated their belief that the bill was unconstitutional, before it was referred to the Judiciary

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[176] Cong. Rec. 43/1, 614–8. These same arguments had been made in the previous session. See Globe 42/2, App. 15–16, 18.

[177] Cong. Rec. 43/1, 616. He said:

"But . . . if the civil-rights bill does come back with mixed schools out, the colored members here, and the colored voters elsewhere, will not be satisfied. The battle will rage again. You may give them the freedom of the inn, the railroad, and the theater; you may bury them side by side with the white in the cemetery; you may go further, and provide that we shall all rise together out of the same mold in the resurrection, irrespective of race, color, or of previous condition; but the broad voweled Africanese tongue will talk, and . . . will still make its music of agitation. Gentlemen of white persuasion may tender the forty acres, but the inquiry still will be, 'Where's your mule?'"

[178] Cong. Rec. 43/1, 618. He quoted a prominent advocate of equality as follows: "'Having this regard, you will not consent to have the clause securing us from proscription in public schools in the several States stricken from the civil-rights bill now before you. It is to us the clause of primary import. Public schools inculcate ideas, teaching the rising generation. If the rising generation is taught by the State to look on the color of a citizen, and (as the arrangement setting them apart implies) to despise them, to regard the class as inferior, one that may be outraged, they not only, in thus educating them, unfit the despised as well as the despising class to sit on the juries, but the arrangement wars with the Constitution, which forbids any State from making or enforcing any law abridging the right of citizens . . ."

[179] Cong. Rec. 43/1, 900.

[180] Cong. Rec. 43/1, 902. Cain said: "The gentleman says that he does not desire that the colored people shall be crowded into the schools of the white people. Well, I do not think that they would be harmed by it; some few of them might be. But experience has taught us that it is not true that great harm will come from any such measure. I think, therefore, that if we pass this bill we will be doing a great act of justice, we will settle for all time the question of the rights of all people. And that is necessary to its success."

[181] Cong. Rec. 43/1, 1313–4.

Committee.[182] On March 11, 1874, while the bill was under consideration, Sumner died. His last wish was the passage of his civil rights bill.[183]

Frelinghuysen reported the bill for the Judiciary Committee, and narrowed its constitutional basis to the Equal Protection Clause of the Fourteenth Amendment. He thrice stated that the "bill therefore properly secures equal rights to the white as well as the colored race."[184] When Frelinghuysen turned to the school clause, he supported it on the ground that institutions "which are supported by the taxation of all, should be subject to the equal use of all. Subjecting to taxation is a guarantee of the right to use." He added:

"Uniform discrimination may be made in schools and institutions of learning and benevolence on account of age, sex, morals, preparatory qualifications, health, and the like. But the son of the poorest Irishman in the land . . . shall have as good a place in our schools as the son of the Chief man of the parish. The old blind Italian, who comes otherwise within the regulations of an asylum for the blind supported by taxation, shall have as good a right to its relief as if he were an American born. There is but one idea in the bill and that is: The equality of races before the law."[185]

Frelinghuysen then turned to the question of "whether this bill admits of the classification of races in the common-school system; that is, having one school for white and another for colored children." He first read to the Senate from the decision in *Clark* v. *Board of Directors*.[186] In this case, a Negro child had demanded the right to attend a neighborhood school, and the local school board said that it had discretion to refuse admission thereto, and to require her to go to a central separate colored school in accordance with local sentiment. However, the Iowa Supreme Court held that the board had no such discretion under Iowa law, and had to admit her to the neighborhood school. He then quoted from the decision in *State* v. *McCann*,[187] in which the Ohio Supreme Court had held that state school segregation statutes do not violate the Fourteenth Amendment. Frelinghuysen then explained:

"The constitution and laws of Iowa provide for the 'education of all the youths of the State without distinction of color.' In Ohio the statute expressly provided for separate schools for white and colored children. Therefore the decisions of those courts afford no precedent for the construction of this bill when enacted. The language of this bill secures full and equal privileges in the schools, subject to laws which do not discriminate as to color.

"The bill does not permit the exclusion of one from a public school on account of his nationality alone.

"The object of the bill is to destroy, not to recognize, the distinctions of race.

"When in a school district there are two schools, and the white children choose to go to one and the colored to the other, there is nothing in this bill that prevents their doing so.

"And this bill being a law, such a voluntary division would not in any way invalidate an assessment for taxes to support such schools.

"And let me say that from statements made to me by colored Representatives in the other House, I believe that this voluntary division into separate schools would often be the solution of difficulty in communities where there still lingers a prejudice against a colored boy, . . . because of his blood.

"The colored race have in the last ten years manifested such noble and amiable qualities, judiciously adapting themselves to the demands of their peculiar position, that we should not hesitate to believe that they will in the future conciliate and remove rather than provoke unworthy prejudices; and there is nothing in this law which would affect the legality of schools which were voluntarily thus arranged, one for the white and the other for the colored children.

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[182] Cong. Rec. 43/1, 945–951. See also Thurman's assertion that the bill was unconstitutional. *Id.* at 3455.

[183] Cong. Rec. 43/1, 4786. See also Cong. Rec. 43rd Cong., 2d Sess. 952 (1875) (Cong. Thomas Whitehead).

[184] Cong. Rec. 43/1, 3451.

[185] Cong. Rec. 43/1, 3452. However, shortly thereafter Frelinghuysen inconsistently moved to restrict the benefits of the bill to citizens because "I do not think that a person merely landing in this country is entitled, as a matter of right, to the benefit of our schools, which are supported by taxation" although the Equal Protection Clause covers all "persons," and not merely citizens, who are covered by the Privileges and Immunities Clause. See Cong. Rec. 43/1, 4081.

[186] 24 Iowa 267 (1868).

[187] 21 Ohio St. 198 (1872).

"If it be asked what is the objection to classification by race, separate schools for colored children, I reply, that question can best be answered by the person who proposes it asking himself what would be the objection in his mind to his children being excluded from the public schools that he was taxed to support on account of their supposed inferiority of race.

"The objection to such a law in its effect on the subjects of it is that it is an enactment of personal degradation.

"The objection to such a law on our part is that it would be legislation in violation of the fundamental principles of the nation.

"The objection to the law in its effect on society is that a community is seldom more just than its laws; and it would be perpetuating that lingering prejudice growing out of a race having been slaves which it is as much our duty to remove as it was to abolish slavery.

"Then, too, we know that if we establish separate schools for colored people, those schools will be inferior to those for the whites. The whites are and will be the dominant race and rule society. The value of the principle of equality in government is that thereby the strength of the strong inures to the benefits of the weak, the wealth of the rich to the relief of the poor, and the influence of the great to the protection of the lowly. It makes the fabric of society a unit, so that the humbler portions cannot suffer without the more splendid parts being injured and defaced. This is protection to those who need it." [188]

Frelinghuysen then went on to justify the constitutionality of school regulation by Congress under (1) the principles of the three reconstruction amendments lumped together with recent history, (2) the Privileges and Immunities Clause of the Fourteenth Amendment, and (3) the Equal Protection Clause.[189] He conceded that "it is not one of the privileges of a citizen of the United States to have any education in a State; that a State may abolish all its schools." However, he contended that it was one of the privileges of national citizenship "not to be discriminated against on account of race or color by the law of a State relating to . . . schools. . . ." He asserted that excluding a child from school solely because he was of German or African descent "would violate his privileges as a citizen of the United States." Frelinghuysen also contended that the Privileges and Immunities Clause went further than the old Interstate Privileges and Immunities Clause of Article 4, Section 2,[190] although Congressman John A. Bingham, the Radical Republican lawyer from Ohio who drafted the clause, stated that the Fourteenth Amendment clause did not go any further and was solely designed to give Congress power to enforce the original constitutional provision.[191] Frelinghuysen also failed to notice that his construction of the Privileges and Immunities Clause would have invalidated the widespread and long-standing school laws requiring residence of children in the district.[192]

Several days later, Senator Thomas M. Norwood, a Georgia Democrat, delivered a long harangue during which he, too, raised the point that the rich children could be sent to private schools while poor children, under the bill, must choose either integration or ignorance.[193] He sarcastically identified the the war power as the source of Congress' power to "declare war between white children and black children in the public schools," and since "the power to make war necessarily carries with it the power to destroy, Congress can go further and even destroy the public schools!" [194] Ultimately, he became serious and made a long argument that the right to go to school was not protected under the Privileges and Immunities Clause.[195]

On May 20, when the Senate resumed consideration of the civil rights bill, Senator Daniel W. Pratt, a Republican lawyer from Indiana, explained his support of the school clause as follows:

"But the chief objection is to allowing what are called mixed schools. In the first place, this bill does not necessarily lead to that, especially in the large

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[188] Cong. Rec. 43/1, 3452.
[189] Cong. Rec. 43/1, 3453.
[190] Cong. Rec. 43/1, 3454.
[191] H.R. Rep. No. 22, 41st Cong. 3rd Sess. 1 (1871): "The clause of the fourteenth amendment, 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' does not, in the opinion of the committee refer to privileges and immunities of citizens of the United States other than those privileges and immunities embraced in the original text of the Constitution, article 4, section 2."
[192] See n. 143, *supra*.
[193] Cong. Rec. 43/1, App. 237.
[194] Cong. Rec. 43/1, App. 238.
[195] Cong. Rec. 43/1, App. 239–244.

cities, where colored people abound. In this city, for example, the schools are kept separate and will continue to be, though this bill become a law. Where the colored people are numerous enough to have separate schools of their own, they would probably prefer their children should be educated by themselves, and there is nothing in this bill which prohibits this. But in the villages and country separate schools will be impracticable, and the colored children, if educated at all in public schools, must necessarily be where the great majority of the children are white. There may be but one or two colored families in the district, and I admit that here the question must be fairly met whether they shall share or be excluded from the benefits of the public schools.

"In the first place, if not allowed, they must remain uneducated; a thing to be avoided, since these children will one day be voters, and policy requires they should be intelligent voters. In the next place, there is no more reason or justice why they should be excluded than an equal number of white children, for their father as a citizen has been taxed to build the school-house and to maintain the school. And, lastly, there is precisely the same reason his children should receive a rudimentary education at the common school that there is for white children. Beyond all this, what becomes of the colored man's rights as a citizen if this discrimination shall operate against him in a point where a parent's heart is most sensitive, to exclude his children from drinking at the common fount of knowledge."[196]

Pratt added that opposition to school integration would evaporate when the law was passed.[197]

Thurman, an implacable Democratic foe of the bill, arose to answer Pratt. After an extensive analysis of the Privileges and Immunities Clause designed to demonstrate that the bill was unconstitutional,[198] he asserted that if Pratt "has understood this first section as allowing the State of Indiana to provide by law that the children of colored people and of white people shall be educated in different schools, [he] is entirely mistaken." Thurman then quoted extensively from the *McCann* decision of the Ohio Supreme Court, "composed of five eminent republicans," to the effect that school segregation laws did not violate the Fourteenth Amendment. He added that since "the exclusion of colored children from white schools is not a violation of the fourteenth amendment, then you have no right to punish such exclusion." He concluded by observing that whites paid almost all of the school taxes, and issued the stock dire warning about school closing if the bill were passed.[199] The next day, Senator John W. Johnston, a Virginia Democratic lawyer, told the Senate of the great progress the Democratic administration of his state had made in building up a school system, that colored school facilities were equal to those of white schools, that neither party wanted school integrtaion, and if it came the school system would be destroyed.[200]

Morton spoke next. He first stated that the words "the equal protection of the laws" in the Fourteenth Amendment "means to the equal benefit of the laws" because the "whole body of the law is for protection in some form—the definition and protection of the rights of person and property. . . ."[201] He then got into a colloquy with Senator Augustus S. Merrimon, a North Carolina Democratic lawyer, who asked him whether a person, by virtue of United States citizenship had the "right to attend a particular class of schools," and whether a state could require that females be educated separately from males, as follows:

"Mr. MORTON. . . . this phrase, 'nor shall any State deny to any person within its jurisdiction the equal protection of the laws,' denies to any State the power to make a discrimination against any class of men as a class. . . . it denies the power to exclude them from schools because they are negroes. . . . The question of separating males and females into different schools does not come within the

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[196] Cong. Rec. 43/1, 4082.

[197] Cong. Rec. 43/1, 4083. He said: "It is said such a law as this bill enacts will be so odious that it cannot be executed. The objection assumes what I deny is true, that it will be generally odious. . . . It will be odious only in particular sections of the country, for in many parts their rights and privileges as set out in this are now recognized. In one State the practice of mixed schools has always been the rule, and in several of the Southern States the rule has been established by State laws. Pass this bill and all opposition will cease in a few months, when it is known that the question is settled: for people will come to see that the law is supported by reason and justice, and that free government demands the abolition of all distinctions founded on color and race."

[198] Cong. Rec. 43/1, 4085–8.

[199] Cong. Rec. 43/1, 4088–4090.

[200] Cong. Rec. 43/1, 4114–5.

[201] Cong. Rec. 43/1, App. 358.

principle at all. The great object of the fourteenth amendment was to establish the equality of races, equality before the law. The separation of the sexes, putting male children into one school and females into another, does not violate that principle, provided it extends to all races. . . . The power of the States to establish different grades of schools . . . remains just as it was, with this difference, that the power to discriminate between races is taken away. The States are not bound to establish common schools; but if the States do establish common schools to be supported at public expense, they cannot exclude the children of any race from those schools. . . . They may say if they please—perhaps that is an extreme case—that none but male children shall attend; but they must be the males of all races. I will not go that far, but the law may say that no child shall attend a common school, if you please, over sixteen years of age.

"Mr. MERRIMON. Why do you use the word 'races?' . . . The point I make is this: the Constitution does not say anything about 'race' except in certain respects. . . . there is no such expression touching distinctions as to race in any other respect whatsoever [than the Fifteenth Amendment]."

"Mr. MORTON. The Constitution in effect does say so. It says that no person shall be denied the equal protection of the laws; and if common schools are established and the children of colored men are excluded from those schools, I ask my friend—and he cannot deny it for a moment—if they are not denied the equal protection of the laws?

"Mr. MERRIMON. I say they are not, if like provision is made for the education of colored children that is made for white children." [202]

Merrimon then pressed Morton as to whether segregation of Chinese or Indian students was constitutional. Morton replied that it is a violation of the Fourteenth Amendment to exclude colored children from schools entirely. Merriman said that he admitted this, but reiterated that states could provide separate and equal facilities and segregate by race or sex. Morton answered that when Merrimon "conceded that the exclusion of colored children from schools is a violation of the fourteenth amendment, it occurs to me that he has conceded all that we can ask." Merrimon continued to press his segregation point, as follows:

"Mr. MERRIMON. . . . I say that the State Legislature cannot pass a law providing that white children should be educated and that colored children should not be, because that would deny the equal protection of the laws. But when it affords the same provision, the same measure, the same character for the colored race that it afforded for the white race, there is no more discrimination against one race than there is against the other; and therefore it is competent for the Legislature to do it, there being no restriction on such a power in the Constitution of the United States.

"Mr. MORTON. Mr. friend's argument then comes to this, that under the fourteenth amendment the State must make equal provision for the children of both races, and if there be any inequality in the benefits, then it is a violation of the fourteenth amendment. It brings him down then to the possibility of making separate and distinct schools precisely equal in point of benefit." [203]

Morton then completely ignored the segregation question and reiterated that colored children could not be denied the equal benefits of the school system. In spite of Merrimon's persistent questioning on the point, he studiously avoided discussing segregation at all.[204]

Senator George S. Boutwell, a Massachuetts Radical Republican, then offered an amendment to strike from the Judiciary Committee draft the provision that all persons "shall be entitled to the full and equal enjoyment . . . of common schools," and insert "of every common school and public institution of learning or benevolence . . . that may hereafter be endowed by any State, or supported . . . by public taxation." [205] He supported the school clause based on the Privileges and Immunities Clause, and disagreed with the decision in the *Slaughter-House Cases*. He also said he was offering his amendment because the committee draft left it in doubt as to how far school segregation was permitted. He wanted to forbid it entirely, saying:

"A system of public instruction supported by general taxation is security, first, for the prevalence and continuance of those ideas of equality which lead every human being to recognize every other human being as an equal in all

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[202] Cong. Rec. 43/1, App. 359.
[203] *Ibid.*
[204] Cong. Rec. 43/1, App. 359–361.
[205] Cong. Rec. 43/1, 4115: See also *id.* at 3570.

natural and political rights, and the only way by which those ideas can be made universal is to bring together in public schools, during the forming period of life, the children of all classes, and educate them together.

"The public school is an epitome of life, and in it children are taught so that they understand those relations and conditions of life which, if not acquired in childhood and youth, are not likely afterward to be gained. To say, as is the construction placed upon so much of this bill as I propose to strike out, that equal facilities shall be given in different schools, is to rob your system of public instruction of that quality by which our people, without regard to race or color, shall be assimilated in ideas, personal, political, and public, so that when they arrive at the period of manhood they shall act together upon public questions with ideas formed under the same influences and directed to the same general results; and, therefore, I say, if it were possible, as in the large cities it is possible, to establish separate schools for black children and for white children, it is in the highest degree inexpedient to either establish or tolerate such schools.

"The theory of human equality cannot be taught in families, . . . but in the public school, where children of all classes and conditions are brought together, this doctrine of human equality can be taught, and it is the chief means of securing the perpetuity of republican institutions. And inasmuch as we have in this country four million colored people, I assume that it is a public duty that they and the white people of the country, with whom they are to be associated in political and public affairs, shall be assimilated and made one of the fundamental ideas of human equality. Therefore, where it would be possible to establish distinct schools, I am against it as a matter of public policy.

"But throughout the larger part of the South it is not possible to establish separate schools for black children and for white children, that will furnish means of education suited to the wants of either class; and therefore in all that region of country it is a necessity that the schools shall be mixed, in order that they shall be of sufficient size to make them useful in the highest degree; and it is also important that they should be mixed schools in order that, when the prejudice which now pervades portions of our people shall be rooted out by the power of general taxation, they will be able to accumulate in every district those educational forces by the public schools shall be made useful to the highest degree for which there is capacity in the public will with the power of general taxation."[206]

Stockton, a New Jersey Democrat, ended the day's proceedings with a plea for local control over schools. He told his colleague, Frelinghuysen, to go to the New Jersey legislature if he wanted to regulate schools, and added that the state legislature would never pass a bill like this.[207]

The next day, May 22, was the last day of Senate debate. Stockton finished his speech by reading from a statement by Senator William G. Brownlow, a Tennessee Republican, attacking school integration. He added that Boutwell's speech contained the same ideas as those urged by Sumner and by sundry Negro conventions, that Negroes were entitled not merely to equal schools but to go to the same schools as white children in order "that this miserable prejudice that existed should be rooted out of the hearts of the young as they grow up."[208] He, too, warned that the bill would destroy the school system.[209]

Howe then commenced a speech in support of the bill. Like Boutwell, he differed with the Supreme Court's restricted interpretation of the Privileges and Immunities Clause of the Fourteenth Amendment in the *Slaughter-House Cases*.[210] He asserted that in Georgia school districts could give Negroes inferior schooling or none at all,[211] and spurned the threats of school-closing.[212] But he declared:

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[206] Cong. Rec. 43/1, 4116.
[207] Cong. Rec. 43/1, 4117.
[208] Cong. Rec. 43/1, 4144.
[209] Cong. Rec. 43/1, 4145.
[210] Cong. Rec. 43/1, 4148.
[211] Cong. Rec. 43/1, 4150.
[212] Cong. Rec. 43/1, 4151. Howe said: "But Senators say, 'Let us be careful: do not go too far; . . . do not you dare to say that the colors in those school be mixed; say that and the schools fall; there shall be none.' I hear the threat, and I admit I am afraid. I do not know but they will do it. . . . This (threat) is one that comes very near me. I do not know but the schools will fall if we do not stay our course; but when peril threatens of any kind I can meet it but in one way. Let justice be done though the common schools and the very heavens fall."

"Mr. President, we are not providing in this bill for mixing colors at all. If you are resolved that the two colors shall not mingle in your school-houses, they need not mingle, in spite of anything in this bill. I do not agree with my honorable friend from Massachusetts, [Mr. Boutwell,] who said yesterday that it was necessary to mingle them, if I understood him, in the school-houses, in order that they might there unlearn this prejudice which separates one color from the other. I do not believe in that doctrine at all. I do not believe that it belongs to education to unteach this prejudice.

"Mr. President, I say if you insist upon it that the colors shall never be mingled in your school-houses, this bill will not force them together. If you choose to build two school houses on every acre in every district, and to give the two colors the privilege of choosing between the two, each color will go to that where they feel the most at home and where their education is most advanced. Open two school-houses wherever you please; furnish in them equal accommodations and equal instruction, and the whites will for a time go by themselves, and the colored children will go by themselves, for the same reason, because each will feel more at home by themselves than at present either can feel with the other; and the child who should separate from his own color to go into the white school for mere social reasons would feel and would be treated by his own color as a rebel against his race. But, on the contrary, let your law say that they shall not be educated together, and then the subordinate color must take just such accommodations as are provided, let them be poor or good. Let the law speak, then; offer equal inducements to each of the races, and each will in the school-house continue to keep by themselves. But let the individuals and not the superintendent of schools judge of the comparative merits of the schools; that is the point. They will know where they are best taken care of. I would rather trust them than to trust any municipal officer."[212] Howe also asserted that little children are not prejudiced, and that they are color-blind until taught prejudice.[214]

Alcorn, who had consistently spoke and voted against Sumner's bill in the prior Congress,[215] now advocated it. He said that "I am not in favor of mixing [schools]; and I contend that this bill does not mix them." He explained that in Mississippi the Negroes controlled the whole government, "Yet there is not a mixed school in the State of Mississippi, and we have civil rights there." He added that the colored people "believe the interests of both races will be promoted by keeping the schools separate," and that a satisfactory segregated school system was in operation which gave every citizen "a right to send your child to any school you choose," but that children of both races were, by the the choice of their parents, sent to segregated schools. He urged the bill because in some states Negroes had no right to go to any school.[216] Alcorn concluded by accusing Boutwell of hypocrisy in a proposed amendment limiting schools covered to those "hereafter" established, contending that he wanted to bar them from the old Massachusetts colleges. He said that Negroes demanded the right of admission to all schools, and if refused on constitutional grounds they will "trample down constitutions." His conclusion made it clear that he had changed his position because his colored constituents demanded it.[217]

Boutwell replied to this that a college, such as Dartmouth College, which was founded by a private person, could not be required to integrate even if it later received gifts from the state, citing *Dartmouth College v. Woodward*,[218] because it "takes its law from the founder of the institution . . . and all subsequent gifts and bequests are upon that foundation, and, as a matter of law, follow the will of the founder, even though the subsequent gifts may greatly exceed the original one." He said that Congress could only reach institutions

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[213] *Ibid.*

[214] *Ibid.* He said: "They are not the laws of nature. Nature gives the lie to the assertion everywhere. There is not in Washington a white child, until politics gets possession of the unfortunate to some extent, that makes the slightest discrimination between the black and the white race; not one. Politicians teach that prejudice. It is not a law of nature; it is one of the worst and most degrading lessons we learn, and one of the most mischievous."

[215] Globe 42/2, 274, 3264, 3265, 3270.

[216] Cong. Rec. 43/1, App. 305.

[217] Cong. Rec. 43/1, App. 307. He said: "The colored people of my State demand the passage of this bill. I yield to that demand. My refusal would excite them to anger; they would keenly feel the injustice and wrong. I bend gracefully to their will." His mind may have been changed by the fact that he was an unsuccessful candidate for governor in 1873, in between the last Congress and this one.

[218] 4 Wheat. 518 (1819).

originally endowed from state money, or subsequently endowed or supported out of tax money. Boutwell concluded:

"To say that an institution private in its foundation and receiving its law from the founder, though it may have afterwards received a donation or a gift from a State, shall be open to every citizen for the purposes of education, is going further than I think we can go under the principles of law and according to the decisions of the Supreme Court."[219]

But Alcorn was not satisfied. He said that the United States Constitution could impair state contracts and charters, and demanded admission to Dartmouth College for Negroes.[220]

Senator Lewis V. Bogy, a Missouri Democratic lawyer, likewise referred to Boutwell's amendment as an illustration of Northern hypocrisy.[221] He, too, predicted that his state would repeal its school laws if the bill were passed, that the school system would be destroyed, and that rich white children would be sent to private school while poor whites and Negroes would go without education.[222] But Senator Henry R. Pease, Alcorn's Republican colleague from Mississippi, told the Senate that none of the southern states would abolish their school system if the bill passed because labor would leave without a school system and this was against their interests.[223] He noted that by law in Mississippi Negroes could enter any school but chose to have segregated schools. He said that not a single Negro had applied to Oxford University (now the University of Mississippi) although entitled to do so, but instead asked to have a colored university set up, which was done. He also stated that he opposed Boutwell's amendment because he wanted Negroes to have the right to go to Harvard and Dartmouth. He added:

"Gentlemen say that if equal advantages in separate schools are provided the law is met so far as privileges are concerned. I say that whenever a State shall legislate that the races shall be separated, and that legislation is based upon color or race, there is a distinction made; it is a distinction the intent of which is to foster a concomitant of slavery and to degrade him. The colored man understands and appreciates his former condition; and when laws are passed that say that 'because you are a black man you shall have a separate school,' he looks upon that, and justly, as tending to degrade him. There is no equality in that."[224]

Senator Henry Cooper, a Tennessee Democratic lawyer, also attacked the school clause. He said that the committee draft, unlike the original bill, was ambiguous on whether the states could maintain a system of segregated schools. He urged that no benefit was gained by Negroes in forcing themselves into white schools where there would be prejudice against them. He, too, concluded that Tennessee would close its schools if the bill were passed.[225]

Saulsbury of Delaware made the next assault on the school clause. After attacking Boutwell's view that segregated schools should be abolished to root out prejudice, and "that children are to be forced into the same school in order that their ideas and views and opinions may become one," he declared:

"Every Senator on this floor who favors the bill knows, that the only effect and operation of it is to be had upon the poorer classes in this country, who are dependent upon common schools. While that Senator and the Senators who support this bill advocate mixed schools, and insist that it is the right of the colored man to send his children to the same school with the white man, there is not one of them—I repeat in the presence of Senators, there is not one of them—who will send his children to any such mixed school . . . Ah, sir, fortune has favored them, and they are able to select their schools and send their children to them and pay for their tuition; but the humble poor man . . . it is against them and their children that the provisions of this bill are directed. We had as well deal frankly with this question. I know full well that in no section of this country are mixed common schools patronized by gentlemen of fortune. They

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[219] Cong. Rec. 43/1, 4152.
[220] Cong. Rec. 43/1, 4152–3.
[221] Cong. Rec. 43/1, App. 320–1. He said: "While northern Senators are determined that the southern people shall associate with their colored neighbors, and that the blacks shall be admitted to the schools of the country, . . . on an equal footing with the whites they are unwilling that they should enter the halls of learning at the North; they are unwilling to do that for them at home which they compel us to do for them in our homes."
[222] Cong. Rec. 43/1, App. 321–2.
[223] Cong. Rec. 43/1, 4153.
[224] Cong. Rec. 43/1, 4154.
[225] Cong. Rec. 43/1, 4154–5.

select their schools, and Senators know full well that if this bill goes into operation it will not affect their children, while they are avowing their purpose to force the mixed schools whereby the children of the poor white men may be compelled to be educated in association with the colored children or not educated at all."[226]

Saulsbury predicted that school integration would produce miscegenation,[227] and the destruction of southern and border-state school systems, which would intensify white prejudice against Negroes rather than alleviate it.[228]

With the Senate going into an all-night session to force passage of the bill, Senator James K. Kelly, an Oregon Democratic lawyer, attacked it on constitutional grounds. Once again, he explained the limited nature of the Privileges and Immunities Clause, and prophesied that "if the States should abolish the common schools, the Federal Government would undertake to coerce the people of the States, to levy taxes to support common schools."[229] Merrimon's contribution to the Democratic filibuster consisted of a rambling discourse which ended with a lengthy analysis of the limited scope of the Privileges and Immunities and Equal Protection Clauses.[230] He returned to his analogy between segregation by race and segregation by sex in the schools, and noted that Morton was unable to say why one was permitted and the other forbidden. He contended that equal protection was preserved when separate schools were provided for both classes, and that the Fourteenth Amendment did not mention race any more than sex, and either permitted both types of segregation or neither.[231] He added:

"Will it be said the negro child has not the right to go to a white school? Then I answer, the white child has no right to go to the negro school. It is as broad one way as it is the other, and the principle in this case does not differ from the principle in the case where a law provides that males shall be educated only in male schools and females only in female schools. I cannot understand or comprehend a distinction in point of principle between the power to educate the sexes in separate schools and that to require the races to be educated in separate schools. Like equal legal provision must be made for each race, and this is the equality of right and protection required by the Constitution. The State may exercise the power to distinguish on the ground of race, so as to provide for the education of the races in separate schools equally provided for in all material respects. But, even apart from the police powers, I cannot see wherein one man is injured and deprived of any right in the one case more than he is in the other."[232]

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[226] Cong. Rec. 43/1, 4158.

[227] Cong. Rec. 43/1, 4160.

[228] Cong. Rec. 43/1, 4161. See also Cong. Rec., 43rd Cong., 2nd Sess. App. 105 (1875) (Sen. Thomas F. Bayard, D.-Del.).

[229] Cong. Rec. 43/1, 4162–4.

[230] Cong. Rec. 43/1, App. 311–3.

[231] Cong. Rec. 43/1, App. 313. He said: "Will it be said that because the difference is on account of color it will not do? That objection is unfounded, it seems to me. There is no provision in the Constitution of the United States which protects color any more than sex or age. If there was any purpose to protect *color* against the exercise of the police power of the States, and prevent the States from exercising their powers to regulate right and society, why was it not so provided? Are the States to be deprived of the absolute right to exercise the important power of police upon the merest speculative inference? Surely not. That it was not contemplated that any such restriction on the States was thought of, intended, or provided, appears in the provision contained in the fifteenth amendment, that no person shall be deprived by the United States, or any State of his right *to vote* on account of *race, color, or previous condition of servitude*. Why was this provison limited to the right to *vote* alone? . . . It was easy to have provided that no distinction for any cause should ever be made because of *race, color, or previous condition of servitude*, but no such provision was made."

[232] Cong. Rec. 43/1, App. 313. He also observed: "But it is said that these police powers may be exercised in many respects, but it cannot be done in the matter of color. Why not in the matter of color? If the Legislature of a State, in their judgment founded on the experience of the people, think and determine that the black race and the white race should be educated separately, why is it not competent for them so to provide by statute? It is said it is a discrimination against the black race. It is just as much a discrimination, in point of principle, against the white race. If there are separate schools, the black man has the same right to deny my child admission to the school where his children go as I have to deny his children admission to the schools where my children go, so that we are upon a perfect equality of right in principle.

"The Senator from Wisconsin (Mr. Howe) today declaimed loudly against the proposition of the minority here and of the people in certain States, as tending to deprive the the colored people of education. He talked about shutting the door in their faces, keeping them locked up in ignorance indefinitely or forever. Nobody has made any such uncharitable proposition. * * * The proposition is to allow the colored people of the country to have their own school-house; to allow the white people to have their own school-house and that neither race shall interfere with the other * * *." *Id.* at 315.

Merrimon, too, accused the Republican majority of hypocrisy.[233] He ended his declamation with a warning against miscegenation and school closing.[234]

With the Republicans still refusing to adjourn at 1:30 a.m.,[235] Senator William T. Hamilton, a Maryland Democratic lawyer, began a lengthy discussion of the bill. He first asserted that its constitutionality could not be justified under the Fourteenth Amendment, since that amendment said nothing about race, and if Congress could forbid racial discrimination thereunder, it could forbid other kinds of discrimination as well.[236] He advocated segregated schools, and declared that mixed schools would lead to racial strife. He, too, predicted that Maryland would close its schools rather than submit to integration.[237]

At this point, Senator Aaron A. Sargent, a California Republican lawyer, moved the following amendment:

"*Provided*, That nothing herein contained shall be construed to prohibit any State or school district from providing separate schools for persons of different sex or color, where such schools are equal in all respects to others of the same grade established by such authority, and supported by an equal *pro rata* expenditure of school funds."[238]

A vote was taken on this amendment, and it lost, 26 nay to 21 yea. The affirmative votes were cast by thirteen Democrats, one southern Republican, and seven northern Republicans, from California, Illinois, Iowa, Maine, Nevada, Pennsylvania, and West Virginia. Included in the affirmative votes were those of Morrill of Maine, who had always voted against Sumner's bill, Senator William M. Stewart, a Nevada Republican lawyer who had voted for the Fourteenth Amendment and who was a prominent Radical throughout the whole reconstruction period, and Senator William B. Allison, an Iowa Republican lawyer who, as a member of the House in the 39th Congress, had voted for the Fourteenth Amendment on its passage. The negative votes were cast by nineteen northern Republicans and seven southern Republicans. Three of these had voted for the Fourteenth Amendment as members of the Senate and five as members of the House. Frelinghuysen, Howe, and Pratt, all of whom said that a dual school system and voluntary segregation were permissible, at the least, voted in the negative, so apparently Sargent's amendment must have been construed as permitting compulsory segregation by law.[239]

Boutwell then moved his amendment, and Stewart opposed it. He said that now that Negroes could vote, they could look out for themselves, and pointed to the votes for the civil rights bill in the Sentate as the effect of Negro suffrage. He said that while Congress could constitutionally compel the states to repeal their segregation laws, it was inexpedient to do so because some of them had fledgling school systems which might be ruined by the bill. Frelinghuysen then said that he would vote against Boutwell's amendment because the Judiciary Committee draft, without the defeated amendment of Sargent, "leaves the schools, colored schools or white schools, as they are." Frelinghuysen explained that "it is perfectly competent to have one school for the whites to go to, another for the colored children to go to; and I suppose by the law as it stands a colored child has a right to go to a white school, or a white child to go to a colored school," and that "it would be no violation of law if they had separate schools."[240]

Boutwell then explained his amendment as follows:

"What I feared is just exactly that condition of things which the honorable chairman of the Committee on the Judiciary intimates may happen. I wish to

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[233] Cong. Rec. 43/1, App. 317: "I venture to say that any one may go to the Senators who expect to vote for this bill and put the plain, practical question to them . . . 'Are you willing your daughter shall attend a school with the negro children in my town?' And if he would give you a sincere answer he would tell you 'nay,' and yet he would have his fellow-country men do what he would not do himself."

[234] Cong. Rec. 43/1, App. 316–8.

[235] Cong. Rec. 43/1, 4166.

[236] Cong. Rec. 43/1, App. 362.

[237] Cong. Rec. 43/1, App. 367–9. He said: "I do not want the sentiments and principles enunciated by the Senator from Massachusetts (Mr. Boutwell) to be applied to our people and forced upon us. The policy of forcing mixed schools upon us, forcing our children into schools with colored children, is publicly avowed. There is to be no choice. If desired by neither race it must still be done, says the Senator, to perpetuate or establish a principle. I can not whether it be right or wrong in sentiment, whether it should or should not be done as a matter of principle; I say as a matter of policy and or philosophy the men who would do this are blind to the interest of both races." *Id.* at 368.

[238] Cong. Rec. 43/1, 4167. See also *id.* at 4168.

[239] Cong. Rec. 43/1, 4167.

[240] Cong. Rec. 43/1, 4167–8.

break down the prejudice in the public mind by which it is possible in some cities and sections of the country to make separate schools and give to children, who when they become men are bound by the same political bonds to a government based upon the doctrine of equality, ideas which are inconsistent with the existence of such institutions; for it is only by instilling into the minds of the children and the youth of the country the idea that there is no difference by nature or birth or race or color or caste, that we can take security for the continuance of the institutions under which we live; and every system which tolerates, encourages, or lays the foundation for the dissemination of different ideas, is a system hostile to republican government. Inasmuch as these four million colored people are made by the Constitution citizens of the country, as they and their posterity throug'. all time are to have a lot and part with us as citizens, I say now . . . let us do that thing which is right in the eye of the Constitution; and nothing is right but absolute equality of rights."[241]

Frelinghuysen then asked Boutwell whether "he proposes by his amendment to compel colored children to go to white schools." The latter replied that he could not do this, but that he intended to eliminate a dual school system. Stewart rebutted Boutwell's assertion "that it is necessary now, in order to preserve the Republic, to require the children of colored people and white people to go to the same school, whether they desire it or not, and that we should not leave it optional even with them to separate themselves, but must force them into the same school, and this for accomplishing of a great moral idea!" Stewart warned his Republican colleagues that in many of the states a free school system was not firmly established, and that integration might create so much opposition as to destroy it. He concluded that he was not going to surrender to the Negro vote at the expense of education.[242]

Under questioning by Stockton, Boutwell reiterated that the purpose of his amendment was not to eliminate all distinctions of race and color, but to remove the prejudices which exist between persons of different races and different colors, and substitute the idea of human equality." Frelinghuysen said that he disagreed with this. A vote was then taken on Boutwell's amendment. Five votes were cast in its favor, one by Boutwell and one by a Republican senator from Alabama, Louisiana, Mississippi, and South Carolina, each of which had heavy Negro voting populations. Forty-two votes were cast against the amendment. Thirteen were Democrats, four were southern Republicans, and twenty-five were northern Republicans. This last group included five Republicans who had voted for the Fourteenth Amendment as members of the Senate, and five as members of the House, including Senator Roscoe Conkling, an erstwhile colleague of Boutwell on the Joint Committee on Reconstruction which had reported out the Fourteenth Amendment. Even Senator William D. Washburn, a Republican colleague of Boutwell from Massachusetts who had likewise, as a member of the House, voted for the Fourteenth Amendment on its passage there, in the 39th Congress, voted against his proposal to abolish a dual school system.[243]

A vote was then taken to strike out the whole school clause, and it lost by a strict party-line vote of 30 to 14, with only Boreman voting with the minority.[244] Next, Alcorn moved to amend the committee draft to include colleges which had received state endowments, provisions opposed by Frelinghuysen because a state, "by making an endowment to an institution . . . [could not] change it from a private to a public institution."[245] Nine Republican senators voted for this, seven from the south and two from the north. Thirty-seven senators voted against it, thirteen Democrats, two southern Republicans, and twenty-two north-

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[241] Cong. Rec. 43/1, 4168.

[242] Cong. Rec. 43/1, 4168–9. Stewart said: "My friend from Massachusetts knows how our ranks have been augmented since that event (Fifteenth Amendment), for he acted a conspicuous part in giving the ballot to the negro. He knows very well how the forces that advocate these rights have been augmented by the ballot. He hears the potent voice. Eight hundred thousand votes in America are calculated to make the politicians tremble. . . . If for education, the amendment of the Senator from California is right; if to conciliate eight hundred thousand voters at the expense of the loss of education in many States, then the amendment of the Senator from Massachusetts if right. . . . I do not believe that but for these eight hundred thousand votes there would be ten votes, or even five votes, in this Chamber for this particular clause."

[243] Cong. Rec. 43/1, 4169.

[244] Cong. Rec. 43/1, 4170.

[245] Cong. Rec. 43/1, 4168.

ern Republicans, including Boutwell. All of the Republicans who had voted for the Fourteenth Amendment in the Senate or House voted against this.[246]

Sargent then proposed an amendment to give Negroes the equal benefit of the school system, and the following colloquy occurred:

"Mr. EDMUNDS. . . . The whole effect of this proposition is to authorize States on count of color to deny the right . . . to go to a particular common school. If there is anything in the bill, it is exactly contrary to that. If there is anything in the fourteenth amendment it is exactly opposite to that. The fourteenth amendment does not authorize us to make any trades with States either way on the subject, or regulate the action of States. What the Constitution authorizes us to do is to enforce equality; and it is not half-equality, for there is no such thing as half-equality. It is entire equality or nothing at all. . . . To put in these words here or in any part of the bill is merely to say in substance and effect that this bill shall have no force in asserting the equality that the fourteenth amendment to the Constitution asserts, if that asserts any equality at all, and, of course the bill goes on the theory that it does. . . .

"Mr. SARGENT. I do not know that the fourteenth amendment enjoins upon us that we shall have mixed schools. I do not know that the fourteenth amendment performs any of the offices the Senator speaks of. . . . I doubt if the fourteenth amendment provides that females shall be intruded into male schools or males into female schools; and yet this would be the office of the fourteenth amendment under the logic of the Senator from Vermont." [247]

Sargent next said that a powerful and wealthy religious organization was at work to undermine the public school systems of the states, and that this bill would help them do it. He accused his Republican colleagues of surrendering educational welfare to the Negro vote.[248] He concluded:

"If you say that the fourteenth amendment absolutely levels all distinctions and justifies you in putting heavy penalties to prevent a system of separate schools, then I say you cannot separate your sexes: you must put them all into the same school, and the boy who demands to enter a female school has just as much right to do it under the fourteenth amendment. Following your principle, lauded here, you are required to enforce this by a law and penalties just as much as you are that a person of a particular color shall be allowed to enter into schools of another color. I would give all the full benefit of the school system, and I would do no more." [249]

Edmunds then said that Sargent had adopted the Democratic position that the Fourteenth Amendment does not forbid all distinctions in state laws based on race or color, or religion. He emphasized: "But the Senator's argument results in exactly this: that the fourteenth amendment does not, as it respects common schools, level a distinction which a State may have a right to make on account of race and color." Edmunds then stated that the bill proceeded on the theory that the Fourteenth Amendment does not make a state blind to race, color, or origin. He added:

"the Senator's argument is the democratic argument, inasmuch as he says the State has the right to regulate this business of common schools and to exclude people on account of their color one way or the other. If the State has that right, we cannot interfere with it. If the State has not that right, we cannot confer it by an act of Congress, because such an act of Congress would be in violation of the fourteenth amendment itself. The Senator's amendment proposes to recognize the right in a State to discriminate on account of color, and if it does recognize that right, it recognizes it as a right inherent in the State and which the fourteenth amendment does not touch. If it does not touch it, then there is not a right in your bill that is constitutional. On the other hand, if the fourteenth amendment does touch it, and this right to discriminate on account of color is not in the State, then I repeat, the Congress of the United States has no power to confer such a right upon a State to make discriminations between its citizens on account of color." [250]

Edmunds then deplored Sargent's reference to the alleged Roman Catholic Church opposition to public schools, and praised it for never having made racial

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[246] Cong. Rec. 43/1, 4171.
[247] Cong. Rec. 43/1, 4171–2.
[248] Cong. Rec. 43/1, 4172. He said: "But by the effect of this legislation, which is insisted on here for political purposes, in order to gain the eye of the colored people and encourage them to adhere to the republican party—for that is what it amounts to, for political purposes—we are sacrificing the higher interests of the country. . . . I consider that these are more important considerations than the question whether the republican party shall have more or less of the colored vote of this country."
[249] *Ibid.*
[250] Cong. Rec. 43/1, 4173.

discriminations. He went on to quote various statistics designed to show that southern Negroes had inferior school opportunities to those of whites, and urged the Senate to run the risk of any disturbances in the school systems which the bill might engender.[251] Three Democrats, Johnston of Virginia, Norwood of Georgia, and Merrimon of North Carolina, rebutted Edmund's assertion about inferior Negro schooling in the South.[253] Sargent replied that as a consistent Republican, he believed that segregation by race was no more a violation of the Fourteenth Amendment than segregation by sex.[253] However, his amendment lost by 28 to 16. Two Republicans switched sides from the prior vote and several were absent who originally voted with Sargent. However, Stewart continued to vote with Sargent although this amendment was less favorable to Negro claims than the prior one.[254] The bill then passed, 29 to 16, with only three Republicans voting with the Democrats in the negative.[255]

The House took no action on the bill during this session. Several Democrats attacked it for requiring social equality and race mixing, asserted that Negroes themselves wanted separate schools, and issued the usual dire warnings about destruction of the school system or inevitable miscegenation.[256] A Tennessee Republican stated that almost all Negroes were satisfied with segregated schools except a few "smarties" or "would-be leaders," and questioned the constitutionality of the law.[257] Congressman James T. Rapier, an Alabama Negro Republican lawyer, charged that the Democrats were using the civil rights bill to gain votes.[258] He denied any desire for social equality, and complained that whites wanted to shut Negroes out of schools completely.[259]

Congressman Chester B. Darrall, a Louisiana Republican, read a section of that state's constitution giving every child in the state the right to attend any public school without disinction of race or color. He noted that this provision was put into force in New Orleans over a good deal of white opposition, and opponents urged white parents to withdraw their children from school. He read a report by the president of the city board of school directors that no unfavorable results which had been freely predicted had occurred. Most students attended school with members of their own race, but in some instances where schools became mixed there was no difficulty. In one school where white students were withdrawn in protest, they soon returned. He declared that since the law had gone into effect, the school system of Louisiana had increased and flourished and that many prominent white people now endorsed the non-discriminatory school system. He concluded that the prophesies that schools would be closed if the bill should pass were groundless.[260] He declared:

"As to the threat in regard to the school clause that we will destroy the schools of some of the States. I have only to say that it is rather late in the day to be making threats of any kind, and we are all tired of these continual threats of what will be done if we do not quit legislating to protect our citizens in their rights. But there is no danger whatever that these threats will ever be carried into effect, or if they are, if the Legislature of Virginia or of Tennessee should fail to appropriate for one year, they would find their people were wiser than they were, and it would not be repeated. But should the worst come, should the schools fall, let them fall, but let justice be done."[261]

4. THE HIGH-WATER MARK

In the elections of 1874, the Republican Party suffered a political hemorrhage. The hold-overs in the Senate kept it Republican by a much reduced margin. The policy of equalitatians who had passed the Fourteenth Amendment to admit sparsely populated western states with more trees than people as soon as two staunch Republicans could be found to give them equal Senate representation paid handsome party dividends. But in the House, where more nearly "one-man, one vote" obtained, a party line-up of Rep.—194, Dem.—92, and other—14, in

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[251] *Ibid.*
[252] Cong. Rec. 43/1, 4173–5.
[253] Cong. Rec. 43/1, 4174–5.
[254] Cong. Rec. 43/1, 4175.
[255] Cong. Rec. 43/1, 4176.
[256] Cong. Rec. 43/1, App. 341–4 (Cong. William B. Read, Ky.); App. 417–421 (Cong. Ephraim K. Wilson, Md.); App. 481 (Cong. John J. Davis, West Va.).
[257] Cong. Rec. 43/1, 4592–3 (Cong. Roderick R. Butler).
[258] Cong. Rec. 43/1, 5782.
[259] Cong. Rec. 43/1, 4782–3, 4785.
[260] Cong. Rec. 43/1, App. 478–9.
[261] Cong. Rec. 43/1, App. 479.

the 43rd Congress became Dem.—169, Rep.—109, other—14 in the 44th Congress.[262] Massachusetts, that bastion of Republicanism, was swept, was swept by the Democratic tidal wave; even Butler's own seat could not be saved from the holocaust.[263] The depression, fraud, corruption, and sundry scandals were major Democratic assets,[264] but the "party of the rebellion" also made the civil rights bill, and especially race-mixing in schools, pay handsome dividends in the election.[265]

When the "lame-duck" Second Session of the Fifty-Third Congress met in the early part of 1875, Congressman Alexander White, an Alabama Republican lawyer, moved to amend the Senate bill by specifically permitting school segregation, while Congressman John Cessna, a Pennsylvania Republican lawyer, moved to retain the Senate bill intact, and Congressman Stephen W. Kellogg, a Connecticut Republican lawyer, moved to strike all reference to schools.[266] Congressman John R. Lynch, a Mississippi Republican Negro photographer, then launched into a defense of the Senate school clause. He said:

"I regard this school clause as the most harmless provision in the bill. If it were true that the passage of this bill with the school clause in it would tolerate the existence of none but a system of mixed free schools, then I would question very seriously the propriety of retaining such a clause; but such is not the case. . . . it simply confers upon all citizens, . . . to send their children to any public free school that is supported in whole or in part by taxation, the exercise of the right to remain a matter of option as it now is—nothing compulsory about it. That the passage of this bill can result in breaking up the public school system in any State is absurd. The men who make these reckless assertions are very well aware of the fact, or else they are guilty of unpardonable ignorance, that every right and privilege that is enumerated in this bill has already been conferred upon all citizens alike in at least one-half of the States of this Union by State legislation. In every Southern State where the republican party is in power a civil rights bill is in force that is more severe in its penalties than are the penalties in this bill. We find mixed-school clauses in some of their State constitutions. If, then, the passage of this bill, which does not confer upon the colored people of such States any rights that they do not possess already, will result in breaking up the public-school system in their respective States, why is it that State legislation has not broken them up? This proves very conclusively, I think, that there is nothing in the argument whatever. . . . My opinion is that the passage of this bill just as it passed the Senate will bring about mixed schools practically only in localities where one or the other of the two races is small in numbers, and that in localities where both races are large in numbers separate schools and separate institutions of learning will continue to exist, for a number of years at least." [267]

Lynch then read an editorial from the Jackson Clarion, a Democratic newspaper, that the pending bill would have no effect on the Mississippi school system. He concluded that although Negroes did not want mixed schools, they did not want to be separated by law instead of individual choice, and declared that if the bill were passed, "there will be nothing more for the colored people to ask or expect in the way of civil rights." [268]

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[262] U.S. Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1957*, 691 (1960).

[263] Trefausse, *Ben Butler* 230 (1957).

[264] 27 Encyclopedia Britannica 720 (11th ed, 1911).

[265] Congressional Record, 43rd Congress, Second Session 951, 952, 978, 982, 1001, App. 17, 20, 113 (1875) (hereinafter referred to as Cong. Rec. 43/2.)

[266] Cong. Rec. 43/2, 938–9.

[267] Cong. Rec. 43/2, 945.

[268] *Ibid.* He said: "It is contrary to our system of government to discriminate by law between persons on account of their race, their color, their religion, or the place of their birth. It is just as wrong and just as contrary to republicanism to provide by law for the education of children who may be identified with a certain race in separate schools to themselves, as to provide by law for the education of children who may be identified with a certain religious denomination in separate schools to themselves. The duty of the law-maker is to know no race, no color, no religion, no nationality, except to prevent distinctions on any of these grounds, so far as the law is concerned.

"The colored people in asking the passage of this bill just as it passed the Senate do not thereby admit that their children can be better educated in white than in colored schools; not that white teachers because they are white are better qualified to teach than colored ones. But they recognize the fact that the distinctions when made and tolerated by law is an unjust and odious proscription; that you make their color a ground of objection, and consequently a crime. This is what we most earnestly protest against. Let us confer upon all citizens, then, the rights to which they are entitled under the Constitution; and then if they choose to have their children educated in separate schools, as they do in my own State, then both races will be satisfied, because they will know that the separation is their own voluntary act and not legislative compulsion."

Congressman William E. Finck, an Ohio Democratic lawyer who had voted against the Fourteenth Amendment in the 39th Congress, stated that it did not give the federal government power to regulate admission to schools. He quoted copiously from the McCall case to support this proposition.[269] Congressman John B. Storm, a Pennsylvania Democratic lawyer, also urged that segregated schools conferred equal rights.[270] Cain, a South Carolina Negro Republican, added that he thought Negroes "shall not lose anything if it (the school clause) is struck out." He said that they "could afford for the sake of peace in the republican ranks, if for nothing else—not as a matter of principle—to except the school clause.[271] A Virginia Democrat praised the state's school system and warned that the bill would deliver a fatal blow to it;[272] a view which a Republican colleague of his endorsed.[273]

The next day, February 4, 1975, was the last day of House debate, Congressman James B. Sener, a Virginia Republican lawyer who had been defeated for re-election, told the House that not only would the school clause demolish the southern school systems, but also it would drag down the Republican Party in the South.[274] Congressman Ellis H. Roberts, a Republican newspaper editor from New York, opposed the complete elimination of the school clause because he wanted to give Negroes the right to go to school, but favored the segregation provision so that the South would not be antagonized.[275] A Missouri Republican who had also been defeated extolled the segregated schools of St. Louis and opposed the bill.[276]

Cain arose, despairing of the school clause, which he called the most important part of the bill. He said:

"As a republican, and for the sake of the welfare of the republican party, I am willing, if we cannot rally our friends to those higher conceptions entertained by Mr. Sumner—if we cannot bring up the republican party to that high standard with regard to the rights of man as seen by those who laid the foundation of this Government—then I am willing to agree to a compromise. If the school clause is objectionable to our friends, and they think they cannot sustain it, then let it be struck out entirely. We want no invidious discrimination in the laws of this country. Either give us that provision in its entirety or else leave it out altogether, and thus settle the question."[277]

Under questioning, Cain averred that the southern Negroes did not want mixed schools, and said that the only mixed institutions in South Carolina was the state college. He further declared that if Congress would force people to accept mixed schools, they would obey without trouble. But he once again concluded that he would prefer the school clause stricken rather than have a segregation provision therein.[278]

Congressman Simeon B. Chittenden, a New York Republican, then explained why he was going to vote against the bill:

"I do not want to go down with my party quite so deep as the bill would sink it if it becomes the law, and that is the reason why I speak. * * * I am a practical man, and believe it impolitic unnecessarily to vex white men, North and South, by passing this bill now."[279]

White of Alabama then made a major speech in favor of segregation amendment. He attacked fellow Republican extremists and counseled "moderation on this subject." He said that the evil "to be remedied by this bill is that the people of color in many of the States are denied the privilege of admission to public schools." He added that neither Negroes or whites in the South desired race-mixing, and averted to the action of the House Judiciary Committee in reporting a school segregation amendment, commenting as follows:

"This is a question of expediency, not a matter of right. Your committee concede this by providing in their bill for separate schools. Had it been a matter

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[269] Cong. Rec. 43/2, 948.
[270] Cong. Rec. 43/2, 951.
[271] Cong. Rec. 43/2, 957.
[272] Cong. Rec. 43/2, App. 119–120 (Cong. Eppa Hunten).
[273] Cong. Rec. 43/2, App. 158–9 (Cong. J. Ambler Smith).
[274] Cong. Rec. 43/2, 978–9. He said: "in this effort they are crippling the great republican party in eight of the (southern) states . . . which . . . cast their electoral vote for . . . Grant . . . ."
[275] Cong. Rec. 43/2, 980–1.
[276] Cong. Rec. 43/2, 981 (Con. Edwin O. Stanard).
[277] *Ibid.*
[278] Cong. Rec. 43/2, 981–2.
[279] Cong. Rec. 43/2, 982.

of right or of principle, they could not have provided in their bill for separate schools; but as it was neither, but only a question of expediency, they could do so, and acted wisely and will in so doing." [280]

White then made a lengthy political analysis, in which he pointed out that the civil rights bill was changing so many white votes that it would cost the Republican Party every southern state.[281] Speaking of the Republican mountain areas, he warned:

"No earthly power could have loosed your hold upon them but the republican party itself. But when you proposed to put the Senate bill upon them; when, as they were told, you proposed to invade the sanctity of their homes and to force social equality upon them; when you proposed to force their children into schools with colored children or deprive them of the benefits of the common schools, the blood of the Anglo-Saxon rebelled, and they turned away from you. You may say that this is a prejudice but they say it is not, that it is a sentiment; but whether the one or the other it is a fact, and a stubborn fact—one that will not yield to force. If the civil-rights bill which is on your table becomes the law, you will drive these men, whose fidelity to republican principles has been proven by sacrifices and trials to which no northern republican has been subjected, permanently away from you, and you obliterate in a brief time the republican party South." [282]

Kellogg then explained that he was moving to strike out the school clause because schools should be under local control, because the school clause might injure the school systems, and because national legislation should not provide for segregation by law. Congressman James Monroe, an Ohio Republican, added that although he preferred the Senate bill, he would rather have the school clause stricken out than to take the House Judiciary Committee's provision providing for segregated schools. He explained that Negroes and radicals were opposed to any statutory racial distinctions, and would prefer to take their chances for obtaining an education for colored students under the Constitution without a statute, than to accept segregated education under federal law.[283] And Congressman Barbour Lewis, a Tennessee Republican, warned about sentiment against school-mixing in the South.[284]

Congressman Julius C. Burrows, a Michigan Radical Republican, arose to warmly endorse the Senate bill. He pointed to the widespread illiteracy among Negroes as the reason why they needed schools more than anything else. He further protested against the school segregation provision, as "entering upon that course of legislation which draws a line of demarcation between American citizens who by your laws and your Constitution stand in absolute equality. . . ." [285] He added that the provision permitting states to establish school segregation "is to establish by Federal law separate schools in the majority of the States of this Union." To this objection came on several grounds. First, he said that it would create racial prejudice in small children where none had existed before. Secondly, he urged that a segregated school system would double the expense for schools. Finally, he said that the federal law would reopen the contest about school segregation in those states which had already eliminated it by local law. He named Connecticut, Illinois, Iowa, Massachusetts, Minnesota, and Michigan as states where school segregation had been abolished.[286] Rapier, the Negro Republican colleague of White, also rejected any compromise and made an emotional appeal for the Senate bill.[287]

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[280] Cong. Rec. 43/2, App. 15.

[281] Cong. Rec. 43/2, App. 16–24. He said: "But it is to the effects of this measure upon the people of the Southern States I wish to call attention. The elections there have swept nearly every republican Representative from the States of Virginia, West Virginia, North Carolina, Tennessee, Georgia, Alabama, and Arkansas . . . while in the State Legislatures there has been a corresponding dimunition of power. Falling bodies move with accelerated rapidity and cumulative force, and unless this downward movement is speedily checked, in a brief time the republicans in the South will have no Representative here, and no power or influence in a Legislative Assembly in the South. . . . These consequences have followed from the proposal to pass the civil rights bill of last session, and will be multiplied and it may be made irreparable by its passage. The result then will be to lose you the entire South, and to break and dissipate your political power there for all time to come. Looking at it as a mere question of party tactics, where in the North and West can you expect to gain, by the passage of this bill, States or voters to compensate you for the loss of nine hundred thousand voters and seven or eight States in the South?" *Id.* at 17.

[282] Cong. Rec. 43/2, App. 20.

[283] Cong. Rec. 43/2, 997–8.

[284] Cong. Rec. 43/2, 998–9.

[285] Cong. Rec. 43/2, 999.

[286] Cong. Rec. 43/2, 1000.

[287] Cong. Rec. 43/2, 1001.

Congressman William W. Phelps, a New Jersey Republican lawyer, opposed the bill as unconstitutional and destructive of the budding southern school systems. But his main argument was political. He said that the two parties had divided in the last election on the bill, and that the people voted against it emphatically.[288] But Congressman Charles G. Williams, a Wisconsin Republican, opposed school segregation, "thereby nurturing a prejudice they never knew, and preparing these classes for mutual hatred hereafter, though they are the ones . . . upon whose action the peace and tranquillity of the nation must depend."[289] Finally, two Republicans appealed for Democratic votes to let Negroes go to school, based on God and the 1872 Democratic platform.[290] Butler of Massachusetts, who concluded the debate, also expressed a preference for no school provision rather than for one with segregated schools.[291]

A vote was then taken on Kellogg's motion, striking out the entire school clause, including its section permitting states to maintain segregated schools. This vote carried by 128 to 48. A vote to restore the school clause, and providing for segregation and other public accommodation, on White's motion, lost by 114 to 91. In neither case were the yeas and nays taken.[292]

Federal compulsion of school desegregation then reached what would be its high water mark for over three-quarters of a century. A vote was taken on restoring the school clause as it passed the Senate. This vote lost by 114 yea to 148 nay.[293] The affirmative votes were all cast by Republicans. Of the Negative votes, 61 were cast by Republicans and 87 by Democrats. All the few remaining Democrats who had served in the 39th Congress, Charles Eldredge of Wisconsin, William E. Finck of Ohio, William E. Niblack of Indiana, and Samuel J. Randall of Pennsylvania, all of who had voted against the Fourteenth Amendment in the House, and James W. Nesmith of Oregon, who as a Senator was absent when the vote was taken on it in 1866, voted nay, as could be expected.

The Republican vote is of more interest. The school clause split off about one-third of the Republican party. This split was not based on North-South lines. Of the Republicans voting for the school clause, 98 came from the North, one came from a border state (Maryland), and 15 came from the South. Of the Republicans voting against the school clause, 37 came from the North, 7 from the border states of Delaware, Maryland, West Virginia, and Missouri, and 17 came from the South. To further show the nature of the split, all five Republicans from Louisiana, all three from Mississippi, and all four from South Carolina voted for the school clause, while four out of five from Alabama, all five from Tennessee, and four out of five from Virginia voted against it. Seven out of nine Michigan Republicans voted for it, but all three Minnesota Republicans voted against it. The New Jersey Republican delegation was split three to three, while the Pennsylvania delegation was split, twelve for and nine against. There was a somewhat heavier vote against the clause by Republicans in marginal seats. About one third of the Republicans who voted for the school clause had been defeated in 1874, while one-half who voted against it had been defeated. However, this does not seem to be such an undue proportion as to lead to the conclusion that the defeats in 1874 were the sole factors for voting against the clause, although doubtless they were an important cause.

By this time, only a handful of Republicans sat in the House who had been in the 39th Congress and voted for the Fourteenth Amendment. The following of that group voted for the school clause: Godlove S. Orth of Indiana, John A. Kasson of Kansas, Henry L. Dawes and Samuel Hooper of Massachusetts, James A. Garfield and William Lawrence of Ohio, William D. Kelley, Leonard Myers, and Charles O'Neill of Pennsylvania, and Philetus Sawyer of Wisconsin, all of whom but Hooper and Sawyer were lawyers. Four Republicans who had voted for the Fourteenth Amendment voted against the school clause. They were Hezekiah S. Bundy, an Ohio Republican lawyer, Robert S. Hale, a former New York State judge whose speech against the original draft of the Fourteenth Amendment had resulted in the substantial rewording of the First Section,[294]

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[288] Cong. Rec. 43/2, 1001–2.
[289] Cong. Rec. 43/2, 1002.
[290] Cong. Rec. 43/2, 1003 (Cong. William A. Phillips, Kansas; Cong. John P. Shanks, Ind.).
[291] Cong. Rec. 43/2, 1005.
[292] Cong. Rec. 43/2, 1010.
[293] Cong. Rec. 43/2, 1011.
[294] See Cong. Globe, 39th Cong., 1st Sess. 1063–6 (1866).

Glenni W. Scofield of Pennsylvania, a former state judge, who had several years before spoken against railroad segregation,[295] and Luke P. Poland, a former Chief Justice of the Vermont Supreme Court who had likewise taken a prominent part in urging passage of the Fourteenth Amendment, as a senator from that state.[296]

The House vote for the Fourteenth Amendment was 128 to 37.[297] The party line-up in the 39th Congress of Republican: 149, and Democrat: 42,[298] is not very dissimilar to the total vote on the school clause, of Republican: 142, and Democrat: 58, if the southern and Nebraska delegations, which were unrepresented in the 39th Congress when the Fourteenth Amendment was proposed, is eliminated from both party totals. Thus, if the third of the Republicans in the House which had defected on the school clause at the end of the reconstruction in 1875, were presented with a school clause by the Radicals in 1866, and likewise defected then, as they probably would have, it would have meant a swing of 40 Republican votes. The vote on the Fourteenth Amendment with a school desegregation provision would have been about 88 to 77, far less than the two-thirds necessary for passage. A school desegregation provision on the Fourteenth Amendment would have blocked that amendment in the House, without considering the more narrowly divided Senate.

5. SUMMARY AND CONCLUSIONS

In contrast to the scanty debates in 1866 on schools, those on the Civil Rights Act of 1875 were voluminous and exhaustive. These debates have been set forth at some length above to demonstrate that virtually every possible position that is espoused today was known and advocated by 1875 in regard to race relations and schools. Moreover, every substantial argument for or against school segregation or integration was known and advocated at that time. The only difference today is that partisans of these positions are using longer words and bigger footnotes to say the same thing. One must flatter oneself to believe that one has something really new to say on the subject which was not said almost a century ago.[299]

The views expressed ranged the entire spectrum. The unreconstructed Democrats from Delaware and Kentucky expressed the *ante-bellum* view that Negroes paid so little in taxes that they ought to be exempted from both taxes for schools and should not go to any kind of school at all. We need not concern ourselves with what they thought of the Fourteenth Amendment. More progressive Democrats such as Thurman and Merrimon thought that the Fourteenth Amendment had nothing to do with schools, or at least school segregation, and that Negroes in schools should be rigidly segregated by law. However, as all Democrats, and conservatives voted against the Fourteenth Amendment, their views are not too significant.

The "swing" group of Republican moderates, who made possible the Fourteenth Amendment, led by Trumbull of Illinois, believed that the right to go to school was not a civil right protected by the Fourteenth Amendment, over which Congress could legislate. As for the District of Columbia, this group advocated or acquiesced in separate and equal facilities by law for Negroes. This group included not only the moderates of 1866, but also such erstwhile regulars and Radicals as Morrill of Maine, Poland of Vermont, and Sprague of Rhode Island. It constituted at all relevant times about a third of the Republican strength in both Houses of Congress.

There was also a handful of regulars, such as Pratt of Indiana and Sherman of Ohio, who believed that the *McCann* case was correctly decided but that Congress could abolish at least state-wide school segregation laws. Apparently, they believed that the local school boards should decide whether schools should be segregated or integrated. Their view would probably also require the overruling of *Berea College v. Kentucky*.[300]

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[295] Cong. Globe, 40th Cong., 2nd Sess. 1965 (1868).

[296] Cong. Globe, 39th Cong., 1st Sess. 2 61–4 (1866). Poland was also a member of the House Judiciary Committee which drafted the committee's school segregation provision, and was one of the three Republicans committee members to vote against the Senate school clause, four of them voting for it.

[297] *Id.* at 2545.

[298] U.S. Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1957*, 691 (1960).

[299] See the statement of Congressman John B. Storm, a Pennsylvania Democrat: "I believed that this subject had been talked threadbare both before the House and the

The Radical view, as illustrated by the speeches of Edmunds of Vermont, Frelinghuysen of New Jersey, and Howe of Wisconsin, was that the Fourteenth Amendment prohibited state or local laws which segregated students by race, but that school boards could maintain a dual system of schools and do everything to encourage racial segregation short of compelling it. This view would sustain *Brown* v. *Board of Education*,[300] if read very narrowly, far more narrowly than the Supreme Court has ever read it. It would certainly not support the gloss placed on it by *Coss* v. *Board of Education*,[301] or by the later decisions of the lower federal courts.[302]

Finally, the Sumner-Boutwell view was that there should be a single school system with everybody going to his neighborhood school. This is the way the Supreme Court has so far viewed the Fourteenth Amendment. Nobody suggested that the school authorities had an obligation to transport students around the city to eliminate "de facto" segregation because of neighborhood population patterns.

A determination of which of these views the Fourteenth Amendment embodied is a matter of simple arithmetic. Boutwell's proposal received not a single additional vote from a northern Republican; so obviously the Fourteenth Amendment could not have embodied this. The Radical ideas, as embodied in the Senate bill, never obtained a two-thirds vote in either House, which would have been necessary to embody it in a constitutional amendment. The Republicans who voted against the school clause did not do so, as has been suggested, because of the stock warning that southerners would dismantle their school systems.[303] This was simply a makeweight argument that those against the school clause used, with those for it either claiming that it would not occur or willing to take their chances. Those Republicans who opposed the school clause either did so because of fear of voter reaction, personal belief that the Fourteenth Amendment did not require school desegregation, or personal hostility to school desegregation, or a combination of these views. Insofar as such action was based on fear of voter antipathy, it constitutes a strong argument against the possibility that the Fourteenth Amendment requires school desegregation. The amendment was proposed as a platform for the Republican Party to run on in the key fall 1866 elections,[304] and the party was forced to forgo its far more moderate and ardently-desired objective of Negro suffrage for this reason. Indeed, Sherman had warned his colleagues to be "moderate" and "to waive extreme opinions",[305] and Democrats twitted the majority on its surrender to the voters.[306] In light of the fact that the House at the beginning of the reconstruction period had given District of Columbia Negroes the ballot,[307] even before the Fourteenth Amendment was proposed, but never, even by 1875, had desegregated District schools, it is conceivable that the Fourteenth Amendment would have been loaded down with a proposition so likely to defeat both it and the Republican Party.[308]

In 1866, as in 1875, the Republicans could not have afforded to lose a third, or indeed, any significant number of their party, and still muster a two-thirds vote in the Congress. The moderates held the balance of power in 1866. Their views must therefore be deemed decisive, since without them nothing could have been accomplished. This group emphatically and consistently demonstrated

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country. Since 1870 it has been discussed in all its various phases, so that it is impossible for the ingenuity of man to say anything either new or original upon it." Cong. Rec. 43/2, 950. Congressman Eppa Hunton, a Virginia Democrat, also said: "So much has been said on the civil rights bill that but little can be uttered now either new or interesting." Cong. Rec. 43/2, App. 117. 211 U.S. 45 (1908).

[300] 347 U.S. 483 (1954).

[301] 373 U.S. 683 (1963).

[302] A member of these are collected in Dowell v. School Board, 244 F. Supp. 971 (W. D. Okla. 1965).

[303] Frank & Munro, *The Original Understanding of "Equal Protection of the laws"*, 50 Col. L. Rev. 131, 161–2 (1950). Prof. Kelly has indicated that threats of school closing were important, but even he has recognized that political considerations were decisive. *Supra*, n. 12 at 554–561.

[304] James, *The Framing of the Fourteenth Amendment* 110–120, 123–4, 134–5, 145 (1956).

[305] Cong. Globe, 39th Cong., 1st Sess., App. 183 (1866).

[306] *Id.* at 2580 (Randall).

[307] *Id.* at 311.

[308] See Cong. Rec. 43/2, 1001, where Congressman William W. Phelps, a Republican opponent of the civil rights bill from New Jersey, declared that in the form of the bill Sumner left "the (Republican) party which he created and led, a legacy full of the seeds of disintegration and decay . . . ."

that it considered that the Fourteenth Amendment neither compelled of itself nor gave Congress the power to compel school desegregation.

The conclusion is inevitable. The rule of *Brown* v. *Board of Education* is not now, nor has it ever been, the supreme law of the land. Rather, it is an unwarranted exercise of non-existent authority which, being illegitimate in its origin, cannot be made legitimate by the lapse of time, nor by compliance, voluntary, purchased, or coerced. As for so-called "de facto" segregation, to believe that the Fourteenth Amendment mandated elimination of this requires a complete hallucination. The short answer to the array who urge the contrary was given by Mr. Justice Field, a contemporary of the amendment, in another context as follows:

"But notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of the states. . . . Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence."[809]

If a synthesis of Radical and Moderate views on schools were attempted, it would result in a doctrine that is the parent and not the stage who must control the educational atmosphere of the child. In such a synthesis, the duty of each school board is to create, consistently with efficient school administration, such a number of schools, both segregated and integrated, by race or otherwise, as will afford to the parents an opportunity to place their children in the educational atmosphere which they desire. Such a scheme would give the fullest opportunity for freedom of choice and association, but yet guard any child against unwanted association. To the extent that it is administrative feasible, the local school board should run a variety of schools and classes to suit the desires of all segments of the community. To the extent that the Fourteenth Amendment has anything to do with school segregation, it merely guarantees individual freedom of choice, consistent with the choice of all other individuals. Anyone who thinks he has a right to force himself on others is not asserting his Fourteenth Amendment rights but trampling on the rights of others.

Racial Segregation in Public Accommodations: Some Reflected Light on the Fourteenth Amendment and the Civil Rights Act of 1875

(By Alfred Avins)

1. Introduction

The extent to which the Fourteenth Amendment forbids racial segregation is a matter of current importance in the field of "public accommodations." Section 201(d) of the Civil Rights Act of 1964[1] specifically relies on the Fourteenth Amendment as one of the constitutional bases forbidding segregation in public accommodations. Moreover, where the Supreme Court finds "state action" to exist, it has specifically relied on this amendment to forbid such segregation even without a federal statute,[2] and in so doing has overruled what was long the landmark in the field of race relations, *Plessy* v. *Ferguson*.[3]

While direct light on the intent of the framers of the Fourteenth Amendment respecting segregation is scanty,[4] there is abundant reflected light in respect to segregation and public accommodations from the debates on the Civil Rights Act of 1875.[5] The first section of that statute forbade discrimination in inns, public carriers, and theaters and places of amusement.

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[809] Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) quoted in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78–79 (1938).

[1] 78 Stat. 241 (1961).

[2] Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956) aff'd, 352 U.S. 903 (1956).

[3] 163 U.S. 537 (1896).

[4] Cf. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 56–59 (1955).

[5] 18 Stat. 335 (1875).

Apparently, examination of the legislative history of that act has been discouraged by the fact that it was held unconstitutional in the *Civil Rights Cases*,[6] on the ground that it went beyond the "state action" limitation of the Fourteenth Amendment. Nevertheless, the debates in connection with that act are illuminating. This article will attempt to weave the reflected light into a pattern which will show the intent of the framers of the Fourteenth Amendment in respect to segregation in public accommodations.

2. SUMNER AND THE AMNESTY BILL

On May 13, 1870, Senator Charles Sumner of Massachusetts, the ultra-equalitarian Radical Republican, introduced in the Senate a bill to supplement the Civil Rights Act of 1866.[7] The first section of Sumner's bill read:

"That all citizens of the United States, without distinction of race, color, or previous condition of servitude, are entitled to the equal and impartial enjoyment of any accommodation, advantage, facility, or privilege furnished by common carriers, whether on land or water; by inn-keepers; by licensed owners, managers, or lessees of theaters or other places of public amusement; by trustees, commissioners, superintendents, teachers, or other officers of common schools and other institutions of learning, the same being supported or authorized by law; by trustees or officers of church organizations, cemetery associations, and benevolent institutions incorporated by national or State authority; and this right shall not be denied or abridged on any pretense of race, color, or previous condition of servitude."[8]

The bill died after being sent to the Judiciary Committee and reported adversely by its chairman, Senator Lyman Trumbull of Illinois, for the committee.[9] In the next session, Sumner again introduced the bill,[10] but again it died in the Judiciary Committee.[11]

When the First Session of the Forty-Second Congress opened, Sumner introduced the bill for the third time. Having twice been rebuffed by the Judiciary Committee, he asked that the bill not be returned to that Committee again. He urged in support of it:

"you cannot expect repose in this country . . . until all citizens are really equal before the law. Why, sir, you know well that the Senator from Mississippi, who sat at our right only the other day, (Mr. Revels,) cannot travel to his home as you can without being insulted on account of his color. And . . . has he not the same rights before the law that you have? Should you enjoy in any car a privilege which the late Senator from Mississippi should not enjoy? And yet you know his rights in the cars are not secured to him; you know that he is exposed to insult. So long as this endures, how can you expect the colored population of this country to place trust in the Government? Government insults them so long as it refrains from giving them protection in these rights of equality."[12]

However, no other senator showed much interest, and the bill once again died of its own accord.

In the face of these repulses, Sumner moved on December 20, 1871, to attach his proposal on as a rider to the amnesty bill, a proposal authorized by the third section of the Fourteenth Amendment to lift the remaining political disabilities which that section imposed on many important confederates.[13] This bill was supported by the President, ardently desired by Southern Republicans and all Democrats, and acquiesced in, at least half-heartedly, by most Republicans. Its passage by the necessary two-thirds majority seemed all but assured.

When Sumner contended that his bill was designed to secure "equal rights", Senator Joshua Hill, a Georgia Republican, immediately arose to contest this. He declared that separate dining rooms in hotels and separate railway cars did not deny civil rights if the accommodations were equal. He pointed to the fact that slaves who had worshipped at the same church as their masters before the

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[6] 109 U.S. 3 (1883).
[7] 14 Stat. 27 (1866).
[8] Cong. Globe, 41st Cong., 2d Sess. 3434 (1870). See also Cong. Globe, 42nd Cong., 1st Sess. 21 (1871); Cong. Globe, 42nd Cong., 2d Sess. 244, 821 (1872) (hereinafter referred to as Globe 42/2).
[9] Cong. Globe, 41st Cong. 2d Sess. 5314 (1870). See also Globe 42/2, 821.
[10] Cong. Globe, 41st Cong. 3rd Sess. 616 (1871).
[11] *Id.* at 1263. See also Globe 42/2, 822.
[12] Cong. Globe, 42nd Cong., 1st Sess. 21 (1871).
[13] Globe 42/2, 237, 240.

Civil War requested assistance in building separate churches after emancipation.[14] The following colloquy then occurred:

"Mr. SUMNER. Mr. President, we have a vindication on this floor of inequality as a principle, as a political rule.

"Mr. HILL. On which race, I would inquire, does the inequality to which the Senator refers operate?

"Mr. SUMNER. On both. Why, the Senator would not allow a white man to go into the same car with a colored man.

"Mr. HILL. Not unless he was invited, perhaps [Laughter].

Mr. SUMNER. Very well, The Senator mistakes substitutes for equality. Equality is where all are alike. A substitute can never take the place of equality. . . ."[15]

The colloquy continued, with Sumner asserting that in railroads and hotels, as well as schools, Negroes should have the same rights as whites. He contended that segregation in these places was an indignity, an insult and a wrong. Hill, however, pointed out that he himself was "subject in hotels and upon railroads to the regulations provided by hotel proprietors for their guests, and by the railroad companies for their passengers." He pointed out that while both he and Negroes were entitled to "all security and comfort that either presents to the most favored guest or passenger," physical proximity does not add to it, and hence is not a denial of any right to either white or colored. He drew on the example of segregated ladies cars on railroads, and concluded that separation was a matter of taste.

Discussion continued in the same vein. Sumner justified first, second, and third class railroad cars based on price, but proclaimed that segregation was inequality and violated the Declaration of Independence. He alluded to the large Negro voting population of Georgia, and how badly Hill was representing them. Hill replied that while Sumner's views were consistent with his whole life's outlook, "he has not yet succeeded in convincing the great mass of minds, even in the far North and East," of the practicality or necessary of these views. Hill denied that race mixing in railroads added to comfort, while Sumner asserted that to select a white person as a railroad companion on a long trip was an indignity to the colored man. When Sumner decried the segregation in a steamboat dining room of Frederick Douglass because of race as violation of equal rights, Hill defended the right of companies to make such regulations as "no infringement of the Constitution of the country or of any existing law."[16]

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[14] Globe 42/2, 241.

[15] Globe 42/2, 242.

[16] As to common law, at least, Hill was unquestionably correct. See Chicago & Northwestern Ry. Co. v. Williams, 55 Ill. 185, 8 Am. Rep. 641 (1870); Day v. Owen, 5 Mich. 520, 72 Am. Dec. 62 (1858); West Chester & P. R. Co. v. Miles, 55 Pa. St. 209, 93 Am. Dec. 744 (1867); Goines v. McCandless, 4 Phila. 255 (Pa. 1861). Day v. Owen and Goines v. McCandless suggest that the separate accommodations may be inferior; the other two cases noted above, and decided after the Civil War, require equal accommodations, as does Coger v. North West Union Packet Co., 37 Iowa 145 (1873), which did not decide the question of segregation. All of the cases, however, required carriers to take Negroes in some way. Cully v. Baltimore & Ohio R. Co., 6 Fed. Cas. 946, No. 3466 (D. Md. 1876), citing Field v. Baltimore City Pass. R. Co. (unreported); Pleasants v. North Beach & M.R. Co., 34 Cal. 586 (1868); Turner v. North Beach & M.R. Co., 34 Cal. 594 (1868); State v. Kimber, 3 Ohio Dec. 197 (1859); Derry v. Lowry, 6 Phila. 30 (Pa. 1865). There are a considerable number of later federal cases holding that a carrier may offer Negroes separate accommodations only if they are equal to those of whites. Guinn v. Forbes, 37 Fed. 639 (D. Md. 1889); Murphy v. Western & A.R.R., 28 Fed. 637 (C.C. E.D. Tenn. 1885); Logwood v. Memphis & C.R. Co., 23 Fed 318 (C.C.W.D. Tenn. 1885); The Sue, 22 Fed. 843 (D. Md. 1885); Gray v. Cincinnati So. R. Co., 11 Fed. 683 (C.C.S.D. Ohio 1882); Green V. City of Bridgeton, 10 Fed. Cas. 1090, No. 5754 (S.D. Ga. 1879); Charge to Grand Jury, 30 Fed. Cas. 999, No. 18,258 (C.C.N.C. 1875); Charge to Grand Jury, 30 Fed. Cas. 1005, No. 18,260 (C.C.W.D. Tenn 1875). It might also be noted that at common law, an innkeeper could assign whatever rooms he wanted to give to his guests. Fell v. Knight, 8 M. & W. 269, 151 Eng. Rep. 1039 (1841); Doyle v. Walker, 26 Upper Can. Q.B. 502 (1868); Rogers, *The Law of Hotel Life* 7 (1879); Wandell, *The Law of Inns, Hotels and Boarding Houses*, 75 (1888). To the same effect see Note, *The Civil Rights Bill*, 10 Weekly L. Bull. 241 (1883).

It is quite likely that Sumner was aware of the common-law rule permitting segregation of passengers and hotel guests. In his major opening speech on the bill, he had quoted from Story on Bailments, sec. 591. Globe 42/2, 383. The next section, sec. 591a, which was in every edition from the 3rd edition published in 1832, stated that "The passengers are bound to submit to such reasonable regulations as the proprietors may adopt for the convenience and comfort of the other passengers, as well as for their own proper interests." See, in particular, Story on Bailments, § 591a, 610 (5th ed., 1851). Sumner had edited the fifth edition of Story on Bailments, and so unquestionably was familiar with this statement of the law. See Advertisement to the Fifth Edition printed

Footnote continued on following page.

Sumner concluded the colloquy by asserting that Congress "must annul all such regulations" because they were "in defiance of equality," and that unless Negroes were "equal before the law" the "promises of the Declaration of Independence are not yet fulfilled." As the self-proclaimed defender of the Negro-race, he pledged to see that they were not treated with indignity.[17]

Sumner then started reading letters from Negroes complaining that hotels would not serve them. However, debate on this was concluded when Sumner's amendment was ruled out of order.[18]

The next day, Sumner moved his amendment in the Committee of the Whole.[19] Debate centered around arguments that Sumner's amendment would kill the amnesty bill.[20] Finally, a vote was taken and the amendment lost by 30 to 29.[21] But Sumner renewed his amendment in the whole Senate,[22] and spoke at length in its favor on January 15, 1872. He decried the cases where Frederick Douglass was not permitted to dine with fellow commissioners, and where a colored lieutenant governor of Louisiana "was denied the ordinary accommodations for comfort and repose" on a railway trip to Washington.[23] Sumner protested that all classes and sexes of Negroes were "shut out from the ordinary privileges of the steamboat or railcar, and driven into a vulgar sty with smokers and rude persons, where the conversation is as offensive as the scene, and then again at the road-side inn are denied that shelter and nourishment without which travel is impossible." Even Massachusetts was not free from discrimination.[24]

Sumner denied that separate facilities were equal. It was an equivalent, but equality demanded the same thing. He contended that "in the process of substitution, the vital elixir [of equality] exhales and escapes," even if accommodations are the same. It was an indignity to Negroes, and "instinct with the spirit of slavery." He concluded that the law would change adverse public opinion, and that patronage of mixed facilities would not cease because of the requirements of his bill.[25]

Two days later Sumner was back on his feet to rebut assertions that the bill was unnecessary. He read to the Senate long excerpts from letters and resolutions by Negroes complaining of denial of facilities in railroads and hotels. A colored teacher traveling to Alabama from Boston could get nothing to eat for several days.[26] A hotel in Boston would not give a Negro a room during one of the worst storms of the year.[27] The colored Secretary of State of South Carolina wrote in a letter to Sumner that a federal law was needed because state courts would not enforce a similar state statute.[28] A Negro legislator from North Carolina complained that he had passed a charter through the state house of representatives for a steamboat company. On returning home, his only route was on the company's line, and he was denied first-class accommodations and placed in a colored section of much inferior accommodation.[29] First-class accom-

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Footnote continued from previous page.

following Story's dedication page. However, it is probable that Sumner was reading from a later edition than that which he had edited, since the quotation from Wintermute v. Clark, 5 Sandf. 242 (N.Y. Super. Ct. 1851), from which he quoted, does not appear in Story on Bailments until the sixth edition, published in 1856. Commencing with the seventh edition, published in 1863, Day v. Owen, *supra*, is cited. See Story on Bailments, 561, n. 6 (7th ed. 1863). And Fell v. Knight, *supra*, is noted in 2 Kent's Commentaries 596, n. a (11th ed. Comstock 1866), from which he also read. Globe 42/2, 383. The point that carriers could not exclude, but could segregate, Negroes, is made quite clear in the speeches of Senator Willard Saulsbury (D.-Del.), John S. Carlisle (Un.-Va.) and James R. Doolittle (R.-Wisc.), in Cong. Globe, 38th Cong., 1st Sess. 1157–9 (1864), notwithstanding Mr. Justice Black's doubt on this point, in Bell v. Maryland, 32 U.S. Law Week 4664, 4697 (1964). As for the Field case, cited by Mr. Justice Goldberg as a desegregation case (*id.* at 4689, n. 26), this is more properly interpreted as a non-discrimination case. See the Cully case, *supra*. Cf. the brief of the U.S. Solicitor General in Griffin v. Maryland, 378 U.S. 920 (1963), at p. 51, n. 91.

[17] Globe 42/2. 243.
[18] Globe 42/2, 244–5.
[19] Globe 42/2, 263.
[20] Globe 42/2, 272.
[21] Globe 42/2, 274.
[22] Globe 42/2, 278.
[23] Globe 42/2, 381.
[24] Globe 42/2, 382. But Massachusetts had an anti-discrimination law. Act of May 16, 1865, Mass. Stat. 1865, c. 277. See also Commonwealth v. Sylvester, 95 Mass. 247 (1866).
[25] Globe 42/2, 383.
[26] Globe 42/2, 429–30.
[27] Globe 42/2, 430.
[28] *Ibid.* But see *infra*, n. 33.
[29] Globe 42/2, 431.

modations were closed to Negroes, as were hotels, places to eat, sleeping cars, churches and cemeteries.[30]

Senator Frederick T. Frelinghuysen, a New Jersey Republican, then rose to offer some technical amendments as to wording, and to urge an amendment providing that churches, schools, cemeteries, and institutions of learning established exclusively for either colored or whites should remain segregated. To do otherwise, he contended, would allow whites to join Negro churches and wrest their valuable property from them. Since Negroes could not be given greater privileges than whites, the law would have to be modified.[31] Sumner ultimately accepted this amendment.[32]

Next, Senator Frederick A. Sawyer, a South Carolina Republican, objected that the Sumner amendment would endanger the amnesty bill. He stated that the South Carolina civil rights law[33] was enforced generally, although conceding some lapses by courts. He favored Sumner's bill, although as an independent measure, and spent much time defending himself from Sumner's stinging attacks.[34] Hill also asserted that Negroes had ample accommodation and did not favor race mixing.[35] Senator James W. Nye, a Radical Republican lawyer from Nevada, supported Sumner's bill. He asserted that equality before the law does not "mean that I am to be kicked from the cars because I am not blessed with a white skin."[36]

Senator Eli Saulsbury, a Delaware Democrat, made a characteristic attack on Sumner's bill as one "of social equality enforced by pains and penalties." He declared:

"If a man chooses to ride in the same car with Negroes, if he voluntarily attends the same church and sits in the same pew, . . . then he chooses social equality with negroes . . . But, if he . . . is compelled to ride in the same car . . . then it is enforced social equality, and that is what the Senator's amendment proposes."[37]

Saulsbury condemned the bill for requiring mixed railroads, hotels, churches, and cemeteries. He predicted that whites would cease to patronize places affected by the law, and that they would have to close for want of business. He even asserted that churches would be closed.[38] But Nye said that since southerners were willing to ride with Negroes when they were slaves, they should not object now that they are free. He added that if they did not want to eat with Negroes, they could get up and leave the table.[39]

The next day, Sumner read some more letters from Negroes. One complained that he could get no seat in a theater or street car.[40] Another said that the Arkansas civil rights law[41] was a "dead letter," while a third stated that a Negro committee was refused service at a restaurant, that another colored family could not get a stateroom, and that a colored minister would be refused admission to hotels, theaters, and churches.[42]

Senator Allen G. Thurman, an Ohio Democrat and a former chief justice of the state supreme court, attacked Sumner's amendment for infringing individual liberty and freedom of association, by forcing whites to associate with Negroes in places of amusement, clubs, and churches. He said that the bill denied "them the liberty to choose their own associates in places of public amusement, in the church, or in the school." He discussed at length the right of people to form clubs, societies, and churches limited to one group.[43] After some legal arguments, Thurman returned to attack the bill for enforcing "social equality." He asked rhetorically: "where have the people of the United States given up their liberty to form associations the members of which shall be exclusively black or exclusively white?" He applied this concept to churches, lodges, ceme-

[30] Globe 42/2, 429–435.
[31] Globe 42/2, 435.
[32] Globe 42/2, 487.
[33] South Carolina Act of Feb. 13, 1869, No. 98. See also Rev. Stat. of S.C., ¶ 136 (1873); Redding v. South Carolina R. Co., 3 S.C. (3 Rich.) 1 (1871).
[34] Globe 42/2, 489–490.
[35] Globe 42/2, 491–2.
[36] Globe 42/2, 495.
[37] Globe 42/2, App. 9.
[38] Globe 42/2, App. 10–11.
[39] Globe 42/2, 708.
[40] Globe 42/2, 726.
[41] Ark. Act of Feb. 25, 1873, amending Act of 1868.
[42] Globe 42/2, 727.
[43] Globe 42/2, App. 27.

teries, and "a theater for whites alone or blacks alone." Thurman concluded:

"I do not know any country in the world in which the subject or the citizen is interferred with as this bill proposes to interfere with him; to take from men the right to associate according to their own tastes when by doing so they interfere with the right of no one, and do not injure or in any way prejudice the state. I know of no country in which the liberty of free association, according to the taste or the wishes or the interests of the persons associating, is denied to either subject or citizen. And yet the Senator, in the name of liberty, in the name of freedom, in the name of humanity, seeks to manacle the American people and take from them liberties that they and their ancestors have enjoyed from time immemorial, and which the people in every civilized country enjoy at this day.

"I will repeat again, his bill is a bill of depotism and not of liberty." [44]

Two days later, Senator Lyman Trumbull, the veteran Illinois lawyer and legislator who, as Republican Chairman of the Senate Judiciary Committee, had shepherded to passage the Civil Rights Act of 1866, the forerunner of the first section of the Fourteenth Amendment, and had frequently acted as spokesman and leader of the Senate Republicans in the Thirty-Ninth Congress, opposed Sumner's amendment. He confined civil rights to those enumerated in the 1866 law, and said that it "did not extend . . . to social rights." He added;

"The railroad corporations make regulations in regard to the manner in which their trains are to be conducted; they set aside one car for ladies, another for gentlemen; they have first and second-class passenger cars, freight cars, and saloon cars, and I suppose they have a right to make all these regulations; but whatever right the white man has the black man has also." [45]

Senator John W. Stevenson, a Kentucky Democratic lawyer, also complained that the bill was intended to "coerce social equality between the races in hotels, in theaters, in railways, and other modes of public conveyance." [46]

At length, a vote was taken on Sumner's amendment to the amnesty bill. A 28-to-28 tie resulted, and the vice-president voted in the affirmative to break it.[47] However, because a number of supporters of the amnesty bill considered Sumner's measure unconstitutional and voted against it,[48] it received less than the requisite two-thirds vote, only 33 yea to 19 nay.[49]

On February 19, a bill similar to Sumner's provision was introduced into the House of Representatives.[50] Congressman James G. Blair, a Missouri Republican lawyer, advocated the right of business owners to provide segregated facilities. He declared that "unless the law imposes upon public carriers and hotel-keepers the duty of providing white associates for their colored passengers and guests, there can be no question but that these officers and persons may discharge every duty enjoined on them by law by providing separate accommodations for the colored people." [51] He said that the bill proposed unwanted social equality for whites, and that hotels would be closed if it were passed.[52] He added:

"Let the steam and sail vessels have their separate rooms and tables for the colored people, the railway companies separate cars, and the hotel-keepers separate rooms, and tables; managers of theaters separate galleries, and public schools separate houses, rooms, and teachers, and the question of races will adjust itself quicker than by using arbitrary means."

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"Let our Republican friends come up to the work manfully, for if they have the power under the Constitution to do what they are seeking to do by this bill, they have the power to blot out all distinction on account of color. Let me insist that my Republican friends not stop here . . . . Should any white man or white child refuse to speak to a Negro on the public highway, in the streets or elsewhere, because of color, find them and send them to the penitentiary." [53]

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[44] Globe 42/2, App. 29.
[45] Globe 42/2, 901.
[46] Globe 42/2, 918.
[47] Globe 42/2, 919.
[48] Globe 42/2, 926–8.
[49] Globe 42/2, 928–9.
[50] Globe 42/2, 1116.
[51] Globe 42/2, App. 143.
[52] *Ibid.*
[53] Globe 42/2, App. 144. He also declared: "it is not depriving any colored person of any legal right to have separate accommodations on ships, boats, cars, hotels, theaters. . . ."

Congressman Henry D. McHenry, a Kentucky Democratic lawyer, also decried the bill for enforcing social equality in public accommodations.[54] He, too, concluded: "The right of a citizen to associate exclusively with those who are congenial to him, and whom he recognizes as his peers, is an individual liberty, and no Government can prostrate it to his inferiors under the pretext of 'equality before the law.'"[55] Congressman John M. Rice, another Kentucky Democratic lawyer, also raised the social equality argument, and predicted that white patronage would be withdrawn from carriers, hotels, and theaters, and that their business would be ruined.[56]

On May 8, the Senate again considered an amnesty bill which had passed the House.[57] Sumner at once moved to annex his civil rights bill to this measure.[58] During the ensuing debate and parliamentary maneuvering, Trumbull got into a debate with Sherman of Ohio and Edmunds of Vermont. Trumbull attacked his fellow Republicans with some warmth for loading Sumner's measure on to the amnesty bill. He added:

"That is his proposition; and to pass what? A civil rights bill! Mr. President, it is a misnomer; and I now ask the Senator from Ohio, and I would be glad to give way for an answer, if he will tell me one single right that he has or I have that the colored people of this country have not. What is it? What civil right do I have or has he that is denied a colored man? I want to know what it is.

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"I know of no civil right that I have that a colored man has not, and I say it is a misnomer to talk about this being a civil rights bill. If the Senator from Ohio means social rights, if he means by legislation to force the colored people and white people to go to church together, or to be buried in the same grave-yard, that is not a civil right. I know of no right to ride in a car, no right to stop at a hotel, no right to travel possessed by the white man that the colored has not."[59]

Edmunds then asserted that it was no more equality before the law to require "that the black man shall go to one hotel to stay and the white man shall go to another," than it would be to require "that the colored man shall go into Pennsylvania Avenue or Maryland Avenue when he wants to go to the west end of town, and the white man shall take Massachusetts or some other avenue where it is proper for white people to go."[60] When Senator Orris S. Ferry, a Connecticut Republican lawyer, asked him whether segregation by sex was any denial of equality, Edmunds replied: "Would it not be a denial of right to declare that white men or men with red hair, or native citizens only should be entitled to travel in a particular horse-car, and that every other class of people should only be allowed to travel in another?"[61]

Trumbull then derided Edmund's argument, and said that nobody was being kept out of the cars on account of his hair color. He added that Negroes had the same legal right to be transported in a railroad or put up in a hotel as white people, and that the bill was not a civil rights bill at all.[62] Senator John Sherman, the Ohio Republican lawyer who voted with Trumbull for the Fourteenth Amendment, then reminded the latter that the Republicans had voted under his leadership for the Civil Rights Act of 1866, and that this bill was intended to carry out the purposes of that act by protecting "the colored people in their right to travel in the cars," which "right is denied practically in many of the

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[54] Globe 42/2, App. 217.

[55] Globe 42/2, App. 219. He also said: "The law can only prevent prejudice from interfering with the legal rights of others; but social prejudice is a social liberty that the law has no right to disturb." *Id.* at 218. See also *id.* at 371 (Cong. James C. Harper, D.-N.C.).

[56] Globe 42/2, App. 597. See also *id.* at 383.

[57] Globe 42/2, 3179.

[58] Globe 42/2, 3181.

[59] Globe 42/2, 3189. Trumbull called Sumner's amendment a "social equality bill" the next day. Globe 42/2, 3254. This is precisely what the southern Democrats were calling it.

[60] Globe 42/2, 3190.

[61] *Ibid.* Edmunds also said: "I defy him to point out any distinction between the right of Congress under the Constitution in this District, for illustration, to declare that a white child shall not go to a particular public school and that he shall go to another if he goes at all, and the power to declare that a white man shall not ride in a particular horse-car that has a blue stripe across it, and that if he rides at all he shall ride on a different one."

[62] *Ibid.*

States." When Trumbull urged that they had this right at common law, Sherman said that a better remedy was needed.[63]

Senator Francis P. Blair, a Missouri Democratic lawyer who had switched from the Republican party to become the losing Democratic Vice-Presidential candidate in 1868, also said that the bill was designated to give Negroes "social rights, to impose upon the whites of the community the necessity of a close association in all matters with the negroes." He said that this would irritate the whites. He advocated separate railway cars, hotels, and other facilities for Negroes.[64] Ferry also denied the necessity for the bill on the ground that Negroes had all the common-law remedies they needed to obtain service on carriers and hotels.[65]

Trumbull, Senator Eugene Casserly, a California Democratic lawyer, and Senator James L. Alcorn, a Mississippi Republican lawyer, then all declared that Negroes had the same rights under common law to travel on railways as did whites, while Edmunds and Sumner declared once again that the bill was necessary.[66] When a vote was taken on adding Sumner's civil rights bill to the amnesty bill, it resulted in a 29 to 29 tie. The vice-president then broke the tie in Sumner's favor.[67]

Next the silly season started, with amendments obviously intended merely to make a point. Senator Henry Cooper, a Tennessee Democratic lawyer, moved to amend Sumner's bill to provide that there should be no discrimination based on pecuniary condition, so that a poor person who could not pay would have to be given accommodation. This was laughingly voted down 35 to 7. Hill moved to require that customers be properly clothed. No roll-call was even demanded on this.[68]

Ultimately, a second vote was taken on annexing Sumner's bill to the amnesty bill, and a 28 to 28 tie resulted, which the vice-president broke in Sumner's favor.[69] However, the 32 to 32 vote on the combined measure was less than the requisite two-thirds needed for passage.[70]

Several days later, Trumbull, who was much in favor of amnesty but who had voted consistently against the amnesty bill with Sumner's amendment, moved to annex the amnesty bill as a rider to another piece of legislation.[71] When several senators warned that Sumner would simply annex his bill to the amnesty rider, the following coloquy ensued:

"Mr. TRUMBULL. . . . I want amnesty so much that I will vote for almost anything that is not unconstitutional to get it."

"Mr. SCOTT. . . . Suppose . . . the civil rights bill gets on by the same process?"

"Mr. TRUMBULL. I know of no civil rights bill."

"Mr. SUMNER. I know of one. [laughter.]"

"Mr. TRUMBULL. There is a bill that has been misnamed a civil rights bill, proposing to establish social rights which is unconstitutional in its provisions, and which I shall not vote for. But the Senator from Pennsylvania and myself agreeing, and the Senator from West Virginia, I believe, agreeing, let us unite together and vote down this misnamed civil rights bill, this monstrosity that has got a name that does not belong to it, that seeks under false pretenses to impose upon the country and upon the colored people of the country by giving it a name. You cannot make a mule a horse by calling it a horse. Let us vote it down . . . bills misnamed civil rights—called bills to establish equal rights when they establish no equality. . . ."[72]

Sumner answered Trumbull's vehement attack with a letter from Frederick Douglass denying any desire for "social equality;" and Trumbull replied by reading a newspaper clipping stating that Negroes wanted social equality, the ac-

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[63] Globe 42/2, 3192.
[64] Globe 42/2, 3251.
[65] Globe 42/2, 3257.
[66] Globe 42/2, 3264. Speaking of Trumbull, Edmunds declared: "He does not believe that it is a right belonging to a citizen of the United States to travel in a car if he is a citizen and conforms to all other conditions if his color happens to be one way rather than another; and so on through the whole list." *Ibid.* A little while later, a similar exchange occurred. Globe 42/2, 3268.
[67] Globe 42/2, 3264–5.
[68] Globe 42/2, 3265.
[69] Globe 42/2, 3268.
[70] Globe 42/2, 3270.
[71] Globe 42/2, 3860.
[72] Globe 42/2, 3861. Trumbull also called it a "social equality bill" the next day. Globe 42/2, 3418, 3421.

curacy of which Sumner disputed.[73] No southern Democrat arose; Trumbull was no doubt doing their work very satisfactorily.

Meanwhile, in the House, a move was made to suspend the rules and pass a resolution requiring the House Judiciary Committee to report a supplemental civil rights bill, the terms of which were not set forth. Presumably they were to be at least generally similar to the Sumner Senate bill. The vote was 112 yea, 76 nay, and it lost for want of two-thirds vote. Eleven Republicans who had voted for the Fourteenth Amendment voted yea; four Democrats who had voted against the Fourteenth Amendment voted nay. Rep. John A. Bingham of Ohio, who had framed the first section of the Fourteenth Amendment, voted in the affirmative.[74]

After sundry parliamentary maneuvering in which Trumbull and Sumner proposed to tack the amnesty bill and the civil rights bill on to various items of other legislation, and which other senators opposed, as it would defeat every bill to which they were attached,[75] Senator Matthew H. Carpenter, a Wisconsin Republican, decided to break the deadlock. On May 21 at about 5 p.m., with both Sumner and Trumbull absent, and with the Senate having barely a quorum, Carpenter first called up the civil rights bill, with the intention of amending it to cover only public inns, licensed places of amusement, and common carriers.[76] By passing a civil rights bill first, he could then get the amnesty bill through, he reasoned. The Senate rebuffed Democratic members' attempts to adjourn,[77] and prepared to work through the night.

Democrats opposed the civil rights bill.[78] The Carpenter substitute, principally designed to eliminate the school and jury clauses, was then adopted by 22 to 20, with 32 senators absent,[79] and the bill then passed by a party-line vote of 28 to 14.[80]

The next morning, Sumner bitterly denounced the Carptenter substitute as "an emasculated civil rights bill," and moved to add his own proposal to the pending amnesty bill.[81] This time, his entreaty that the Senate make "the Declaration of Independence in its principles and promises a living letter" fell on deaf ears, and his proposal was decisively rejected, 13 to 29. The Senate then passed the amnesty bill, 38 to 2, Sumner and one other Western Radical alone voting in the negative.[82] That was the end of the bill for that session and Congress.

3. SUMNER'S TESTAMENT

At the opening of the First Session of the Forty-Third Congress, Sumner once again introduced his civil rights bill.[83] However, debate commenced in the House, where a copy of the bill had previously been introduced.[84] Congressman Charles A. Eldridge, a Wisconsin Democratic lawyer, immediately moved an amendment permitting businesses to make a separate accommodation for white persons.[85] Congressman Benjamin F. Butler, Republican Chairman of the Judiciary Committee, which had reported the bill out, advocated it because Negroes who paid first class fare were thrown into dirty cars, or expelled from railroads entirely. Congressman William Lawrence, an Ohio Republican gave an instance of this. Butler, however, added that Negroes who discriminated against whites would also be liable.[86] And Congressman Joseph H. Rainey, a South Carolina Negro Republican, complained that Negroes could not enter hotels, public conveyances, amusements, churches, and cemeteries.[87]

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[73] Globe 42/2, 3361–2.
[74] Globe 42/2, 3383. The Republicans voting yea were: Ames, Banks, Bingham, Dawes, Garfield, Hooper, Kelley, Ketcham, Myers, Sawyer, and Scofield. Democrats in the negative were Eldridge, Kerr, Niblack, and Randall. See also Cong. Globe, 42d Cong., 3rd Sess. 85 (1872).
[75] Globe 42/2, 3418–3427.
[76] Globe 42/2, 3730.
[77] Globe 42/2, 3727–3729.
[78] Globe 42/2, 3783–4. Casserly called it unconstitutional.
[79] Globe 42/2, 3735.
[80] Globe 42/2, 3736.
[81] Globe 42/2, 3737–8. See also *id.* at 3789.
[82] Globe 42/2; 3738.
[83] 2 Cong. Rec. 10–11 (43rd Cong., 1st Sess. 1873) (hereinafter referred to as Cong. Rec. 43/1).
[84] Cong. Rec. 43/1, 97, 337–8.
[85] Cong. Rec. 43/1, 339.
[86] Cong. Rec. 43/1, 341–2.
[87] Cong. Rec. 43/1, 344.

Congressman John T. Harris, a thoroughly unreconstructed Virginia Democratic lawyer, justified segregation in railroads by noting that white persons also on occasion were prevented from entering particular cars.[88] Another voice from the past came from Congressman Alexander H. Stephens, a Georgia Democrat and Vice-President of the Confederacy. Stephens said:

"under our law as it stands whoever pays for a first-class car railroad ticket is entitled to a first-class seat, whatever may be his or her condition in life, and whether white or colored. If he be a colored man who pays for such a ticket, he is entitled to a seat of equal comfort with the white man who may purchase a like ticket; but this does not entitle him of right to a seat in the same car with the white man. Railroad companies, and all public carriers, have the right by common law to assign their passengers to such seats in such coaches as they may please, provided they are of the comforts and class paid for." [89]

He was answered by Congressman Alonzo J. Ransier, a South Carolina Negro Republican, who denied that Negroes wanted social equality, but asked for equal accommodations.[90] Representative Roger Q. Mills, a Texas Democrat, added a speech devoted to freedom of association and taste, which he asserted Congress could not control.[91]

The next day, Congressman James B. Beck, a Kentucky Democratic lawyer, offered an amendment allowing business owners to segregate their patrons.[92] Another South Carolina Negro Republican, Congressman Robert B. Elliott, also justified the bill because of "our exclusion from the public inn, from the saloon and table of the steamboat, from the sleeping-coach on the railway . . ." [93] But Congressman James H. Blount, a Georgia Democratic lawyer, replied that Negroes had their own separate facilities and were well provided for. He predicted bad feeling if the bill should pass.[94]

Next Lawrence made the point that the bill would not change the common law, but merely, give an additional remedy to enforce it and prevent the states from depriving Negroes of equal common-law benefits, a point previously made by Butler in his opening speech.[95] Lawrence justified the bill as one to enforce the Equal Protection Clause of the Fourteenth Amendment.[96]

Congressman John M. Bright, Tennessee Democratic lawyer, opposed the bill, *inter alia*, because most Negroes were laborers and could not afford first-class accommodations, and because they had their own facilities anyway.[97] Congressman William S. Herndon, a Texas Democratic lawyer, predicted a withdrawal of white patronage and closing of the places of public accommodations, as well as danger to "our social system," to be apprehended from passage of the bill.[98]

The next rhetoric came from Congressman William J. Purman, a Florida Republican lawyer. In the process of denying that states had "the right to enforce any conditions of *inequality*," he gave the following as examples of such laws:

"*Supposed Acts of a State-Rights Legislature.*

"An act to prohibit all white persons, not citizens of and not residing within the State, from being admitted and accommodated in any public inn.

"An act to exclude all persons possessed of real and personal property to the value of ten thousand dollars from all places of public amusement or entertainment for which a license from any legal authority is required.

"An act to exclude all persons of the religious denomination known as Methodists from riding on any line of stage-coaches, railroads, or other means of public carriage of passengers or freight.

"An act to prohibit all foreign-born citizens and their descendants from being buried in any public cemetery.

* * * * * * *

"An act to exclude all persons known as the "colored race" from public inns, cemeteries, and common schools supported by public taxation, and from equal accommodations with other persons, on all public stage-coaches, steamboats, and railroads." [99]

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[88] Cong. Rec. 43/1, 377.
[89] Cong. Rec. 43/1, 379. This was a correct statement of the law. See n. 16, *supra*.
[90] Cong. Rec. 43/1, 382–3. See also *id.* at 1311–2.
[91] Cong. Rec. 43/1, 385.
[92] Cong. Rec. 43/1, 405.
[93] Cong. Rec. 43/1, 408.
[94] Cong. Rec. 43/1, 411.
[95] Cong. Rec. 43/1, 340.
[96] Cong. Rec. 43/1, 412.
[97] Cong. Rec. 43/1, 416.
[98] Cong. Rec. 43/1, 421.
[99] Cong. Rec. 43/1, 428–4.

He lapsed back into a harangue of the House, but did declare in passing that "the sixth act, which is not supposed now for illustration, but is virtually in existence in most of the States of the Union, especially in the Southern States . . . is the hostile pretended legislation that the passage of the bill under consideration will wipe out.[100] Bombast on alleged southern injustice followed, and aside from a tidbit of complaint by Negroes that they were denied first class accommodations on conveyances and turned away from hotels read to the House, and some praise of the Florida civil rights statute,[101] there is nothing else in this ranting relevant here.[102]

A Missouri Democrat followed, whose southern propensities oozed through his speech. He denied that Negroes were refused access to public facilities, and declared that the objection was based on segregation, which he extolled. His position was that the equal protection clause did not abolish the right to segregate, and that any such abolition would interfere with private property rights.[103]

Debate was closed the next day. An Ohio Democratic lawyer pronounced the bill to be one for social equality and hence unconstitutional.[104] Two other Democrats lauded segregation,[105] and one of them accused the Republicans of hypocrisy in attempting to abolish it.[106] The final Democratic argument, made by Congressman John D. C. Atkins of Tennessee, again accused the Republicans of hypocrisy, denounced the bill for imposing social equality, and concluded with a plea for segregation.[107] Butler then made the last speech. In sarcastic measure he rejected the social equality argument, on the grounds that southerners were quite willing to associate freely with Negro slaves before the war, and hence should have no objection now. He related how he had used his military authority to order a boat clerk to let a Negro sit in a dining room and occupy a stateroom against boat regulations during the war. He concluded with a general oration, and the bill was returned to the Judiciary Committee.[108]

Several days later, there was an encore to the debate. Congressman Robert B. Vance, a prominent Democrat and ex-confederate from North Carolina, declared that the bill was a social rights bill. He said that Negroes now had the right to enter conveyances and hotels, but that they were segregated. This he supported with considerable warmth.[109] Congressman Richard H. Cain, a South Carolina Negro Republican, rose to answer Vance. Cain complained that he and colleagues of his were not served in hotels, railroad cars, and restaurants. He saw no objection to use of first-class accommodations by Negroes who could pay for it. He concluded that Negroes were entitled to their rights.[110] Congressman David B. Mellish, a Republican, added that in New York City, where some street-car lines would not take Negro passengers, and others made them wait for long periods to take exclusively colored cars, discrimination was ended when the president of the police board ordered policemen to arrest any conductor who ejected a Negro passenger from a car.[111]

On January 17, 1874, the House was treated to more oratory on the civil rights bill. Congressman Henry R. Harris, a Georgia Democrat, spent his time on general declamation about social equality and freedom of association.[112] And

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[100] Cong. Rec. 43/1, 424.
[101] Fla. Act of Jan. 25, 1873, c. 1947, No. 13, Laws of 1873.
[102] Cong. Rec. 43/1, 424–5.
[103] Cong. Rec. 43/1, 427–430 (Cong. Aylett H. Buckner).
[104] Cong. Rec. 43/1, App. 1–3 (Cong. Milton J. Southard).
[105] Cong. Rec. 43/1, App. 3–4 (Cong. Hiram P. Bell of Georgia and John M. Glover of Missouri).
[106] Cong. Rec. 43/1, App. 5, where Glover said:
"When has President Grant . . . seen fit to leave his box at the theatre and go to the pit or the gallery to get in contact with those who cannot come to him? If the mountain cannot come to Mahomet, why does not Mahomet go to the mountain? Why have we never witnessed the 'civil rights' advocates setting one solitary example of the propriety, the advantage, and the excellence of a law which they propose to enforce against their remonstrating countrymen with fire and sword? Why don't we see them leaving Willard's and going to some colored hotel? Why do we not see them, by a delicious choice, going to worship in a colored church. . .? Why, sir, do they not do what they say is all right and proper, before they attempt to coerce us into compliance with an act the most monstrous. . .?"
[107] Cong. Rec. 43/1, 453–5.
[108] Cong. Rec. 43/1, 457–8.
[109] Cong. Rec. 43/1, 554–6.
[110] Cong. Rec. 43/1, 565–7. A few days later, Congressman Samuel S. Cox, a New York Democrat, said that Negroes did not care much for the use of expensive hotels and theaters. Cong. Rec. 43/1, 618.
[111] Cong. Rec. 43/1, 567.
[112] Cong. Rec. 43/1, 726.

Congressman Robert Hamilton, a New Jersey Democratic lawyer, urged freedom of association for white people.[112]

In the Senate, Sumner's bill was referred to the Judiciary Committee,[114] and while under consideration there, on March 11, 1874, Sumner died. His last wish was that his civil rights bill be passed.[115] Frelinghuysen reported the bill in his absence for the Judiciary Committee. He declared that it would protect white people as well as Negroes, and that it was not designed to enforce social equality. He narrowed its constitutionality basis to the Equal Protection Clause of the Fourteenth Amendment.[116] He then said:

"As the capital invested in inns, places of amusements, and public conveyances is that of the proprietors, and as they alone can know what minute arrangements their business requires, the discretion as to the particular accommodation to be given to the guest, the traveler, and the visitor is quite wide. But as the employment these proprietors have selected touches the public, the law demands that the accommodation shall be good and suitable, and this bill adds to that requirement the condition that no person shall, in the regulation of these employments, be discriminated against merely because he is an American or an Irishman, a German or a colored man."[117]

Senator Thomas M. Norwood, a Georgia Democrat, some days later, made a speech in which he accused Republicans of passing a social equality bill which would affect only the poor whites, while the rich ones could afford private conveyances. He sarcastically asked why the Republican congressmen chose to ride to the Capitol in their own carriages instead of in public street-cars filled with Negroes.[118] He caustically made suggestions as to how Congress might supervise equality of foods served to both races at hotels.[119]

On May 20, when the Senate resumed consideration of civil rights, Senator Daniel D. Pratt, an Indiana Republican lawyer, spoke at length in support of the bill. He stated that by common law all colored people were entitled to privileges mentioned in the bill, and could maintain a suit against the proprietor if denied them. He said:

"Suppose a colored man presents himself at a public inn, . . . and is either refused admittance or treated as an inferior guest—placed at the second table and consigned to the garret, or compelled to make his couch upon the floor—does any one doubt that upon an appeal to the courts, the law if justly administered would pronounce the innkeeper responsible to him in damages for unjust discrimination?" I suppose not. . . . The same is true of public carriers. . . . And all persons who behave themselves and are not afflicted with any contagious disease are entitled to equal accommodations where they pay equal fares.

"But it is asked, if the law be as you lay it down, where is the necessity for this legislation, since the courts are open to all? My answer is, that the remedy is inadequate and too expensive, and involves too much loss of time and patience to pursue it. When a man is traveling, and far from home, it does not pay to

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[112] Cong. Rec. 43/1, 741. He said: "When we consider what has been done for the colored people in the United States . . . we would naturally conclude that if they had any sense of the principle of gratitude, they would be more gracious than to seek to force themselves into the society and association of the white people against their wishes, . . . We might justly suppose that white people had some rights and feelings they would be willing to respect; but it is not so. . . . they want to break down the barriers of society, force themselves into the highest seat in the synagogue, into association with the white people *nolens volens*, . . . to break down all the conventionalities of social life.

"If the gentleman from Massachusetts, and the other zealous friend of the colored people, the gentleman from Ohio, . . . who desired the bill amended so that the negroes could have the benefit of the writ of *mandamus* to put them in the best traveling cars and place them in the best seats at the hotel tables, desire to be seated in the cars side by side with their colored friends, and wish to be sandwiched at each meal at the hotels between two negroes, doubtless they can be accommodated; nobody will object, and no law prohibit it; but that is purely a matter of taste; and they should not desire to force others whose tastes may differ into the acceptance of theirs."

[114] Cong. Rec. 43/1, 949, 951.

[115] Cong. Rec. 43/1, 4786. See also Cong. Rec. 43rd Cong. 2d. Sess. 952 (1875) (Cong. Thomas Whitehead).

[116] Cong. Rec. 43/1, 3451.

[117] Cong. Rec. 43/1, 3452.

[118] Cong. Rec. 43/1, App. 236. Norwood said: "Republican Senators wish to compel common carriers to open their cars and ships to all comers alike; in other words, to force the whites to this intimate association and close contact, or to stay at home or provide their own conveyance. The poor are here to be the victims. The rich can gather up their velvet trains and sweep contemptuously by the poor whites and negroes banked and huddled together, and take luxurious refuge in a palace car. Thus money is to establish class and caste."

[119] Cong. Rec. 43/1, App. 238.

sue every inn-keeper who, or railroad company which, insults him by unjust discrimination. Practically the remedy is worthless.

"Now sir, if I am right in stating the law, this bill is justified in providing a more efficient remedy, one that is so stringent in its penalties that it is likely to be obeyed, and render litigation unnecessary. Many a wrong is practiced even upon the white traveler, upon the supposition that his business will not allow him to remain and bring the wrong-doer to account, which is generally true.

"And let me say right here, that the measure is not confined to colored citizens; it embraces all, of whatever color." [120]

Pratt denied that the bill would promote social equality, and declared that in public facilities travelers had to tolerate all types of people. He concluded with a long declamation on equality and prejudice.[121] Thurman arose to answer Pratt. He proceeded on to reason that the bill must have intended mixed public facilities, but it was not until he got to the school clause that his opponents paid any attention to what he was saying, and it is probable that his observation was incorrect.[122]

The last day of Senate debate was May 22. Senator Timothy O. Howe, a Wisconsin Radical Republican, justified the bill because Negroes were being turned away from hotels and other accommodations.[123]

Senator James L. Alcorn, a Mississippi Republican lawyer, then orated, adding little but generalized declamation on the "right guaranteed to [Negroes] or free transit throughout the country," and Congress' right to assure colored people of equal accommodations in carriers.[124] He noted the complaints of Negroes that they were not admitted to theaters in Washington and in the north, and likewise advocated the bill so they would be admitted to hotels.[125] Then, as an ex-slaveholder and former Confederate elected to the Senate by a Negro majority of Mississippi, he launched into rhetoric well calculated to endear him to his new friends, concluding thus:

"While I speak to-day, there stand eight hundred thousand colored men at my back. They are united on this specialty, and they are able to work that legislation which they deem proper and demand at the hands of this Congress, and they will do it. If you say your Constitution is not sufficient, if the courts of the country shall say that the Constitution stands a barrier, these eight hundred thousand men will make it known to the nation that it shall be sufficient to answer all the ends of equal government and justice to every man in the land. If you want to know what is to be the destiny of this nation, look not to the Constitution, but look into the faces of the people. The people in a revolution like this, for the revolution still goes forward, trample down the consti-

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[120] Cong. Rec. 4081–2.

[121] Cong. Rec. 4082–3.

[122] Cong. Rec. 43/1, 4088. He said: "That means mixed audiences, does it not? That means mixed guests at a hotel does it not? That means mixed travelers on a railway or in a stage-coach, does it not? If not, it does mean anything. It certainly was not intended by the committee that Mr. Saville should build another theater for the entertainment of the colored people of Washington City, or that the Baltimore and Ohio Railway or the Baltimore and Potomac Railway is to run separate cars to carry colored persons. These are the very things that are complained of. Therefore, mixture is meant in inns, in public conveyances on land or water, in theaters, or other places of public amusement. . . ." It may be noted that the premise for the remark, that segregation was what was being complained of, is inaccurate. It was the denial of facilities, or unequal facilities, and not mere segregation, which drew Republican fire. Hence it is probable that this remark was just made to bolster his school clause argument, in opposition to Pratt, that school segregation was not permissible under the bill. Since Thurman, an opponent of the bill, was using this to rebut an argument by Pratt, a proponent, that the bill permitted segregation, though not inequality, his argument can hardly be considered an accurate reflection of the intention of Congress.

[123] Cong. Rec. 43/1, 4147.

[124] Cong. Rec. 43/1, App. 304.

[125] Cong. Rec. 43/, App. 305. He said: "Objection is made that the bill provides that the colored man shall have accommodations at public hotels. If he is denied accommodations at the public hotels, where will he get accommodations if he sees proper to travel? When upon a journey he has no right to go to a private house. If the public house refuses him, then an American citizen becomes a pariah in the land which guarantees to him the right of travel. The hotels are licensed institutions. When the grant of a license is made, the municipality demands of the keeper a bond for the faithful performance of his contract. The condition of the bond is that he shall provide food and lodging for the traveling public. Practically this bill requires him to comply with the conditions of his bond. He cannot be permitted to stand at his door and turn men away from the accommodations which he has in his bond agreed he would furnish on account of their complexion. He must not be permitted to look into a man's face to decide by the color of his skin whether the food and lodging shall be provided which he has obligated himself to furnish. It would be a strange government indeed that would tolerate a proceeding like this."

tutions and they disappear as flax before the flame. The demands of the people of this free Government are not to be turned aside; they are to be listened to; and I say to you, sir, that this demand will be heard. Having felt their strength, I realize the power that lies in the hands of the masses of the American people. When reconstruction was decreed the Constitution gave no warrant for the enactment, but the people spake and the Constitution responded: "Here am I; the power is given!"

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"The colored people of my State demanded the passage of this bill. I yield to that demand. My refusal would excite them to anger; they would keenly feel the injustice and wrong. I bend gracefully to their will." [126]

Senator Henry R. Pease, Alcorn's Republican colleague from Mississippi, urged enactment of the bill to spare Negroes from "indignities." [127]

Discussion continued into the night, as Senator Saulsbury, a Delaware Democrat, arose to protest that the bill would enforce association among the races. After observing that his colleagues were too exhausted to listen to debate, he argued the bill was intended to enforce race mixing in inns and theaters, a proposition he deduced from the absence of a clause specifically permitting segregation. He charged that compulsory integration was to be applied to schools, hospitals, almshouses, orphan asylums, and benevolent associations, and that whites would resent this.[128] He told the Republicans: "Do not say that you can make any separate arrangement under the provision of this bill," [129] thereby at once showing that the charge of compulsory association was made for partisan advantage, and not as a true reflection of the majority's intent. His rambling discourse carried him through generalized constitutional discussion, the Negro vote, a prediction that hotels and theaters would lose their patronage, prejudice, and social equality, and finally schools.[130] At his conclusion, the Senate had been sitting for over ten hours, and it was 9:30 p.m. The Democrats wanted an adjournment, but the Republicans voted it down, and the Senate went into an all-night session.[131]

The contribution to the Democratic filibuster by Senator Augustus Merrimon of North Carolina was a self-confessed "desultory", rambling history of the United States from the Declaration of Independence onward, replete with cases.[132] When he finally arrived at the equal protection clause of the Fourteenth Amendment, he said that while it forbade giving rights to some people but not others, it permitted racial segregation. After supporting segregation by law in schools, he endorsed the same for theaters.[133] He meandered back to a defense of segregation by law in theaters, inns, cemeteries, and schools,[134]

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[126] Cong. Rec. 43/1, App. 307. One can well believe that this speech represented the views of Alcorn's Negro constituents and not his own views in light of the fact that only two years before he consistently spoke and voted against Sumner's bill. Globe 42/2, 274, 3264, 3268, 3270.

[127] Cong. Rec. 43/1, 4154.

[128] Cong. Rec. 43/1, 4157–8.

[129] Cong. Rec. 43/1, 4159.

[130] Cong. Rec. 43/1, 4159–4162.

[131] Cong. Rec. 43/1, 4162.

[132] Cong. Rec. 43/1, App. 307–312.

[133] Cong. Rec. 43/1, App. 313. He said: "Can't be denied that the States have power to regulate theaters—the manner of conducting them? Have they not always exercised power to do so? They are supreme in that respect. If they judge that it is necessary that one class of people shall go into one apartment and another class into another, with a view to good order and decency, why is it not competent to do that? . . . By our system of government, the States are left to regulate society within their respective jurisdictions."

[134] Cong. Globe 4311, App. 315. He said: "But it is said that these police powers may be exercised in many respects, but it cannot be done in the matter of color. Why not in the matter of color? . . . The Senator from Wisconsin . . . would have the Senate and the country believe that we propose to shut them out from theaters; that we would not let the poor negro even have a place to bury his dead. Nobody has urged such an absurd proposition as that. The proposition is to allow the colored people of the country to have their own . . . proper apartment fitted up in the theater for the colored race, and a like apartment for the white race, and thereby to keep them apart, and for reasons that I shall advert to presently; in the inn, to have a comfortable place for the colored race to go, and another place for the white race to occupy.

"If a city or the State shall provide a cemetery for the white race, the city or State must provide a like cemetery for the colored race. No white man shall intrude upon the cemetery of the colored man; no colored man shall intrude upon the cemetery of the white man. No colored man shall intrude upon the white man's place in the inn; no white man shall intrude upon the colored man's place in the inn. No white man shall intrude upon the colored man's place in the theater; and no colored man shall intrude upon the white man's place in the theater; and then, if they are not upon terms of perfect equality, applying to each race alike, I am not capable of comprehending a plain proposition."

and ultimately concluded with a protracted harangue on race mixing, hybrids, and school destruction.[135]

At 1:30 a.m., with the Republicans still refusing to adjourn,[136] Senator William T. Hamilton, a Maryland Democratic lawyer, launched into a lengthy oration. He advocated separate churches, cemeteries, hotels, places of amusement, and other facilities, and predicted that the bill would destroy the white patronage of hotels.[137]

The early hours of the morning were taken up principally with the school clause.[138] In the course of discussing segregated schools, Senator Edmunds of Vermont, a staunch Radical Republican supporter of Sumner, contended that the Fourteenth Amendment forbade State segregation in carriers,[139] while Senator Aaron A. Sargent, a California Republican lawyer, denied that this was the effect of the Fourteenth Amendment.[140] Then, after the school issue was disposed of, the Senate passed the bill by a vote of 29 to 16, and adjourned after a twenty hour session. Voting or paired against the bill were all the Democrats and four Republicans, from Nebraska, Virginia, West Virginia, and Wisconsin, with the affirmative votes all cast by Republicans.[141]

The house took no action on the bill during this session. In occasional debate, Democrats attacked it in broadside harangues for race-mixing.[142] A Tennessee Republican doubted the constitutionality of the law, and stated that

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[135] Cong. Rec. 43/1, App. 316–8.
[136] Cong. Rec. 43/1, 4166.
[137] Cong. Rec. 43/1, App. 367–8, 370.
[138] Cong. Rec. 43/1, 4167–4175.
[139] Cong. Rec. 43/1, 4172–8. Replying to Senator Sargent, he declared: "But the Senator's argument results in exactly this: that the fourteenth amendment does not, as it respects common schools, level a distinction which a State may have a right to make on account of race and color. If it does not level that distinction, then it does not level a distinction that a State has a right to make on the same account in respect to a railway, or a highway, or a steamboat, or any other thing; for the fourteenth amendment is general and sweeping . . . . If the State has that right, we cannot interfere with it. If the State has not that right, we cannot confer it by an act of Congress, because such an act of Congress would be in violation of the fourteenth amendment itself." *Ibid.*
[140] Cong. Rec. 43/1, 4174. He said:
"Now, sir, one single remark in reply to that only which can be considered as argument in reply to my positions, and that is, that the amendment which I propose, by providing that there may be separate schools, is a violation of the fourteenth amendment, upon the same principle that a denial of the right of a colored man to ride in the same car, or have identical accommodations in the same hotel, would be a violation of the fourteenth amendment. I do not believe either of these cases cited as illustrations would be a denial of any right guaranteed by the fourteenth amendment. The fourteenth amendment was not intended merely to say that black men should have rights, but that black and white men and women should have rights. It was a guarantee of equality or right to every person within the jurisdiction of the United States, be he black or white. It is a very common thing for me and for every Senator here, and every white man in the country, when he goes to a railroad train without his wife on his arm or some female friend, to be assigned to a car separate from some other car more privileged than the one he takes, by its female society, though not perhaps better in its fittings, which is assigned to ladies or to gentlemen who have ladies with them. Is that a violation of the fourteenth amendment? Suppose the man who is thus required to take the second car on the train instead of the first should be black instead of white, would the difference in color make a violation of the fourteenth amendment?
"I do not believe these things are of enough importance for us to legislate upon them here. They regulate themselves. I doubt if any white man ever felt outraged because he was told to take one car rather than another, on account of a discrimination in the car he should take. Why, then, should the black man?
"So with reference to the hotel table. In most of the hotels, in all of them I believe in New York and in the larger cities, the tables are small, circular tables where families sit, or two or three persons who happen to be friends, and the guests are assigned by the landlord to the places they take. A person entering the dining-room does not take a seat at any table he sees fit; he is put here or there, wherever the landlord pleases. And in assigning rooms at a hotel, the landlord may put him in the fourth story or the first; and if he does not like his accommodation he can go to some other hotel. He has no direction in the matter, and certainly no right to demand under the fourteenth amendment that he shall be put in the third story instead of the fourth, or the second instead of the third. These hotel illustrations fail for that very reason. The fourteenth amendment does not apply to them at all. They are simply incidents of business which have existed for years, and will exist for years whether the fourteenth amendment exists or not.
"If the car to which a white man without a lady is assigned, or the black man is assigned, is just as good as any other of the train, drawn by the same engine, at an equal rate of speed, where is the harm done by that regulation? And why should we interfere with the business of railroad companies and hotel-keepers in this inquisitive way, putting our noses into the smallest details of business."
[141] Cong. Rec. 43/1, 4176.
[142] Cong. Rec. 43/1, App. 341–4 (Cong. William B. Read of Ky.); App. 417–421 (Cong. Ephraim K. Wilson of Md.); App. 481 (Cong. John J. Davis of West Virginia).

colored people were content with segregated accommodations, and only complained of inferior treatment.[143]

Congressman James T. Rapier, an Alabama Negro Republican lawyer, complained that Negroes were all denied first class railroad accommodations, and replied to a prior speaker:

"And I state without fear of being gainsaid, the statement of the gentleman from Tennessee to the contrary notwithstanding, that there is not an inn between Washington and Montgomery, a distance of more than a thousand miles, that will accommodate me to a bed or meal. Now, then, is there a man upon this floor who is so heartless, whose breast is so void of the better feelings, as to say that this brutal custom needs no regulation?" [144]

He went on to point out that whites had a common law right to accommodations, which Negroes also should have, that exclusion from first class accommodations was the result of prejudice, and that it humiliated him. He disclaimed any desire for social equality, but decried being forced to inferior cars, and the fact that on railroad trips he could not get a sleeping car berth.[145]

Congressman Chester B. Darrall, a Louisiana Republican, re-echoed these views. After noting the Louisiana State Contitution gave Negroes equal rights in public conveyances and other licensed businesses, he reassured the House that Negroes rarely insisted on exercising them, and that the state laws was not rigidly enforced. He read a resolution of several leading New Orleans whites advocating non-discrimination in public conveyances and licensed resorts, headed by General G. T. Beauregard, who he neglected to mention was a prominent Republican patronage-holder. Darrall deplored the fact that wealthy New Orleans Negroes and prominent colored office-holders could not obtain first class accommodations in carriers and hotels, and gave examples of this. He called for an end to such discrimination by passage of the bill.[146]

4. THE FINALE

The elections of 1874 were a disaster for the Republican Party. The Senate remained Republican by a much reduced margin due to holdovers, but the House of Representatives, where all the members ran for re-election, became Democratic by a wide margin.[147] Even Butler lost his seat in normally Republican Massachusetts.[148] The depression, fraud, corruption, and sundry scandals were all helpful to the Democratic Party,[149] but it also made considerable gains based on a "white backlash" vote against the civil rights bill, and especially the school clause.[150]

When the "lame-duck" Second Session of the Forty-Third Congress met in the early part of 1875, Congressman Alexander White, an Alabama Republican, moved to amend the civil rights bill by specifically permitting segregation in schools and in public accommodations.[151] Butler then spoke briefly, denying that the bill was intended to promote social equality in public places, and noted that people who used the services of carriers, theaters, and inns did not do so to obtain the society of others but to obtain necessary services.[152] Congressman John R. Lynch, a Mississippi Republican Negro, also rebutted the social equality argument. He complained that Negro women could not get equal treatment, and that he himself, when coming to Congress, was "forced to occupy a filthy smoking-car both night and day; with drunkards, gamblers, and criminals" because of color.[153]

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[143] Cong. Rec. 43/1, 4593 (Cong. Roderick R. Butler). He said: "The colored people do not want to be put in cars with the whites; that is not what they complain of; it was that they had to pay first-class fare and be put in second or third class cars, mixed up often with drunken rowdies smoking and using vulgar language in the presence of their wives and daughters. That is wrong, and no just man will say otherwise."

[144] Cong. Rec. 43/1, 4782. See also *id.* at 4783: "Every day my life and property are exposed, are left to the mercy of others, and will be so long as every hotel-keeper, railroad conductor, and steamboat captain can refuse me with impunity the accommodations common to other travelers."

[145] Cong. Rec. 43/1, 4783–5. See also the remarks of Congressman Rainier, a South Carolina Negro Republican. *Id.* at 4786.

[146] Cong. Rec. 43/1, App. 477–480.

[147] U.S. Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1957*, 691 (1960).

[148] Trefousse, *Ben Butler* 280 (1957).

[149] 27 Encyclopædia Britannica 720 (11th ed. 1911).

[150] Congressional Record, 43rd Congress, Second Session 951, 952, 978, 982, 1001, App. 17, 20, 113 (1875) (hereinafter referred to as Cong. Rec. 43/2.

[151] Cong. Rec. 43/2, 939.

[152] Cong. Rec. 43/2, 940.

[153] Cong. Rec. 43/2, 944–5.

That evening, Congressman John B. Storm, a Pennsylvania Democrat, twitted the Republicans for inconsistency in permitting school segregation but not segregation in carriers, hotels, and theaters.[154] Congressman Thomas Whitehead, a Virginia Democrat, said that the civil rights bill was hurting the Republican Party, and stated that racial discrimination could not be proved.[155] In response to questioning, he affirmed that Negroes could ride in Virginia in first-class railway and streetcars, while a Negro congressman, Rainey of South Carolina, denied it.[156]

Cain, a South Carolina Negro, then arose to rebut Whitehead, and stated that a colored lady he knew was thrown out of a first class railroad car into a smoking car when she reached Virginia.[157] The latter interrupted him to state that Negroes could ride any Richmond street car, but Rainey said he was confined to a "colored car," while Cain added the experience of a friend in support of this.[158]

When Congressman Benjamin W. Harris, a Massachusetts Republican lawyer, arose to rebut Whitehead and support the bill, the latter asked whether proprietors of hotels could, under the bill, segregate patrons:

"Mr. WHITEHEAD. I just want to know whether you are in favor of a hotel-keeper being forced by law to make white and black people sit at the same table?

"Mr. HARRIS. . . . I will tell him what the Massachusetts doctrine is. It is that when any man, white or black, respectable and well-behaved, comes into any hotel in our Commonwealth and asks to have a comfortable apartment assigned him and proper food furnished him, he has a right to it, without regard to his color. But, sir, there is nothing proposed here that would authorize any colored man to force himself on the gentleman from Virginia. This law merely provides that white and black shall be alike entitled to a common hospitality.

"Mr. WHITEHEAD. That does not answer my question at all. Do you wish hotel-keepers to be bound to place white and black at the same table?

"Mr. HARRIS . . . . I will tell the gentleman, however, that in Massachusetts we do not make all classes of white men sit at the same table or sleep in the same bed. But every man in Massachusetts, be he white or black, can have entertainment at one of our hotels, and a black man can get entertainment there equal to that afforded to any white man, if he is despectable and pays his bill."[159]

A little later, the following colloquy occurred:

"Mr. HARRIS . . . . We do not propose to make any man eat at any other man's table uninvited, but we do not propose that a white man, a keeper of a public hotel, shall kick a black man out of doors and refuse him food and shelter simply because he is a black man. That is the difference between us.

"Mr. WHITEHEAD. We do not, either."[160]

Thereafter, Rainey urged the bill because common-law remedies were too "general," and disclaimed any desire for social equality. Congressman James T. Rapier, an Alabama Negro Republican lawyer, who had tried to interrupt Harris' speech to answer Whitehead, then arose to endorse, in effect, Harris' answer.[161]

The next day, February 4, 1875, was the last day of House debate, and strict time limitations were imposed. A Democrat said that southern states already had civil rights laws, and stated that few Negroes used railroads or hotels.[162] A friend of Sumner brought forth the Declaration of Independence and equality of opportunity.[163] However, a New York Republican opposed it because few Negroes traveled in the South, while the bill would, in his view, simply stir up bad feelings.[164]

White of Alabama made a long speech in which he rejected extremists on both sides. In his eyes, the evils to be remedied were the denials of admission of

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[154] Cong. Rec. 43/2, 951.
[155] Cong. Rec. 43/2, 952–3.
[156] Cong. Rec. 43/2, 955.
[157] Cong. Rec. 43/2, 956.
[158] Cong. Rec. 43/2, 957.
[159] Cong. Rec. 43/2, 958.
[160] *Ibid.* Harris was, no doubt, thinking of the Massachusetts civil rights law. Mass. Act of May 16, 1865, Stat. 1865, c. 277. In respect to the right to segregate under such a statute, compare People v. Gallagher, 93 N.Y. 438 (1883) with Ferguson v. Giles, 82 Mich. 358, 46 N.W. 718 (1890). See also the rhetoric on this subject from Congressman Eppa Hunton, another Virginia Democrat, in Cong. Rec. 43/2, App. 119.
[161] Cong. Rec. 43/2, 959–960.
[162] Cong. Rec. 43/2, 977–8 (Cong. James H. Blout, Ga.).
[163] Cong. Rec. 43/2, 979 (Cong. E. Rockwood Hoar, Mass.).
[164] Cong. Rec. 43/2, 982 (Cong. Simeon B. Chittenden).

Negroes to carriers, hotels, and theaters. To him, the Senate bill provided equal rights and a community of enjoyment; the House Judiciary bill provided equal rights, separate enjoyment in schools and a community of enjoyment elsewhere; while his bill provided separate enjoyment in all places. He opposed race mixing.[165] In a long oration, he said that southern Republicans did not want race mixing, and that the bill was costing them every state in the south.[166]

The last Democratic bombast came from Congressman Charles A. Eldridge, a Wisconsin lawyer, whose low opinion of Negroes had not improved since he voted against the Fourteenth Amendment.[167] When Congressman John Y. Brown, a Kentucky Democrat, whose views on Negroes were as far from the noted abolitionist's ideals as it was possible to get, arose to pour invective on Butler, the House was diverted into a party-line censuring of him.[168]

The Republicans closed the debate. A Tennessee Republican asserted that without the civil rights bill Negroes would be consigned to inferior accommodations in carriers.[169] A Michigan Republican added that the bill was designed to prohibit exclusion from carriers, inns, and theaters because of color, and opposed segregation by statute.[170] And a Wisconsin Republic opposed all segregation by laws in public places.[171]

For the grand finale, Butler took the helm. Ridiculing the social equality arguments, Butler proceeded to take sweet revenge for Brown's attack by having his ante-bellum secessionist sentiments read. Then "waving the bloody shirt," he concluded in an outburst of flamboyant theatrics which was to be the final notoriety of his House career.[172]

The House first voted to strike out the whole school clause, and then voted down White's substitute which, while providing for segregation in public facilities, also restored the school clause to the bill. It then decisively rejected a school integration substitute, and thereafter passed the bill by a vote of 162 to 99. The vote was strictly on party lines, except that two Democrats voted with the majority and eleven Republicans, ten of them from the South and border states, voted with the minority.[173]

Senate debate was brief. Senator Thomas F. Bayard, a Delaware Democrat, ridiculed the bill for requiring the federal courts to examine whether one seat in a hotel, theater, or railway was as good as another.[174] Senator William T. Hamilton, a Maryland Democratic lawyer, urged that a theater-owner should be able to select his audience.[175] He concluded with a bombastic broadside against prejudice, racial antagonism, and race mixing.[176]

The debate was closed by Senator George F. Edmunds, the Radical Republican lawyer from Vermont who had voted for the Fourteenth Amendment. After accusing the Democrats of consistently opposing any rights for Negroes, he replied to their arguments that the bill was unconstitutional for want of power in Congress to pass it by asking rhetorically:

"where is the authority for saying that a State shall not have a right to pass a law which shall declare that all citizens of the German race shall go upon the right-hand side of the streets and all citizens of French descent shall go upon the left, and so on, and that all people of a particular religion shall only occupy a particular quarter of the town, and all the people of another religion another side?" [177]

The bill then passd by a vote of 38 Republicans in favor to 20 Democrats and six Republicans against. Of the affirmative Republicans, eight had voted for the Fourteenth Amendment as senators and seven as members of the House. The most significant negative Republican vote was cast by Senator William Sprague of Rhode Island, who had voted for the Fourteenth Amendment.[178]

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[165] Cong. Rec. 43/2, App. 15.
[166] Cong. Rec. 43/2, App. 17–24.
[167] Cong. Rec. 43/2, 982–5. See also Cong. Globe, 39th Cong., 1st Sess. 2545 (1866).
[168] Cong. Rec. 43/2, 985–992.
[169] Cong. Rec. 43/2, 998–9 (Cong. Barbour Lewis).
[170] Cong. Rec. 43/2, 999 (Cong. Julius C. Burrows).
[171] Cong. Rec. 43/2, 1002 (Cong. Charles G. Williams).
[172] Cong. Rec. 43/2, 1005–9.
[173] Cong. Rec. 43/2, 1011.
[174] Cong. Rec. 43/2, App. 105.
[175] Cong. Rec. 43/2, App. 115.
[176] Cong. Rec. 43/2, App. 116–7.
[177] Cong. Rec. 43/2, 1870.
[178] *Ibid.*

5. SUMMARY AND CONCLUSION

In evaluating legislative history to determine intent of the body passing an enactment, one deals in probabilities rather than in mathematical certainties. However, propositions can range from highly improbable to those of which one is morally sure.

The legislative history of the Civil Rights Act of 1875 shows that Congress was principally concerned with complaints by Negroes that they were excluded from railways and other carriers, inns, and theaters, or if admitted were consigned to substantially inferior accommodations. These complaints of being relegated to dirty, smoke-filled railway cars, or of being unable to get hotel rooms and meals, run like a thread throughout the debates. There is a noticeable absence of complaints about mere segregation per se.

In determining whether the debates reflect an intent on the part of the framers of the Fourteenth Amendment to abolish racial segregation, several positions may be readily identified. The Democrats were in favor of strict racial segregation by law to avoid race-mixing. However, they had also opposed the Fourteenth Amendment and would be likely to give it a very narrow construction. We may therefore ignore their views.

Republican moderates, such as Trumbull, joined by several Radicals, such as Senators Lot M. Morrill of Maine, and William Sprague of Rhode Island, who had voted for the Fourteenth Amendment, were of the view that states retained power even under the Fourteenth Amendment to segregate people in railways and in other public places by law. They consistently voted and spoke against the civil rights bill on the ground that it was an unconstitutional "social equality" bill. Their position was essentially in accord with the Democratic position on this point. Trumbull even went so far as to deny that the right to ride in a railway was a civil right at all protected by the Fourteenth Amendment. Considering the fact that in 1872 Trumbull had been a member of the bar for about 40 years, in public life since 1840, a justice of the Illinois Supreme Court for five years, and a United States Senator for 18 years, over six of which he served as Chairman of the Senate Judiciary Committee, it is patent that if he did not know what he was voting for when he voted for the Fourteenth Amendment nobody did.

Moreover, the votes of Trumbull and the other Republican moderates were decisive in the narrowly divided 39th Congress. To obtain the necessary two-thirds majority after President Andrew Johnson's veto of the Freeman's Bureau Bill was sustained,[179] it was necessary to persuade two marginal Republicans to switch to the majority, and to expel or exclude on flimsy grounds Senator John P. Stockton, a New Jersey Democrat.[180] Even so, the President's opponents were unsure of their necessary majority.[181] On the key test of strength, the overriding of the veto of the Civil Rights Act of 1866, the vote was 33 to 15, with one presidential supporter absent.[182] Although the vote on the Fourteenth Amendment was 33 to 11, the difference is accountable to the absence of presidential supporters, with only one vote switching.[183] Had Trumbull, the virtual Republican spokesman, or any other moderates defected, the razor-thin two-thirds majority would have evaporated, and there would have been no Fourteenth Amendment. Indeed, Morrill, Sprague, and Trumbull alone could, by such a defection, have destroyed the anti-Johnson majority, and no doubt would have done so had the Fourteenth Amendment been loaded with any anti-segregation provision. Moreover, there were other moderates who would have added to such a group of defectors. Since the Radicals in the 39th Congress could have done nothing without the moderate vote, it is clear that the moderate views must be decisive.

However, it may be noted that even the Radicals did not intend in the Civil Rights Act of 1875 to eliminate the rights of carriers, inn-keepers and theaters to segregate their patrons, notwithstanding some confusion on this point in the lower federal courts.[184] Frelinghuysen as much as admitted the right of businesses to segregate, as did other members of Congress. Moreover, all proponents of the bill concurred in the position that it was merely designed to re-enact the common law, which allowed businessmen to segregate their patrons if given equal accommodations. Finally, no complaint was made about segregation by Negroes, but only about unequal accommodations.

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[179] Cong. Globe, 39th Cong., 1st Sess. 943 (1866).
[180] Cong. Globe, 40th Cong., 2d Sess. 823 (1868).
[181] See Cong. Globe, 39th Cong., 1st Sess. 1786 (1866).
[182] *Id.* at 1809.
[183] *Id.* at 3042.
[184] Compare United States v. Newcomer, 27 Fed. Cas. 127, No. 15, 868 (E.D. Pa. 1876) with United States v. Dodge, 25 Fed. Cas. 882, No. 14, 976 (W.D. Tex. 1877).

It is true that the Radicals were against segregation by state law, a point on which Sumner and Edmunds were particularly vociferous. No doubt the Radical position was that this was a matter to be left to the business proprietor, and if the state should by statute decree such segregation it would be a degrading mark of inferiority. But it is equally clear that the Republican moderates and a few Radicals, as noted above, were not in agreement on this point, and the Radicals would never have been able to muster a two-thirds vote to put across their position in 1866.

Viewed historically, therefore, the majority decision in *Plessy* v. *Ferguson*[186] by a group of judges all of whom were contemporaries of the Fourteenth Amendment's adoption[186] is an accurate reflection of the original limitations on the scope of that amendment. The dissent of Mr. Justice Harlan is a virtual model, on the other hand, of the Radical position. Indeed, his analogy to segregated sides of a street may well have been taken from one of Edmunds' speeches.[187] Harlan made clear that he was concerned with segregation by law, and not voluntarily or by action of the railroad in putting separate coaches on the train, as long as no legal segregation was made necessary by state statute.[188]

While the Fourteenth Amendment does not prohibit states from segregating persons in public accommodations, in this author's view this is a matter which ought to be left to the discretion of the individual business proprietors, as the Radicals contemplated. Such a proprietor will doubtless arrange his customers so as to give the largest scope for individual convenience and freedom of choice and association. In public places, every person should have the fullest liberty to sit with others he finds compatible and avoid the company of those he finds distasteful. Restoration of the common-law rule by which the business proprietor and not the government determined this in accordance with the wishes of the customers will effectuate this end. Accordingly, although a state has the power to segregate persons by race or otherwise in public accommodations, in a modern society it would be highly inexpedient to exercise such power.

THE FOURTEENTH AMENDMENT AND REAL PROPERTY RIGHTS

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No consideration of anti-discrimination legislation in housing can be complete without an investigation of the original intent of the framers of the Fourteenth Amendment and its companion statute, the Civil Rights Act of 1866.[1] These

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[186] 163 U.S. 537 (1896).
[186] See Avins, Book Review, 58 Col. L. Rev. 428, 430, n. 16 (1958).
[187] 163 U.S. at 557.
[188] *Id.* at 561.

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[1] Act of April 9, 1866, c. 31, § 1, 14 Stat. 27, now 42 U.S.C. § 1982.

provisions, and particularly the latter statute, have been used not only in popular writings[3] but even in judicial opinions[4] to support such legislation. The question of whether they do in fact support such legislation in light of the intention of the framers of these enactments has never been investigated. This article will seek to determine the original intent of the Congress which passed the Civil Rights Act of 1866 and the Fourteenth Amendment, in order to inquire what was sought to be accomplished by these measures as they affect real property rights.

I. Black Codes and Other Discrimination in Real Property in 1866

When the Thirty-Ninth Congress met in December, 1865,[4] it was much preoccupied with the problem of the so-called "Black Codes" enacted by Southern legislatures, which were deemed or depicted in strong language by northerners as returning the newly freed Negro to the status of virtual slaves.[5] Most attention was paid to vagrancy laws, which were depicted as outrageously harsh and unjust.[6] However, restrictions on the right to contract, engage in business, or own real estate also attracted attention.

For example, Congressman M. Russell Thayer of Pennsylvania, a supporter of the Civil Rights Bill, declared that Southern states had enacted laws "which declare, for example, that [freemen] shall not have the privilege of purchasing a home for themselves and their families; laws which impair their ability to make contracts for labor in such manner as virtually to deprive them of the power of making such contracts."[7] Senator Lyman Trumbull of Illinois likewise declared that Southern laws "did not allow him to buy or sell, or to make contracts; that did not allow him to own property."[8] Congressman William Windom of Minnesota told the House that "The State laws of Georgia and South Carolina prohibit any Negro from buying or leasing a home," and set forth in detail the effects of a similar Mississippi statute.[9] And Congressman William Lawrence of Ohio concluded: "If States may deny to any class of our citizens the right to

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[3] N.Y. Times, Dec. 8, 1957, Real Estate, Sec. 8, p. 1, col. 8.

[4] See Colorado Anti-Discrimination Comm. v. Case, ——— P. 2d ———, ——— (Colo. 1962), concurring opinion of Frants, J.; Railway Mail Assn. v. Corsi, 326 U.S. 88, 98 (1945), Frankfurter, J., concurring.

[4] A full account of its activities of interest here is contained in Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. Rev. 5 (1949); James, *The Framing of the Fourteenth Amendment* (1956).

[5] Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 13–14, n.35 (1955). See Cong. Globe, 39th Cong., 1st Sess. 39, 474 (1865) (hereinafter referred to as Globe), wherein Senator Lyman Trumbull (Ill.) said that Southern states discriminate against freemen in their statutes, "deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished." See also Globe, 603, 605, 744–5.

[6] Globe 1123 ("Vagrant laws have been passed; laws which, under the pretense of selling these men as vagrants, are calculated and intended to reduce them to slavery again"); 1124, 1151, 1158, 1160 ("In South Carolina and other states there are laws compelling the return of the freedman to his master under the name of employer, and allowing him to be whipped for insolence"); 1621, 1759.

[7] Globe 1151. He also said: "Why should they be deprived of the right to make and enforce contracts . . . of the right to inherit, purchase, lease, hold, and convey real and personal property?" (Globe 1151) "What kind of freedom is that under which a man may . . . be deprived of the ability to make a contract . . . to sell or convey real or personal estate; may be deprived of the liberty to engage in the ordinary pursuits of civilized life . . . ?" (Globe 1152).

[8] Globe 322. He also declared that Congress may "permit the colored man to contract . . . permit him to buy and sell."

[9] Globe 1160. He stated: "Lieutenant Stewart Eldridge writes to Major General Howard from Vicksburg, Mississippi, under date of November 28, 1865: 'I have the honor to include herewith for your consideration the freedmen's bill, which has just become a law in this State, and would respectfully ask your attention to the following points thereon: Section first prohibits the holding, leasing, or renting of real estate by freedmen. . . . Section five authorises mayors and boards of police by their sole edict to prevent any freedmen from doing any independent business and to compel them to labor as employees, with no appeal from such decision.' . . . Colonel Samuel Thomas, assistant commissioner, writes from Jackson, Mississippi, concerning this same Mississippi freedmen's bill: 'The freedmen bill has become law. It does not allow freedmen to own or lease estate. Thousands of acres have been rented from owners of land by freedmen who expected that they would be allowed to cultivate land in this way. They are notified that they must give up their leases by citizens. What course must I pursue?'" See also Globe 89, 1759. Congressman George Julian of Indiana stated: "Mississippi allows no negro living in any corporate town to lease or rent lands." Globe 3210. See *infra*, n.17.

make contracts, to own a homestead [it] may strip men of all that is valuable in life. . . ." [10]

Southern states were not alone in restricting the rights of Negroes to own land or make contracts. The Indiana Constitution of 1851 provided as follows:

"*Sec. 1.* No Negro or mulatto shall come into or settle in the State after the adoption of this Constitution.

"*Sec. 2.* All contracts made with any Negro or mulatto coming into the State contrary to the provisions of the foregoing section shall be void; and every person who shall employ such Negro or mulatto or otherwise encourage him to remain in the State, shall be fined in any sum not less than ten dollars nor more than $500." [11]

This provision was so often referred to during the debates in 1866,[12] that Congressman William E. Niblack was moved to say: "Mr. Speaker, the Constitution and laws of Indiana relating to negroes and mulattoes have been so often referred to in the debates during the present session of Congress, and are so different from those of most, if not all, of the other northern states that I . . . feel called upon . . . to vindicate . . . the policy which our people have seen proper to pursue. . . ." [13] Likewise, the Oregon Constitution of 1857 provided that "No free negro or mulatto, not residing in this state at the time of the adoption of this constitution, shall, reside, or be within this state, hold any real estate, or make any contracts, or maintain any suit thereon." [14]

Thus, the Thirty-Ninth Congress was faced with state legislation which prohibited Negroes from buying or selling real estate, making contracts, or engaging in business. The problem was not one of forcing private individuals to deal with Negroes, but simply of removing state legislation which prohibited them from leasing or buying land from willing sellers. It was to this that Congress directed its attention.

II. The Freeman's Bureau Bill

On January 5, 1866, Senator Trumbull introduced a bill to enlarge the powers of the Freedmen's Bureau.[15] Section 7 provided:

"That whenever, in any State or district in which the ordinary course of judicial proceeding has been interrupted by the rebellion, and wherein, in consequence of any State or local law . . . any of the civil rights or immunities belonging to white persons, including the right to make and enforce contracts, to sue, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . are refused or denied to negroes . . . it shall be the duty of the President . . . to extend military protection . . ." [16]

This bill was in a sense a successor to the one to secure equal rights proposed by Senator Henry Wilson of Massachusetts.[17] That bill was urged by Wilson to "secure to these freemen the right to acquire and hold property, to enjoy the fruits of their own labor. . . . These are among the natural rights of free men." [18] Trumbull agreed that "it is idle to say that a man is free . . . who cannot buy and sell, who cannot enforce his rights." [19]

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[10] Globe 1837. Cf. Globe 340, 1124, 1680. And Senator John B. Henderson of Missouri declared that the South denied freed Negroes "the right to hold real or personal property." Globe 3034. Testimony before the Joint Committee of Fifteen on Reconstruction tended to reinforce this view. One witness, a loyalist New Orleans attorney, upon being asked "What is the prevailing sentiment among the rebels in regard to allowing negroes to become landholders in the state?" replied: "There is a very general opposition to th . ." Kendrick, *Journal of the Joint Committee of Fifteen on Reconstruction* 273 (1914). See also 276.

[11] Ind. Const., Art. XIII (1851). It is interesting to note that the Supreme Court of Indiana held that the Civil Rights Act of 1866 overruled this provision. Smith v. Moody, 26 Ind. 299 (1866).

[12] See, e.g., Globe 318, App. 158.

[13] Globe 3211–2.

[14] Ore. Const., Art. I, § 35 (1857). Illinois had an unrepealed constitutional provision prohibiting Negroes from coming into the state. Ill. Const., Art. 14 (1848). However, legislation effectuating it had been repealed. Globe 3038.

[15] Globe 129. The Bureau had been created by the Act of March 3, 1865, c. 90, 13 Stat. 507.

[16] Globe 318.

[17] S. 9, Globe 39.

[18] Globe 42. He also said: "I do not believe the Senator is in favor of that kind of freedom that turns the emancipated workingman out into the highway, then takes him up as a vagrant and makes a slave of him because he cannot get a home when they do not allow him to lease land or buy a humble home. They have enacted a law in the State of Mississippi that will not allow the black man to lease lands or to buy lands outside of the cities. Where in God's name is he to go? . . . They have enacted a law in the State of Louisiana that he must get a home in twenty days, and they will not sell him land or allow him to lease land. We must annul this; we must see to it that . . . he can . . . work when and for whom he pleases . . . that he can lease and buy and sell and own property, real and personal; . . . who knows that his cabin, however humble, is protected by the just and equal laws of his country." Globe 111.

The Freemen's Bureau Bill was urged by Trumbull as a temporary expedient, a companion measure to the permanent Civil Rights Bill. He supported it as an enforcement of the Thirteenth Amendment, declaring that Congress had power to "declare null and void all laws which will not permit the colored man to contract . . . which will not permit him to buy and sell." [20] Senator William Stewart of Nevada likewise supported the bill to give Negroes "a chance to hold property." [21]

The Freemen's Bureau Bill never became law. The President vetoed it, and the Senate failed to override the veto.[22] However, the remarks made on its behalf are of significance in an understanding of the Civil Rights Act of 1866.

III. The Civil Rights Act of 1866

On January 29, 1866, before the House had acted on the Freemen's Bureau Bill, Senator Trumbull brought up in the Senate his Civil Rights Bill. Section 1 of this bill contained a provision very similar to that of Section 7 of the Freemen's Bureau Bill. It provided:

"That there shall be no discrimination in the civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding." [23]

The purpose of this bill, according to Trumbull, was to nullify state statutes in Southern states which denied Negroes "fundamental rights as belong to every free person." These rights Trumbull found in court decisions interpreting the "privileges and immunities" clause of the United States Constitution.[24] For example, he quoted one Maryland case interpreting this clause to include "the peculiar advantage of acquiring and holding real as well as personal property, and that such property should be protected and secured by the laws of the state in the same manner as the property of the citizens of the State is protected." [25] From a Massachusetts decision, he again gleaned the right to "take and hold real estate." [26] But his greatest reliance was placed on the enumeration of rights in *Corfield v. Coryell*,[27] including "the right to acquire and possess property of every kind . . . to take, hold, and dispose of property, either real or personal . . . ." [28] He concluded his objects to be to secure:

The great fundamental rights set forth in this bill: the right to acquire property . . . to make contracts, and to inherit and dispose of property.[29]

Here we may stop for a moment to analyze Trumbull's concept of the clause which gives citizens of one state the privileges and immunities of citizens of the several states. Absent this clause, residents of one state might be considered as mere aliens in another state, and hence disabled from acquiring, under English common law rules, real estate by inheritance, succession, or conveyance, but this clause removes the disability of sister-state residence, and permits residents of other states to hold property they might otherwise acquire.[30] However, it

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[20] Globe 322, Cf. Globe 209.
[21] Globe 298.
[22] Globe 915–7, 943.
[23] Globe 474. This was previously considered. See Globe 211.
[24] U.S. Const., Art. IV, § 2.
[25] Globe 474, citing Campbell v. Morris, 3 Har. & McH. 535 (Md. 1797).
[26] Globe 474, citing Abbott v. Bayley, 23 Mass. (6 Pick.) 89, 92, (1827).
[27] 6 Fed. Cas. 546, 551–2 (No. 3,230) (C.C. Pa. 1823). See also Globe App. 135, 293, 1835. This case was also referred to in the debate on the Fourteenth Amendment. See Globe 2765.
[28] Globe 475.
[29] *Ibid.* He further noted: "A law that does not allow a colored person to hold property . . . is certainly a law in violation of the rights of a freeman. . . ."
[30] Magill v. Brown, 16 Fed. Cas. 408, 428 (No. 8952) (C.C.E.D. Pa. 1833). The reference in Trumbull's quotation of Abbott v. Bayley, *supra* note 26, to the fact that "they shall not be deemed aliens, but may take and hold real estate," supports this view. Likewise, Senator Edgar Cowan of Pennsylvania observed: "but in so far as the right to hold property, particularly the right to acquire title to real estate, was concerned, that was a subject entirely within the control of the States. It has been so considered in the State of Pennsylvania; and aliens and others who acknowledge no allegiance, either to the State or to the General Government, may be limited and circumscribed in that particular." Globe 2890.

has never been suggested that this clause gives residents of one state the right to compel residents of another to sell them land although the owners are unwilling to do so, even if this unwillingness stemmed from the owner's dislike of non-residents. All the clause does is to sweep away state laws which forbid the sale or devise to non-residents, leaving the latter to obtain land only if the owner is willing to part with it. The use of this clause in urging the passage of the Civil Rights Bill shows that the latter was intended to have the same effect, and nothing in the debates detracts from this view.

The debates in both houses of Congress show that this was the undoubted intent of the proponents of the bill. Senator John Sherman of Ohio said "that these men must be protected in certain rights . . . to acquire and hold property, and other universal incidents of freedom." [31] And after the President's veto of the Civil Rights Bill, Trumbull again asserted "that certain fundamental rights belong to every American citizen as such, and among those are the rights . . . to acquire property." [32]

Statements in the House are to the same effect. Congressman James F. Wilson of Iowa, manager of the Civil Rights Bill from the House Committee on the Judiciary, opened the debate in that body by defining "civil rights." He quoted from Kent, that civil rights were the absolute rights of individuals, including "the right to acquire and enjoy property," [33] and likewise quoted from the privileges and immunities clause of Article 4 of the Constitution and from *Corfield* v. *Coryell*. [34] He asserted that "the entire structure of this bill rests on the discrimination . . . made by the States." He emphatically disclaimed any intent to "deprive a white man of a single right to which he is entitled." [35] And finally, Wilson returned to Kent as well as Blackstone to drive home his point that property rights were fundamental. [36]

Congressman Cook declared that the Civil Rights Bill would not touch or impair any rights of whites, but only prevent state discriminatory legislation. [37] Congressman Thayer declared that "the sole purpose of the bill is to secure" to freemen "those rights which constitute the essence of freedom, and which are common to the citizens of all civilized States," rights "which are common to the humblest citizen of every free state," the right "to make and enforce contracts" and the right "to inherit, purchase, lease, hold and convey real and personal property." [38] Congressman Lawrence, in urging passage of the bill over the President's veto, reiterated its aim of annulling discriminatory state laws. [39] And even the President, in his veto message, urged as an objection that the bill would

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[31] Globe 744. In opposing the bill, Senator Garrett Davis of Kentucky urged that "Some of the States deny to negroes the right to hold lands," and that the bill would overturn this. Globe 1415.

[32] Globe 1781. Senator Edgar Cowan, a moderate Republican from Pennsylvania, agreed "that all men should have the right to contract, and generally to purchase, lease and hold real estate." *Ibid.* Cf. Globe, 1255.

[33] Globe 1117.

[34] *Supra* note 27. Cf. Globe App. 157–8.

[35] Globe 1118.

[36] *Ibid.* He included: "The right of personal property; which he defines to be, 'The free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land.' Sharwood's Blackstone, vol. 1, chap. 1. In his lecture on the absolute rights of persons, Chancellor Kent (Kent's Commentaries, vol. 1, page 599) says: 'The absolute rights of individuals may be resolved into . . . the right to acquire and enjoy property.'"

[37] Globe 1123–4. He had previously stated that "every individual citizen of each state in the union has rights in every other state—the right to acquire, possess and dispose of property," and that those rights came from the United States Constitution and not from the States. Globe 899.

[38] Globe 1151–2.

[39] Globe 1835, declaring that the federal government could intervene "if a State, by her laws, says to a whole class of native or naturalised citizens, 'You shall not buy a house or homestead to shelter your children within our borders;' . . . 'you shall have no right to sue in our courts or make contracts.'" And Congressman Samuel Shellabarger of Ohio stated: "Who will say that Ohio can pass a law enacting that no man of the German race, and whom the United States has made a citizen of the United States, shall ever own any property in Ohio, or shall ever make a contract in Ohio, or ever inherit property in Ohio, or ever come into Ohio to live, or even to work? If Ohio may pass such a law, and exclude a German citizen, not because he is a bad man or has been guilty of crime, but because he is of the German nationality or race; then may every other state do so; and you have the spectacle of an American citizen admitted to all its high privileges, and entitled to the protection of his government in each of these rights, and bound to surrender life and property for its defense, and yet that citizen is not entitled to either contract, inherit, own property, work, or live upon a single spot of the Republic, nor to breathe its air." Globe 1294.

"abrogate all state laws of discrimination between the two races in the matter of real estate . . . and of contracts generally." [40]

Nowhere in the extensive debates on the Civil Rights Act of 1866 is it even intimated that the law would do anything more than eliminate discriminatory state laws. The bill's proponents eagerly asserted that rights of individual whites would remain unimpaired. In light of the fact that laws forbidding private discrimination were completely unknown, it would be absurd to assert that the ability to compel persons to sell, not to mention contract or devise, without their individual right to discriminate, was a right "common to the humblest citizen" or "the essence of freedom." In the tenor of the times, and the prevailing views of rights in property, such anti-discrimination laws might well have been deemed a violation of the civil rights of whites. It certainly could not be argued that it was part of the civil rights of Negroes intended to be advanced by the bill.

IV. The Initial Version of the Fourteenth Amendment

The privileges and immunities, due process, and equal protection clauses of the Fourteenth Amendment are a product of Representative John A. Bingham, a Radical Republican from Ohio, who had voted against the Civil Rights Act of 1866 although in agreement with its purposes because he believed that Congress lacked constitution power to pass it, and because of the potential sweep of the term "civil rights." [41] It was his version of the Joint Committee on Reconstruction's work on a constitutional amendment to secure equal rights which the Committee ultimately accepted and reported out. [42]

The original version of the Fourteenth Amendment, as Fairman correctly points out, was an affirmative grant of legislative power to Congress to secure privileges and immunities and equal protection for life, liberty and property. [43] Bingham and several Radicals defended it on the grounds that it was merely declarative of constitutional rights already granted. [44]

The proposed amendment first came under fire from Representative Andrew Jackson Rogers of New Jersey, a Democratic member of the Joint Committee. The main thrust of his attack was that the amendment would overcentralize the government and destroy state powers. While apparently in favor of permitting Negroes to own property, [45] he attacked the proposal on the ground that it would wipe away state discriminatory legislation. [46]

However, the main speaker against Bingham's proposal was Representative Robert S. Hale, a moderate New York Republican, who had formerly been a judge. Hale subjected the amendment to close scrutiny, likewise attacking it as a "provision under which all State legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen, may be overridden, may be repealed or abolished, and the law of Congress established instead." [47] To this Congressman Thaddeus Stevens of Pennsylvania, the leader of the Radical Republicans, replied that "Congress could [not] interfere in any case where the legislation of a State was equal, impartial to all" and that the amendment was "simply to provide that, where any state makes a distinction in the same law between different classes of individuals, Congress shall have power to correct such discrimination and inequality." [48]

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[40] Globe 1680.

[41] Bickel, *op. cit. supra* note 5, at 22–28.

[42] *Id.* at 33.

[43] Fairman, *op. cit. supra* note 4, at 24. This was also Hale's view. Globe 1064. The text, at Globe 1034, is: "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."

[44] Globe 1034; Bickel, *op. cit. supra* note 5, at 33–4.

[45] Globe App. 134: "Negroes . . . should be protected in . . . property, and by the States should be allowed all the rights of . . . contracting, and doing every act or thing that a white man is authorized by law to do."

[46] *Ibid.*: "According to the organic law of Indiana a negro is forbidden to come there and hold property. This amendment would abrogate and blot out forever that law, which is valuable in the estimation of the sovereign people of Indiana." See also Globe App. 135: The proposed amendment will "empower the Federal Government to exercise an absolute, despotic, uncontrollable power of entering the domain of the States and saying to them, 'Your state laws must be repealed whenever they do not give to the colored population of the country the same rights and privileges to which your white citizens are entitled.' . . . You nowhere find Congress endowed with the right to interfere with the eminent domain and the sovereign power of a State. But each State has sovereign jurisdiction and power over the property, the liberty, the privileges, and immunities, and the lives of its citizens.'"

[47] Globe 1063.

[48] *Ibid.*

Hale then turned to the change which the amendment would effect in state legislation over property rights. He pointed to the fact that Congress might require that "married women, in regard to their rights of property, should stand on the same footing with men and unmarried women," [49] although in all states distinctions still persisted. Brushing aside Stevens' rebuttal that these groups were in different classes, he replied that if that were the distinction, Negroes could be placed in a different class than whites. He objected to the fact that the amendment would overturn the discriminatory provisions of the Oregon Constitution, and probably those of Indiana as well, as an undue interference in state internal affairs.[50]

The next day, Congressman Thomas T. Davis, another New York Republican, echoed Hale's objection about overcentralization. He urged that states were not under federal control "in respect of social arrangement . . . of the rights of property, and control of persons." [51]

Bingham attempted to save his proposal in a long defensive speech. His position was that the amendment would give Congress the power to enforce the bill of rights against the states.[52] In response to a question from Rogers about the meaning of "due process of law," he replied that "the courts have settled that long ago, and the gentlemen can go and read their decisions." [53] He rebutted Hale's argument by declaring that under the proposal, property would still be under state law.[54]

Bingham then launched into a long discussion of the need to overrule *Barron v. Baltimore* [55] and apply the bill of rights to the states. This case, of course, was one where the state had interfered with real property rights, a point he knew quite well.[56] He asserted that the constitutional guarantees were "disregarded today in Oregon" and in the South, and that the amendment was needed to secure "equal protection to life, liberty or property." [57] In response to a question from Hale, he asserted that the proposal would permit Congress to secure equal protection "to life and liberty and property . . . the right to real estate being dependent on the State law." Hale asked that if Congress could not legislate "in regard to real estate," did Bingham mean "to imply that it extends to personal estate." He answered: "Undoubtedly it is true . . . [because] the personal property of a citizen follows its owner, and is entitled to be protected in the State into which he goes." [58] He concluded that the proposal simply gave Congress power "to see to it that the protection given by the laws of the States shall be equal in respect to life and liberty and property to all persons."

Bingham's remarks did not satisfy his colleagues. Congressman Giles W. Hotchkiss, a New York Republican lawyer, still thought the proposal would

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[49] *Ibid.*

[50] "*Mr. Bingham.* [The amendment] is to apply to other States also that have in their constitutions and laws today provisions in direct violation of every principle of our Constitution.

"*Mr. Rogers.* I suppose the gentleman refers to the State of Indiana?

"*Mr. Bingham.* I do not know; it may be so. It applies unquestionably to the State of Oregon.

"*Mr. Hale.* . . . And here we come to the very thing for which I denounce this proposition, that it takes away from these States the right to determine for themselves what their institutions shall be. . . . Oregon has not been in rebellion; the gentleman has no charge to bring against her, except that she has incorporated into her constitution and laws provisions that to him are distasteful, and which he thinks unjust. I submit that that should never be a question for us to pass upon here in Congress." Globe 1065.

[51] Globe 1088.

[52] Globe 1088.

[53] Globe 1089.

[54] *Ibid.* He said: "But the gentleman's concern is as to the right of property in married women.

"Although this word property has been in your bill of rights from the year 1789 until this hour, who ever heard it intimated that anybody could have property protected in any State until he owned or acquired property there according to its local law or according to the law of some other State which he may have carried thither? I undertake to say no one.

"As to real estate, every one knows that its acquisition and transmission under every interpretation ever given to the word property, as used in the Constitution of the country, are dependent exclusively upon the local law of the States, save under a direct grant of the United States. But suppose any person has acquired property not contrary to the laws of the State, but in accordance with its law, are they not to be equally protected in the enjoyment of it, or are they to be denied all protection? That is the question, and the whole question, so far as that part of the case is concerned."

[55] 32 U.S. (7 Pet.) 243 (1833).

[56] See Cong. Globe, 42d Cong., 1st Sess. App. 68 (1871).

[57] Globe 1090.

[58] Globe 1094. Bingham stated: "Let the gentleman look to the great Mississippi case, Slaughter and another, which is familiar, doubtless, to all members of the House." No doubt Bingham was referring to Groves v. Slaughter, 40 U.S. (15 Pet.) 449 (1841), where Justice Baldwin declared that if slaves were brought into a free state by the owner, "no law of either State could take away or affect his right of property." *Id.* at 510.

give Congress power to establish uniform laws to protect life, liberty, and property, thus overcentralizing the government. Moreover, Congress could repeal or alter such legislation. He suggested an amendment "that no State shall discriminate against any class of its citizens." [59]

The Republican leadership, sensing that the proposal could not pass, moved that it be postponed.[60] The House Republicans, including Bingham, followed party leadership,[61] and the proposal was dropped.

This proposal is significant to show Bingham's thinking. True, it was hazy perhaps even confused.[62] The privileges and immunities clause could apply to, and was early held to apply to, real property,[63] as well as personal property, even though only the latter could be moved from state to state. Certainly, the equal protection clause could apply to both, and Congress was particularly interested in State laws preventing Negroes from owning real estate. However, the debate shows clearly that Bingham did not intend to supplant state law procedures for acquiring property, but merely wanted to protect property lawfully acquired from confiscation or undue restriction, as was true in *Barron* v. *Baltimore*.

V. The Final Version of the Fourteenth Amendment

The final version of the privileges and immunities, due process, and equal protection clauses of the Fourteenth Amendment likewise was Bingham's product.[64] Stevens introduced it as the Committee draft in the House. The Radicals considered it a disappointingly mild provision, but congressional Republicans, afraid of defeat in the fall 1866 elections, rejected any radical proposals too closely tied with Negroes.[65] Instead, the Fourteenth Amendment was intended as a compromise measure which the majority of Republican professional politicians in Congress considered a safe party platform and useful campaign material which would be valuable in carrying the country. Thus the Chicago Tribune of May 5, 1866, a Radical newspaper, referred to the first section as "surplusage," and deemed the measure feeble. However, if Radicals were unenthusiastic, others could hardly attack it. Opponents would have to take an opposite position. "We would like to see them advocate the proposition that local legislatures shall have the authority to abridge the rights of the citizen, or to deprive any person of life, liberty, or property, without due process of law." [66]

Stevens, the leading House Radical, did not conceal his disappointment, but confessed it was the best he could get.[67] He stated that the first section was designed to "correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all." He pointed out that the Civil Rights Bill had the same object, but since Congress could repeal it at any time, he desired to secure this beyond the control of a hostile majority.[68] Other Congressmen likewise discussed the first section as a constitutional embodiment of the Civil Rights Act of 1866.[69] A Pennsylvania Democrat opposed it because "the first section proposes to make an equality in every respect be-

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[59] Globe 1095. It might be noted that Hale had also pointed out that the proposal differed from the bill of rights in that the latter was a limitation on power. Globe 1964.

[60] Kendrick, *op. cit. supra* note 10, at 215, Congressman James A. Garfield, Ohio Republican, who was later to be President, stated: "Now, let it be remembered that the proposed amendment was a plain, unambiguous proposition to empower Congress to legislate directly upon the citizens of all the States in regard to their rights of life, liberty, and property. . . . After a debate of two weeks . . . it became evident that many leading Republicans of this House would not consent to so radical a change in the Constitution, and the bill was recommitted to the joint select committee." Cong. Globe, 42d Cong., 1st Sess. App. 151 (1871). He also declared: "It will not be denied, as a matter of history, that this form of amendment received many Republican votes that the first form to which I have referred could not have received."

[61] Globe 1095.

[62] Bickel, *op. cit., supra* note 5, at 24–25, 39; Fairman, *op. cit. supra* note 4, at 31–36.

[63] Corfield v. Coryell, 6 Fed. Cas. 546, 551–2 (No. 3,230) (C.C. Pa. 1823).

[64] Kendrick, *op. cit. supra* note 10, at 106. The progress of this version is set forth in Bickel, *op. cit. supra* note 5, at 40–45.

[65] James, *The Framing of the Fourteenth Amendment*, 110–120 (1956).

[66] *Id.* at 123–4, 134–5, 145.

[67] "This proposition is not all that the Committee desired. It falls far short of my wishes. . . . I believe it is all that can be obtained in the present state of public opinion. . . . Upon a careful survey of the whole ground, we did not believe that nineteen of the loyal States could be induced to ratify any proposition more stringent than this. . . . Believing, then, that this is the best proposition that can be made effectual, I accept it." Globe 2459. Congressman John M. Broomall, a Pennsylvania Radical Republican said: "It is not what I wanted. How far short of it! But the necessity is urgent, and we must take what will obtain the votes of two thirds of both houses of Congress, and the ratification of three fourths of the actual States. . . ." Globe 2498. See also Globe 2511, 2459.

[68] Globe 2459.

[69] See, e.g., Globe 2462 (Garfield); 2465 (Thayer); 2467 (Boyer); 2498 (Broomall); 2502 (Raymond); 2511 (Eliot); 2538 (Rogers). See Bickel, *op. cit. supra* note 5, at 47–8.

tween the two races, notwithstanding the policy of discrimination which has heretofore been exclusively exercised by the States."[70] Bingham closed the debate by saying that the first section would protect citizens "from unconstitutional state enactments,"[71] and shortly thereafter the House passed the amendment.[72]

In the Senate, Senator Jacob M. Howard of Michigan opened the debate by tying the privileges and immunities clause to Article IV, § 2 and the Bill of Rights, lamenting that "the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon state legislation."[73] He stated that the first section would permit Congress to enforce the bill of rights against the States, and deprive them of power to subject Negroes to different laws than whites. He declared that "section one is a restriction upon the States, and . . . will . . . forever disable every one of them from passing laws trenching upon fundamental those rights and privileges. . . ."[74] When debate resumed after a few days of caucusing by the Republican members,[75] Senator Luke Poland, Vermont Republican and former Chief Justice of that State, referred to the due process and equal protection clauses as an embodiment of the Civil Rights Bill's principles, directed at "partial State legislation," some of "very recent enactment,"[76] a reference to the Black Codes. Senator Timothy O. Howe, a Wisconsin Radical Republican, declared that the first section was necessary because Southern states "denied to a large portion of their respective populations the plainest and most necessary rights of citizenship. The right to hold land when they had bought it and paid for it would have been denied them; the right to collect their wages by the processes of the law when they had earned their wages. . . ."[77]

Senator John B. Henderson, a Missouri Republican, also referred to the Black Codes. He said that the South denied Negroes "the right to hold real or personal property . . . and forced upon him unequal burdens. Though nominally free, so far as discriminating legislation could make him so he was yet a slave." He added that the Civil Rights Bill abolished such laws,[78] but that while women and aliens "are regarded as persons and not dumb brutes; they enjoy the right to acquire property, to enter the courts for its protection, to follow the professions, to accumulate wealth," if the Civil Rights Bill were declared unconstitutional, Negroes would lose such protection.[79] Finally, Senator Reverdy Johnson, a Maryland Democrat who was a member of the Joint Committee, but who voted against the amendment as a whole, stated that he was "in favor of that part of the first section which denies to a State the right to deprive any person of life, libery, or property without due process of law,"[80] showing that this provision was intended to be universal and hence commanded even Democratic support.[81] The amendment, with several changes from the House version, was then passed.[82]

On June 13, 1866, when the House concurred in the Senate amendments, there was only brief debate. Rogers said that the first section "simply embodied the gist of the civil rights bill."[83] In the last speech, Stevens, Mr. Radical of the

[70] Globe 2480 (Congressman Samuel Jackson Randall).
[71] Globe 2543.
[72] Globe 2545.
[73] Globe 2765. He also quoted at length from Corfield v. Coryell, *supra* note 68.
[74] Globe 2766.
[75] Globe 2938.
[76] Globe 2961. Senator Garrett Davis, Kentucky Democrat, said the same thing. Globe App. 240.
[77] Globe App. 219. He also attacked the harsh criminal laws and punishments in the South. Globe App. 223.
[78] Globe 3034–5: Congress did "a simple act of justice to the negroes and poorer whites of the South, who had been always loyal to the Government. For that purpose . . . the 'Freedmen's Bureau bill,' and . . . 'the civil rights bill,' were . . . adopted . . . their sole object was to break down in the seceded States the system of oppression to which I have alluded. Their only effect was . . . to give the right to hold real and personal estate to the negro, to enable him to sue and be sued in courts . . . to have the process of the courts for his protection, and to enjoy in the respective States those fundamental rights of person and property which cannot be denied to any person without disgracing the Government itself. It was simply to carry out that provision of the Constitution which confers upon the citizens of each State the privileges and immunities of citizens in the several States."
[79] Globe 3035.
[80] Globe 3041.
[81] Even Senator Garrett Davis of Kentucky, an unreconstructed rebel (Fairman, *op. cit. supra*, n. 4 at 65, Bickel, *op. cit. supra* note 5, at 14, n. 36), could find nothing wrong with this provision except that it duplicated the provisions of "every State constitution, and the rights which it is intended to secure are regarded by all as a most important portion of American liberty, and there is no danger of the removal of the defenses which the States have thrown around them." Globe App. 240.
[82] Globe 3042.
[83] Globe App. 229.

House, expressed his keen disappointment at "so imperfect a proposition," but accepted it "because I live among men and not among angels. . . ." [84] And with but a few brief references,[85] that was all the debate relevant to real property rights.

A few of the subsequent debates collected by Professor Fairman likewise reflect the universality of the first section. The *Cincinnati Commercial* understood it to abolish Black Codes and similar discriminatory legislation. A prominent Illinois Republican politician said that the rights of citizens it protected included "to sue and be sued, to own property . . . to have protection for life, liberty, and property . . . that the white or black man should collect his debt in court; that either should own and hold property that he pays for." To Congressman Schenck, the amendment removed from Negroes "the weight of inequality in . . . making contracts. . . ," while Congressman Delano viewed it as a protection for northern whites traveling south. Senator Sherman said that it embodied the Civil Rights Bill "to make contracts, to sue and be sued, to contract and be contracted with." [86] State legislatures or governors viewed it as an embodiment of the Civil Rights Bill,[87] or a mere repetition of state bills of rights,[88] designed to eliminate unequal state legislation.[89]

Several points remain to be discussed. The first is that the Fourteenth Amendment was intended to protect white persons as well as Negroes. Bingham repeatedly referred to his desire to protect "loyal white men . . . against State statutes of confiscation and statutes of banishment." [90] Hotchkiss said that the "white man" as well as the "black man" would derive benefit from a proper constitutional amendment.[91] When Senator Davis argued that the Civil Rights Bill discriminated against whites by creating "partial," special rights for Negroes, Trumbull replied:

"Sir, this bill, applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell . . . a bill that protects a white man just as much as a black man. [How] can a Senator . . . say . . . that this is a bill for the benefit of black men exclusively when there is no such distinction in it. . . ." [92]

And in state debates, the need to protect loyal southern whites, or northern whites traveling south, through the Fourteenth Amendment, was prominently mentioned.[93]

The second point is, as Garfield declared, that the amendment "was throughout the debate, with scarcely an exception, spoken of as a limitation on the power of the States." [94] State legislation primarily, and state action exclusively, was

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[84] Globe 3148.

[85] In another debate Congressman George Julian, an Indiana Republican, stated that the Civil Rights Bill was designed to protect Negroes in their right to "make contracts and to own property." Globe 3209. Congressman John Baker, an Illinois Republican, thought the due process clause "a wholesome and needed check upon the great abuse of liberty which several of the States have practiced," apparently referring to Black Codes. Globe App. 256. And Congressman Samuel Shellabarger, an Ohio Republican, quoted Kent to the effect that "rights of protection of life and liberty, and to acquire and enjoy property" were national privileges which the amendment protected. Globe App. 293.

[86] Fairman, *op. cit. supra* note 4, at 70–77.

[87] *Id.* at 105–6, 113, 115, 117. See also Flack, *The Adoption of the Fourteenth Amendment*, 148–5, 149–50 (1908).

[88] Fairman, *op. cit. supra* note 4, at 109, 114.

[89] *Id.* at 114. See also Rowan v. State, 30 Wis. 129, 148 (1872).

[90] Globe 1094. In the same remarks he referred to his desire "to protect the loyal white minority" in South Carolina, and declared that unless an amendment were passed, "the loyal minority of white citizens . . . will be utterly powerless." *Ibid.* In a colloquy with Hale, he stated:

"*Mr. Hale:* It is claimed that this constitutional amendment is aimed simply and purely toward the protection of 'American citizens of African descent' in the States lately in rebellion. I understand that to be the whole intended practical effect of the amendment.

"*Mr. Bingham:* It is due to the committee that I should say that it is proposed as well to protect the thousands and tens of thousands and hundreds of thousands of loyal white citizens of the United States whose property, by State legislation, has been wrested from them under confiscation, and protect them also against banishment."

[91] Globe 1095. See also Globe 2536 (Eckley), note 78 *supra*.

[92] Globe 599. Congressman Samuel W. Moulton of Illinois denounced Alabama "whose aristocratic and anti-republican laws, almost re-enacting slavery, among other harsh inflictions impose an imprisonment of three months and a fine of $100 upon any one owning firearms, and a fine of fifty dollars and six months' imprisonment on any servant or laborer (white or black) who loiters away his time or is stubborn or refractory." (Globe 1621.

[93] Fairman, *op. cit. supra* note 4, at 90 ("a minority of whites so small as to be helpless"); 96 ("freedom of discussion . . . was not tolerated in the Southern States"); James, *op. cit. supra* note 65, at 159.

[94] Cong. Globe, 42nd Cong., 1st Sess. App. 151 (1871).

intended to be limited, not only by Bingham,[95] but by the others as well. No restrictions were to be imposed on private individuals or groups.

Finally, the first section, and especially the due process clause, was intended to be a substantive, as well as a procedural, limitation on government.[96] Bingham, as previously noted, had referred Rogers to court decisions for the meaning of the due process clause,[97] and these had firmly established the interpretation that the clause limited legislative action impairing vested property rights or interests.[98] Bingham declared that "cruel and unusual punishments have been inflicted under State laws" but the federal constitution did not intervene,[99] that states "took property without compensation, and [citizens] had no remedy,"[100] and that "liberty . . . is the liberty . . . to work in an honest calling and contribute by your toil in some sort to the support of yourself . . . and to be secure in the enjoyment of the fruits of your toil."[101] Bingham not only considered the due process clause substantive, but was "a man who held thoroughly Lockian views concerning the sanctity of property"[102] and "property rights by his view are thus virtually absolute."[103]

Moreover, Bingham intended to secure not only property rights, but freedom of association and freedom of choice as well. He said:

"Sir, before the ratification of the fourteenth amendment, . . . a State, as in the case of the State of Illinois, could make it a crime punishable by fine and imprisonment for any citizen within her limits, in obedience to the injunction of our divine Master, to help a slave who was ready to perish; to give him shelter, or break with him his crust of bread. The validity of that State restriction upon the rights of conscience and the duty of life was affirmed, to the shame and disgrace of America, in the Supreme Court of the United States;

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[95] *Id.* at 88–4, where Bingham said: "allow me to say, further, that by the text of the Constitution as you remember it . . . there are negative limitations upon the power of the States; as, for example, that no State shall make an ex post facto law; . . . These are of the negative limitations on the power of the States in the original text of the Constitution. . . . But, says the gentleman to me, why did you change the amendment of February, 1866? Sir, I sat at the feet of . . . that great man, John Marshall, foremost of all the judges, in the hope that by his guidance, the amendment might be so framed that in all the hereafter, it might be accepted by the historian of the American Constitution and her Magna Charta 'as the keystone of American liberty.' . . . I had read—and that is what induced me to attempt to impose by constitutional amendments new limitations upon the power of the States—the great decision of Marshall in Barron vs. . . . Baltimore, where the Chief Justice said . . . 'The amendments [to the Constitution] contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them.' 7 Peters, p. 250. In this case the city had taken private property for public use, without compensation as alleged, and there was no redress for the wrong in the Supreme Court of United States; and only for this reason, the first eight amendments were not limitations on the power of the States.

* * * * * * *

"In reexamining that case of Barron. . . . I noted and apprehended as I never did before, certain words in that opinion of Marshall. Referring to the first eight articles of amendments to the Constitution of the United States, the Chief Justice said: 'Had the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention.' Barron vs. The Mayor, etc., 7 Peters 250. Acting upon this suggestion, I did imitate the framers of the original Constitution."

[96] See the remark of Senator Frelinghuysen of New Jersey that "The fourteenth amendment goes much further than merely establishing 'equality' between whites and blacks." Cong. Globe, 42nd Cong., 1st Sess. 500 (1871).

[97] *Supra*, n.53.

[98] The cases are fully collected in Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 Calif. L. Rev. 583 (1930). See also Corbin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366, 460 (1911). It might also be noted that the adoption of the due process and equal protection clauses was foreshadowed at the 1860 Republican National Convention. Paragraph 8 of the Platform stated: "that as our republican fathers . . . ordained that no person should be deprived of life, liberty, or property without due process of law, it becomes our duty, by legislation, whenever such legislation is necessary, to maintain this provision of the constitution against all attempts to violate it . . ." Likewise, a special resolution moved by Joshua R. Giddings of Ohio and adopted by the convention stated: "Resolved, That we deeply sympathize with those men who have been driven, some from their native States and others from the States of their adoption, and are now exiled from their homes on account of their opinions; and we hold the Democratic Party responsible for the gross violation of the clause of the Constitution which declares that citizens of each State shall be entitled to all privileges and immunities of the citizens of the several States." 1 Curtis, *The Republican Party* 357, 361 (1904).

[99] Globe 2542.

[100] Cong. Globe, 42nd Cong., 1st Sess. App. 85 (1871). He also said: "The Government owes high and solemn duties to every citizen of the country. It is bound to protect him in his most important rights. Has he any rights more important than the rights of life, liberty, and property?" *Ibid.*

[101] *Id.* at 86.

[102] Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 Yale L.J. 371, 401 (1938).

[103] *Id.* at 398.

but nevertheless affirmed in obedience to the requirements of the Constitution." (14 Howard, 19–20, Moore vs. The People.) [104]

This statement is very significant. In *Moore* v. *Illinois*,[105] the Supreme Court upheld a staute forbidding the assisting of runaway slaves based on "the police power . . . to protect themselves against the influx either of liberated or fugitive slaves, and to repel from their soil a population likely to become burdensome and injurious, either as paupers or criminals . . . [This conduct tends] to destroy the harmony and kind feelings which should exist between citizens of this Union, to create border feuds and bitter animosities, and to cause breaches of the peace, violent assaults, riots and murder. No one can deny or doubt the right of a state to defend itself against evils of such magnitude . . ." [106]

Here we see that Bingham has intended to embody in the Fourteenth Amendment the right of individuals to associate or not to associate with each other based on individual decision even as against a great compelling public need satisfied through an exercise of the police power. If the police power cannot restrain freedom of choice even to preserve the public peace and safety, preserve harmony with other states, and prevent a flood of paupers and criminals, it is obvious that the amendment secures it beyond infringement as an absolute right.

VI. Summary and Conclusions

Several firm conclusions can be drawn from an analysis of the legislative history of the Fourteenth Amendment. They are:

1. The framers considered property rights to be fundamental, and intended to limit State power to impair them.
2. Congress intended to restrict state legislation primarily, and state action exclusively. Private individuals were not restricted.
3. Congress intended to assure that states would not deprive Negroes of the capacity to own land or make contracts. The phrase in the debates and the Civil Rights Bill about the "right" to make contracts or own property simply means that state laws shall not prevent a willing seller, testator, or donor from conveying property to a Negro, or a willing person from contracting with him. It does not confer on a Negro power to compel unwilling testators to devise property to them, unwilling owners to give, lease, or sell them property, or anybody to contract with anybody else, nor does it authorize states to do so.

Beyond this, it is impossible to say exactly what the framers of the Fourteenth Amendment intended. No one had ever dreamed at that time of enacting anti-discrimination laws requiring unwilling owners of houses to sell or rent them to Negroes. But the amendment, framed by Bingham, one of the firmest believers in property rights, and not by the equalitarian Stevens, who was disappointed in it, offers little comfort to proponents of such laws. It restricted state laws to enlarge individual rights, and not the converse.

How would Bingham, the conservative Republican corporation lawyer from Ohio, have been struck by a law requiring an unwilling owner to sell to or rent to, or an unwilling resident to live near, people he did not want to do so? Would it have offended his notion of due process? In a recent case, one judge protested that "The Fair Housing Act of 1959 . . . would compel Case to transfer his residential property to the Rhones, not voluntarily, but under compulsion, with sanctions that might lead to imprisonment for failure to comply." [107] This protest seems remarkably like a 1795 case which held that "The legislature . . . had no authority to make an act divesting one citizen of his freehold, and vesting it in another . . . it is contrary to the principles of social alliance in every free government; . . . it is contrary both to the letter and spirit of the constitution." [108] It seems surprisingly like a 1798 United States Supreme Court case holding that a "law that takes property from A and gives it to B; it is against all reason and justice, for a people to entrust a legislature with such powers; and therefore, it cannot be presumed that they have done it." [109] Were these concepts part of the notions of Bingham, the conservative man of property, about "due process," as he wrote them into the Fourteenth Amendment? They may very well have been.

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[104] Cong. Globe, 42nd Cong., 1st Sess. App. 84 (1871).
[105] 55 U.S. (14 How.) 13 (1852).
[106] *Id.* at 18.
[107] Colorado Anti-Discrimination Comm. v. Case, ——— P.2d ———, ——— (Colo. 1962), dissenting opinion of Hall, J.
[108] Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (1795).
[109] Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798).

THE CIVIL RIGHTS ACT OF 1875: SOME REFLECTED LIGHT ON THE FOURTEENTH AMENDMENT AND PUBLIC ACCOMMODATIONS

ALFRED AVINS*

Civil rights and "places of public accommodation" have been the subject of innumerable exhausting analyses by scholarly and partisan commentators alike.[1] Yet the remarkable fact is that little light has been shed on the framers' understanding of the relevance of the fourteenth amendment to "places of public accommodation." To some extent, the failure to concentrate on the intended meaning of that amendment must be attributed to a dearth of legislative history. Aside from some isolated strands of declamation touching on public accommodations, there is little in the debates on the fourteenth amendment which would ground a firm determination of framers' intent.[2] But the present vague understanding of the relationship of the amendment to places of public accommodation must also be ascribed to the manifest desire of many to expand federal control over a broad sphere of local activities. Quite understandably, these proponents of federal action are content to declare the intent of the framers to be too ambiguous or even lost forever and then to construe the amendment according to its "broad purposes." But if one really desired to discover that intent, the logical step would be to investigate expressions of intent in sources other than the actual debates on the amendment; little effort has heretofore been made in this direction.

Efforts to determine the meaning of one of the amendments are met with the stock reply that there can be no controlling intent; since each state had to ratify the amendment, no one body, including Congress, can be relied on as a source of intent. But in reality, Congress alone was the framer of the fourteenth amendment: the states had to act on the amendment on a take-it-or-leave-it basis. And, some states had to take the amendment, regardless of what they thought of it, or they would face continued status as a conquered territory.

Finally, those who prefer a vague understanding of the fourteenth amendment fall back upon the notion that the intent of a century ago is not relevant to the problems of today; and again, they conclude that the amendment must

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1. A review of the many cases and articles is contained in Lewis, *The Sit-In Cases: Great Expectations*, 1963 SUPREME COURT REVIEW 101; Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961).

2. See Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 11 n.30, 29, 56-59 (1955). Even the Congressional discussion of property rights, which is far more extensive, contains little of value bearing directly on places of public accommodation. See Tansill, Avins, Crutchfield & Colegrove, *The Fourteenth Amendment and Real Property Rights*, in OPEN OCCUPANCY VS. FORCED HOUSING UNDER THE FOURTEENTH AMENDMENT 68 (Avins ed. 1963).

be construed to achieve its broad purposes. Of course, the Constitution must be interpreted to meet new conditions, but the basic understanding of the framers cannot be discarded by a veiled, albeit deceptively appealing, judicial or legislative amendment. As the Senate Judiciary Committee stated in 1872:

> In construing the Constitution we are compelled to give it such interpretation as will secure the result which was intended to be accomplished by those who framed it and the people who adopted it. The Constitution, like a contract between private parties, must be read in the light of the circumstances which surrounded those who made it. . . . If such a power did not then exist under the Constitution of the United States, it does not now exist under this provision of the Constitution, which has not been amended. A construction which should give the phrase "a republican form of government" a meaning differing from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the Constitution in any other particular. This is the rule of interpretation adopted by all commentators on the Constitution, and in all judicial expositions of that instrument; and your committee are satisfied of the entire soundness of this principle. A change in the popular use of any word employed in the Constitution cannot retroact upon the Constitution, either to enlarge or limit its provisions.[3]

A general vague understanding of the fourteenth amendment is simply not a sufficient basis on which to decide great issues of the day. Rather, the basic intent of the Congress which passed the amendment should be controlling in present-day applications of the amendment. Although "basic intent" and "broad purposes" appear to be only semantic variations of the same idea, a critical distinction in meaning appears when the terms are used in construing the fourteenth amendment's relation to places of public accommodation. Those who favor greater federal control over local activities take the view that the broad Congressional purpose was to achieve equal opportunities and privileges in general and thus conclude that wherever there is discrimination against Negroes the federal government may intervene. Achievement of equal rights and privileges may have been a general goal of Congress, but, as will be shown hereafter, the framers felt that the congressional authority to intervene to ensure equality was clearly limited by the Constitution.

I. The Framers' Intent: An Alternative Source

Efforts to ascertain the intent of the framers of the fourteenth amendment have generally been limited to the direct light shed from the debates on the amendment itself; unfortunately, as noted above, these debates are virtually unenlightening with respect to places of public accommodation. But the debates

3. S. Rep. No. 21, 42d Cong., 2d Sess. 2-3 (1872). The three senators on the committee who voted for the fourteenth amendment were Trumbull, Conkling, and Edmunds. See note 6 *infra*.

on the nearly contemporaneous Civil Rights Act of 1875[4] do produce a clear, although reflected, image of the framers' view of the fourteenth amendment, particularly as it was thought to apply to places of public accommodation. As finally passed, the first section of the Act provided:

> That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.[5]

That the enactment should have reflected the intent of the framers of the fourteenth amendment is clear since sixteen of the thirty-three Senators and several of the Representatives who voted for the fourteenth amendment[6] par-

4. 18 Stat. 335 (1875).
5. 18 Stat. 336 (1875).
6. The following senators voted for the fourteenth amendment and sat in the 42d Congress: Lyman Trumbull (R.-Ill.); Samuel C. Pomeroy (R.-Kans.); Lot M. Morrill (R.-Maine); Charles Sumner (R.-Mass.); Henry Wilson (R.-Mass.); Zachariah Chandler (R.-Mich.); Alexander Ramsey (R.-Minn.); William Stewart (R.-Nev.); James W. Nye (R.-Nev.); Aaron H. Cragin (R.-N.H.); John Sherman (R.-Ohio); Henry B. Anthony (R.-R.I.); William Sprague (R.-R.I.); George F. Edmunds (R.-Vt.); Luke P. Poland (R.-Vt.); Timothy O. Howe (R.-Wis). Poland served as a member of the House of Representatives in the 42d and 43d Congresses. Garrett Davis (D.-Ky.), who also sat in the 42d Congress voted against the fourteenth amendment. The following Senators who did not vote on the amendment sat in the 39th Congress and the 42d Congress: James Harlan (R.-Iowa); Thomas W. Tipton (R.-Neb.); Frederick T. Frelinghuysen (R.-N.J.); Joseph S. Fowler (R.-Tenn.); John P. Stockton (D.-N.J.). Morrill, Sumner, Chandler, Ramsey, Tipton, Stewart, Cragin, Frelinghuysen, Stockton, Sherman, Anthony, Sprague, Edmunds and Howe also sat in the Senate during the 43d Congress.

The following members of the House of Representatives of the 39th Congress (all Republicans), sat in the Senate, 42d Congress: Thomas W. Ferry (Mich.); William Windon (Minn.); Phineas W. Hitchcock (Neb.); James W. Patterson (N.H.); Roscoe Conkling (N.Y.); Justin S. Morrill (Vt.). Ferry, Windon, Conkling and Morrill voted for the fourteenth amendment. In addition to the above, the following Republicans sat in the Senate of the 43d Congress who, as members of the House of Representatives of the 39th Congress voted for the amendment: William B. Allison (Iowa); George S. Boutwell (Mass.); William B. Washburn (Mass.). James W. Nesmith (D. Ore.) sat in the Senate of the 39th Congress, but was absent at the time of the vote on the amendment, and in the House of Representatives of the 43d Congress. Patterson did not sit in the Senate of the 43d Congress.

The following members of the House of Representatives, 39th Congress, sat in the House, 42d Congress: Burton C. Cook (R.-Ill.); John F. Farnsworth (R.-Ill.); John Lynch (R.-Me.); Oak Ames (R.-Mass.); Nathaniel P. Banks (R.-Mass.); Henry L. Dawes (R.-Mass.); Samuel Hooper (R.-Mass.); William P. Washburn (R.-Mass.); John H. Ketcham (R.-N.Y.); John A. Bingham (R.-Ohio); James A. Garfield (R.-Ohio); Samuel Shellabarger (R.-Ohio); William O. Kelley (R.-Pa.); Ulysses Mercur (R.-Pa.); Leonard Myers (R.-Pa.); Glenni W. Scofield (R.-Pa.); Philetus Sawyer (R.-Wis.); Samuel S. Marshall (D.-Ill.); Michael C. Kerr (D.-Ind.); William E. Niblack (D.-Ind.); Daniel W. Voorhees (D.-Ind.); James Brooks (D.-N.Y.); Samuel J. Randall (D.-Pa.); Charles A. Eldridge (D.-Wis.). Of the above, Marshall, Niblack, Dawes, Hooper, Garfield, Kelley, Myers, Randall, Scofield, Eldridge, and Sawyer also sat in the House of Representatives, 43d Congress. In addition, the following Representatives who sat in the 39th Congress but not the 42d Congress sat in the 43d Congress: Godlove S. Orth (R.-Ind.); John A. Kasson (R.-Iowa); Robert S. Hale (R.-N.Y.); Hezekiah S. Bundy (R.-Ohio); William Lawrence (R.-Ohio); Charles O'Neill (R.-Pa.); William E. Finck (D.-Ohio).

ticipated in the debates preceding the Act's passage. Yet, in an 8 to 1 decision, the Supreme Court, composed of justices who were also contemporaries of the amendment, held the provisions of the Act of 1875 to be beyond the legislative power of Congress.[7] But rather than undermining the validity of the premise that the Act does reflect the intent of the framers of the fourteenth amendment, the decision indicates that those who supported the Act were more radical than were the most conservative supporters of the amendment. Thus, while analysis of the debates preceding passage of the Act of 1875 cannot indicate the amendment's exact dividing line between authorized and unauthorized federal action with respect to places of public accommodation, such an analysis certainly should illuminate the outermost limits of federal power under the amendment.

II. Senator Sumner's Rider to the Amnesty Bill

The effort to protect specifically the "equal rights" of all citizens in places of public accommodation began in May 1870, when Senator Charles Sumner of Massachusetts introduced a bill "to protect the persons of the United States in their civil rights."[8] The first section provided:

> That all citizens of the United States, without distinction of race, color, or previous condition of servitude, are entitled to the equal and impartial enjoyment of any accommodation, advantage, facility, or privilege furnished by common carriers, whether on land or water; by inn-keepers; by licensed owners, managers, or lessees of theaters or other places of public amusement; by trustees, commissioners, superintendents, teachers, or other officers of common schools and other public institutions of learning, the same being supported or authorized by law; by trustees or officers of church organizations, cemetery associations, and benevolent institutions incorporated by national or State authority; and this right shall not be denied or abridged on any pretense of race, color, or previous condition of servitude.[9]

The Senator considered the bill a supplement to the Civil Rights Act of 1866 and initially did not seek to justify its constitutionality—in spite of the fact that doubts about the constitutionality of the 1866 act had been at least partially responsible for the proposal of the fourteenth amendment. The bill was sent to the Judiciary Committee, reported adversely by Senator Lyman Trumbull of Illinois for the Committee, and died.[10] On January 20, 1871, Senator Sumner reintroduced the bill.[11] Again it was referred to the Judiciary Committee, and again, on February 15, 1871, it was reported adversely by

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7. Civil Rights Cases, 109 U.S. 3 (1883).
8. Cong. Globe, 41st. Cong., 2d Sess. 3434 (1870). See also Cong. Globe, 42d Cong., 2d Sess. 821 (1872) (hereinafter referred to as Globe 42/2).
9. See Cong. Globe, 42d Cong., 1st Sess. 21 1871); Globe 42/2, 244.
10. Globe 42/2, 821.
11. Cong. Globe, 41st Cong., 3d Sess. 616 (1871).

Senator Trumbull for the Committee, and died.[12] In both instances, the adverse report, although not written, was unanimous. Some members of the committee thought the bill unconstitutional; others thought it unnecessary.[13]

At the opening of the First Session of the Forty-Second Congress, on March 9, 1871, Sumner introduced the bill for the third time. Having been twice rebuffed by the Judiciary Committee, he asked that it not be sent to that legislative graveyard again. In spite of his plea that the bill conformed with the Declaration of Independence and the Constitution, and that it was designed to prevent colored citizens from being insulted when they traveled on a railway or entered a hotel, no other senator evidenced much interest, and again the bill expired.[14]

A. *The Senator Defends His Bill*

In the face of these rebuffs Sumner moved, in the next session of Congress, to tack his proposal as a rider on the amnesty bill authorized by the third section of the fourteenth amendment. Until then, the amnesty bill had been supported by the President, enthusiastically advocated by Southern Republicans and all Democrats, and accepted, at least in a half-hearted manner, by most Republicans.[15] Although it required a two-thirds vote to pass, such a vote seemed all but assured.

The inevitable resistance to a rider which threatened the successful enactment of the amnesty bill prompted Sumner to undertake a more active defense of his proposal. He conceded that all persons were free to discriminate on racial grounds in choosing their associates, but urged that the law already compelled recognition of equal rights in the places affected by his bill:

> Show me, therefore, a legal institution, anything created or regulated by law, and I will show you what must be open equally to all without distinction of color. Notoriously, the hotel is a legal institution, originally established by the common law, subject to minute provisions and regulations; notoriously, public conveyances are in the nature of common carriers subject to law of their own; notoriously, schools are public institutions created and maintained by law; and now I simply insist that in the enjoyment of those institutions there shall be no exclusion on account of color.[16]

Sumner then commenced reading letters he had received from Negroes complaining that hotels would not serve them.[17]

A ruling that Sumner's amendment was not before the Senate[18] forced

12. *Id.* at 1263. See also GLOBE 42/2, 822.
13. GLOBE 42/2, 493, 731.
14. CONG. GLOBE, 42d Cong., 1st Sess. 21 (1871). See also GLOBE 42/2, 822.
15. *Id.* at 237.
16. *Id.* at 242.
17. *Id.* at 244. One letter urged the adoption of the statute so that "the several States of the Union shall be prohibited from passing or enforcing a statute which makes invidious discriminations on account of color." *Id.* at 245.
18. *Id.* at 245.

the Senator to reintroduce it the next day. Senator Allen G. Thurman, an Ohio Democrat, raised some legal objections to Sumner's rider,[19] but aside from sundry constitutional arguments on the nature of amnesty legislation, the real objection which Sumner attempted to rebut was that the amnesty bill could not obtain a two-thirds vote with Sumner's amendment on it.[20] The rider was voted on, and defeated by 29 to 30, with 13 absent, in the Committee of the Whole Senate.[21] Sumner persisted and reintroduced his amendment on the Senate floor.[22] Senator William F. Kellogg, a Louisiana Republican, spoke against it, stating that every provision of Sumner's bill was in the Louisiana statutes as well as those of several other Southern states. Kellogg further denounced as unfair Sumner's attempt to put those Southern Republicans who opposed saddling the amnesty bill with an amendment certain to bring its defeat, in an unfavorable light with their Negro voters.[23] Senator John Scott, a Pennsylvania Republican, spoke briefly against the amendment;[24] and then Thurman, the Ohio Democrat, stated that, as much as he wanted amnesty, he must vote against the amnesty bill if the amendment were attached. In Thurman's view, the amendment was unconstitutional: "It makes every tavern-keeper the State in which he lives; every manager of a theater the State in which he lives; every conductor of a railroad the State in which he lives." After emphasizing that the fourteenth amendment was directed only at states, Thurman concluded, "I shall have to get blind and be unable to read the Constitution before I can ever go for such a bill as that."[25]

The challenge that the bill was not authorized by the fourteenth amendment prompted Sumner to reply:

> The Senator knows well that a hotel is a legal institution; I use the term advisedly, and the Senator is too good a lawyer not to know it. A railroad corporation is also a legal institution. So is a theater, and all that my bill proposes is that those who enjoy the benefits of law shall treat those who come to them with equality. . . . They are already to a certain extent, within the domain of the law . . . . Whoever seeks the benefit of the law, as the owners and lessees of theaters do, as the common carriers do, as hotelkeepers do, must show equality. . . . I insist that everything that they do and all their regulations shall be in conformity with the supreme law of the land, which is the Declaration of Independence.[26]

When Congress returned from its Christmas holiday, on January 15, 1872, Sumner made a long speech expounding the theory of his amendment. He opened by urging equality before the law, which he defined as "the equal

19. *Id.* at 263.
20. *Id.* at 272, 273.
21. *Id.* at 274.
22. *Id.* at 278.
23. *Id.* at 279.
24. *Ibid.*
25. *Id.* at 280.
26. *Ibid.*

enjoyment of all institutions, privileges, advantages, and conveniences created or regulated by law."[27] Hotels, "which from the earliest days of our jurisprudence" had to accept all applicants, and public conveyances, "which the common law declares equally free to all alike," do not accept Negroes, he declared. And "the same insulting ostracism" is shown at schools, churches, and cemeteries. For illustration, he reminded the Senate that Frederick Douglass, appointed by the President as Secretary of a Commission on St. Domingo, had not been permitted to eat with fellow commissioners on a steamer returning to the United States, and a former lieutenant governor of Louisiana had been excluded from first-class railway cars on account of color.[28]

Sumner then expounded at length on the Declaration of Independence. He denied that social equality was involved. Because "the law does not presume to create or regulate social relations, these are in no respect affected by the pending measure." Everyone, he declared, may freely choose his friends, associates and guests. "His house is his 'castle,'" and the common law "shows his absolute independence within its walls." But when a man walks the streets, "he cannot appropriate the sidewalk to his own exclusive use, driving into the gutter all whose skin is less white than his own." Since equality on a sidewalk was not a question of society, neither was equality "in all institutions created or regulated by law."[29]

He then sought to substantiate his assertion that each of the institutions named in the rider was already subject to a common-law duty to treat all applicants equally. Extensive quotations and case citations were offered to prove that hotels and inns were public institutions, with well-known rights and duties, and as such were required to receive all applicants on reasonable terms, as indeed they were.[30] Accordingly, he added, "it is plain that the pending bill is only declaratory of existing law giving to it the sanction of Congress."[31] Sumner then quoted from textwriters to show that common carriers also had to accept all applicants. Again, his contention was clearly in accord with the common law.[32] Theaters and other places of public amusement evidently presented a more difficult problem to the Senator. Although these entertainment centers did enjoy special privileges of a quasi-monopoly nature in the early

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27. *Id.* at 381.
28. *Id.* at 381-82.
29. *Id.* at 382.
30. See Watson v. Cross, 63 Ky. (2 Duv.) 147 (1865); Kisten v. Hildebrand, 48 Ky. (9 B. Mon.) 72 (1848); Markham v. Brown, 8 N.H. 528 (1837); JEREMY, THE LAW OF CARRIERS 59 (N.Y. ed. 1816); REDFIELD, THE LAW OF CARRIERS § 594 (1869); TIDSWELL, THE INNKEEPER'S LEGAL GUIDE 8 (2d ed. 1864); Note, *Refusing to Receive Guests at a Hotel*, 6 ALBANY L.J. 69 (1872); Note, *The Law Relating to Innkeepers*, 1 LEG. REP. 207 (1841); Note, *Travellers and Innkeepers*, 7 LEG. OBS. 449 (1834).
31. *Id.* at 383.
32. See Jencks v. Coleman, 13 Fed. Cas. 442 (No. 7,258) (C.C.D.R.I. 1835); Galena & Chicago U.R. Co. v. Yarwood, 15 Ill. 468 (1854); Bennett v. Dutton, 10 N.H. 481 (1839); Hollister v. Nowlen, 19 Wend. 234 (N.Y. 1838); JEREMY, THE LAW OF CARRIERS 59 (N.Y. ed. 1816).

period of the United States,[33] there was a paucity of decisions on the duty of theaters to admit anyone.[34] And in Massachusetts, the Senator's home state, the law was clearly to the contrary.[35] Nevertheless, Sumner reasoned by analogy that these centers too must admit all men on an equal basis:

> Theaters and other places of public amusement, licensed by law, are kindred to inns or public conveyances, though less noticed by jurisprudence. But, like their prototypes, they undertake to provide for the public under sanction of law. They are public institutions, regulated if not created by law, enjoying privileges, and in consideration thereof, assuming duties not unlike those of the inn and the public conveyance. From essential reason, the rule should be the same with all. As the inn cannot close its doors, or the public conveyance refuse a seat to any paying traveler, decent in condition, so must it be with the theater and other places of public amusement. Here are institutions whose particular object is the "pursuit of happiness," which has been placed among the equal rights of all.[36]

After defending the inclusion of schools (a category beyond the scope of this article) Sumner concluded with an extensive peroration on the Declaration of Independence and color prejudice.[37]

A remarkable feature of Sumner's defense of his rider is that no effort whatsoever was made to base the proposal on the fourteenth amendment. Indeed, in his pre-occupation with the Declaration of Independence, the Senator did not even specify the constitutional significance of his oft-repeated declarations that the common law required inns, common carriers and theaters to admit all applicants.

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33. Before the Civil War, the number of theaters was relatively small. See HEWITT, THEATRE, U.S.A. 1-161 (1959); HUGHES, A HISTORY OF THE AMERICAN THEATRE 1-227 (1951); HORNBLOW, A HISTORY OF THE THEATRE IN AMERICA, *passim* (1919). One of the reasons for this was the widespread existence of strict licensing requirements, which arose in England as a liberalization of a total ban on professional entertainment. See Note, *The Law for Licensing Theatrical Productions*, 7 MONTHLY L. MAG. 1, 138, 226, 318 (1840); Note, *On the Law of Theatres and Theatrical Performers*, 3 LEG. OBS. 17 (1831). Licensing standards were strict, and used to cut down the number of places of entertainment available. For example, in forty years, only seven licenses were granted in London for music or dancing halls. A HANDY-BOOK ON THE LAW OF THE DRAMA AND MUSIC 55 (1864). By the time of the end of the 19th century, licensing policy had become more liberal. STRONG, DRAMATIC AND MUSICAL LAW 49-62 (1898). In the United States, licensing of entertainment was widespread. WANDELL, THE LAW OF THE THEATRE 294-397 (1891). For typical cases, see Pike v. State, 35 Ala. 419 (1860); Society for the Reformation of Juvenile Delinquents v. Diers, 10 Abb. Pr. (N.S.) 216 (N.Y. 1871); *In re* Steadman's Appeal, 14 Phila. 376 (Pa. 1880); Hedges v. Nashville, 21 Tenn. (2 Humph.) 61 (1840). Licensing was sustained as an exercise of the police power to regulate the nature of theatrical performances. Wallack v. City of New York, 3 Hun. 84 (N.Y. 1874). Baker v. City of Cincinnati, 11 Ohio St. 534, 543 (1860) held: "An inquiry has to be made as to the character of those who propose to exhibit, and as to the nature of the thing to be exhibited." See also City of Boston v. Schaffer, 26 Mass. (9 Pick.) 415 (1831). The natural effect of strict licensing was, of course, to drastically limit the number of places of entertainment.

34. See note 80 *infra*.

35. See Burton v. Scherpf, 83 Mass. (1 All.) 133 (1861); McCrea v. Marsh, 78 Mass. (12 Gray) 211 (1858).

36. GLOBE 42/2, 383.

37. *Id.* at 385-86.

B. *Diverse Constitutional Bases*

To most senators, presumably, the Declaration of Independence was not a sufficient basis for legislative power. And thus, after Sumner's speech, Senator Frederick T. Frelinghuysen, a New Jersey Republican who was a former state attorney-general and a strong supporter of the bill, rose to defend its constitutionality—but on the basis of an understanding of the bill's substantive effect which eventually proved to be quite different from Sumner's view. He conceded that Congress could not enact a law generally regulating the various places covered by the bill. "But," he said, "the amendment of the Senator from Massachusetts, as modified, in no manner assumes to regulate the relations of common carriers, inn-keepers, etc., with the public. All this it leaves to the States, excepting that it provides that every citizen shall be treated as a citizen, be he white or colored. This is constitutional."[38] He went on to explain that in passing the bill Congress was telling the states that they could regulate places mentioned in the bill as they choose, provided that they treated all alike:

> In other words, an equality of citizenship is established, and we are directed to see to it that citizenship is nowhere abridged. It is, therefore, perfectly constitutional for Congress to say to the States, "the regulation of the relations between all these institutions and the public is with you, but you shall treat citizenship as citizenship, everywhere."[39]

Although Frelinghuysen was willing to defend the constitutionality of the main part of the Sumner proposal, on January 22nd, he did suggest some modifications which Sumner accepted. The most significant of these was the proviso that "churches, schools, cemeteries, and institutions of learning established exclusively for white or colored persons, and maintained respectively by contributions of such persons, shall remain according to the terms of the original establishment."[40]

Senator Frederick A. Sawyer, a South Carolina Republican, expressed reservations because the Judiciary Committee had not favored Sumner's bill, and thus it might have "infractions of constitutional provisions."[41] Senator Joshua Hill, a Georgia Republican, chimed in to defend the right of hotels or inns to select their guests—but he failed to offer any citations of authority.[42] Later on the 22nd, Thurman renewed his challenge to the constitutionality of the rider,[43] asserting that Sumner's bill was introduced pursuant to the fourteenth amendment.[44] However, he identified the privileges and immunities

38. *Id.* at 436.
39. *Ibid.*
40. *Id.* at 487, 491. Frelinghuysen may have had Girard College in neighboring Philadelphia in mind. See *In re* Girard's Estate, 386 Pa. 548, 127 A.2d 287 (1956) for an extended discussion of the litigation concerning the Girard Will and Girard College.
41. GLOBE 42/2, 488-90.
42. *Id.* at 392.
43. *Id.* at 494-5.
44. *Id.* at 496. He stated: "I do not suppose it is under the Declaration of Inde-

clause of its first section as the asserted source of power. No state had violated anyone's privileges or immunities, he argued, and therefore no such power existed.[45]

The following day, Thurman returned to his assertion that innkeepers, theater managers, and railroad companies could not make state laws and hence were not subject to Congress' power. However, he conceded that state statutes which discriminated by giving whites privileges denied to Negroes were violative of the fourteenth amendment, and that common-law principles which made a distinction between whites and Negroes were equally unconstitutional when enforced by the judiciary. But, he said, Congresses' only power of enforcement lay in an appeal to the federal courts. By way of an example, he hypothesized a decision of the highest court of a state, that the theater manager could exclude a Negro from the dress circle of the theater when all others had their common-law right of admission. Such a discrimination, he contended, could only be reached by subsequent appellate review, and not by directly penalizing the proprietors.[46] Thurman brushed off the suggestion of Senator George F. Edmunds, a Vermont Republican lawyer who had been in the 39th Congress and had voted for the fourteenth amendment, that the principles of the Civil Rights Act of 1866 justified this measure, by saying it too was unconstitutional. He concluded by reiterating that Congress could not act directly on individuals.[47] At this point, Senator John Scott rose again to suggest that Sumner's bill had unconstitutional provisions and defects which warranted its return to the Judiciary Committee.[48]

Sumner sustained a serious blow on January 25, 1872, from an erstwhile ally, Senator Lot M. Morrill, a Radical Republican Maine lawyer who had figured prominently in anti-slavery measures during the Civil War, and who had voted in favor of the fourteenth amendment in the Senate.[49] Morrill ridiculed Sumner's reliance on the Declaration of Independence, pointing out that that document could not be considered a source of legislative powers. Similarly, the thirteenth amendment was not a source of power since it simply was a "grand negation" of slavery.[50] The fourteenth amendment, on which he expounded at length, contained merely a prohibition on the states.[51] The

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pendence, although that, it seems, is above the Constitution in the minds of some. It is not under *e pluribus unum*."

45. GLOBE 42/2, 496-97.

46. *Id.* at 526-27.

47. *Id.* at 527.

48. *Id.* at 530-31. Both Edmunds and Conkling, strong Republican supporters of the Sumner amendment, virtually admitted the need to perfect it. *Id.* at 531.

49. CONG. GLOBE, 39th Cong., 1st Sess. 3042 (1866).

50. GLOBE 42/2, App. 1-3.

51. *Id.* at App. 3. He said:

> I submit that in no proper sense can the fourteenth amendment be regarded as a substantive grant of power. It is in terms, in essence and effect, a prohibition to the States. Can it be conceived that a simple interdiction to the exercise of State authority can properly be regarded as an affirmation of a substantive power to the General Government? The occasion of the fourteenth amendment discloses

privileges and immunities clause only embodied the objects of the Civil Rights Act of 1866, and he contended that it did not include the facilities of inns, carriers, theaters or amusements.[52] While he endorsed Frelinghuysen's concession that Congress could not enact a law regulating the various places covered by the bill, Morrill apparently could not accept Frelinghuysen's conclusion that the bill only required equal application of such regulations as the states imposed. Instead, he asserted his belief that Sumner's bill was an unconstitutional regulation of state-created institutions.[53] He concluded by attacking the opening of churches, and the bill as a whole, as a violation of states' rights, and "the reserved rights of the people."[54]

Sumner could afford to ignore the protests of a Democrat about the imposition of social equality,[55] or the constitutional doubts of a liberal Republican,[56] but Morrill's attack might, if unanswered, change votes in a closely divided Senate. Sumner's reply to Morrill's constitutional objections was characteristic. He read more letters from Negroes asking for the bill and asserting grievances about discrimination.[57] Sumner said that if Morrill saw Negro grievances "as I see [them], he would find power enough in the Constitution to apply the remedy."[58] When Morrill impatiently pressed him on the Constitution, he replied:

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its object and intent. The thirteenth amendment had just been adopted, inhibiting slavery, but leaving the freedmen in the power of the State. Hence the necessity of the prohibition of the States. Thus the people of the United States took a power from the States, but it by no means follows that they thereby conferred a power upon the Government of the United States. The exigencies did not require it, it is submitted; nor is such inference justified by any fair interpretation.

52. *Id.* at App. 3-4:

What are the privileges and immunities of the citizens of the United States: I am not inquiring now what are the rights of persons in the States, but what are the privileges and immunities referred to in the Constitution of the United States? Familiarly, they are these: they are the privileges of one citizen to enter another State; to make contracts, to sell, hold and convey property, to inherit property; and to be protected in person and in property. Perhaps the general privileges of citizens of all the States were never better expressed, never more concisely or authoritatively stated than in the civil rights bill to which I have adverted, and I will read from it as an apt statement of the privileges and immunities of citizens of the United States. It declares that—"All citizens, without regard to race or color, shall have the same right, in every State and Territory in the United States"— . . . .

The same right to do what? Not the same "accommodation, facilities, advantages, and privileges" in the language of the amendment, in the common schools, in the churches, in the benevolent institutions, in the theaters and places of amusement; not that, but "the same right to make and enforce contracts; to sue, to be parties, and give evidence; to inherit, purchase, lease, sell, hold, and convey real and personal property; and to full and equal benefit of all laws and proceedings for the security of person and property."

53. GLOBE 42/2, App. 4.

54. *Id.* at App. 5.

55. Such a protestation had been made by Senator Eli Saulsbury of Delaware. See *id.* at App. 9-11. Senator James W. Nye, a Nevada Republican, ridiculed this argument. See *id.* at 706.

56. See, *e.g.*, GLOBE 42/2, 703 (remarks of Senator Carl Schurz of Missouri).

57. *Id.* at 726-27.

58. *Id.* at 726.

> Why, sir, the Constitution is full of power; it is overrunning with power. I find it not in one place or in two places or three places, but I find it almost everywhere, from the preamble to the last line of the last amendment. . . . I find it, still further, in that great rule of interpretation conquered at Appomattox. . . . I say a new rule of interpretation, for the Constitution, according to which, in every clause and every line and every word, it is to be interpreted uniformly for human rights.[59]

Sumner then added:

> He [Morrill] finds no power for anything unless it be distinctly written in positive precise words. He cannot read between the lines; he cannot apply a generous principle which will coordinate everything there in harmony with the Declaration of Independence.[60]

After a peroration on the Declaration of Independence, Sumner touched on the thirteenth amendment and the Civil Rights Act of 1866. He drew an analogy between the constitutionality of that statute under the thirteenth amendment and his own bill, contending that his bill was necessary to abolish slavery. After a paragraph of generalized rhetoric on the fourteenth amendment, he returned to reading correspondence from a Negro, whose constitutional analysis was as imprecise as his own. The constitution, the Senator urged, made everyone equal. Morrill, he charged, had delivered an "ancient Democratic speech." And then Sumner concluded by threatening Republicans with loss of the Negro vote unless they voted for his amendment.[61]

Morrill, offended by Sumner's accusation that he made "ante-bellum Democratic speeches" and by the threat of losing Negro votes, stated that the Judiciary Committee had reported against the bill on constitutional grounds. He then ridiculed Sumner's use of the Declaration of Independence,[62] and brushed aside the thirteenth-amendment arguments.[63]

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59. *Id.* at 727. He also said: "The power to do justice leaps forth from every clause of the Constitution; it stands in every word of its text, it is the inspiration of the whole charter." *Id.* at 730.

60. *Id.* at 728.

61. *Id.* at 728-30.

62. *Id.* at 730-31. The following exchange occurred:

Mr. MORRILL. . . . Why, that the Declaration of Independence is necessarily in the Constitution and he insisted that the Constitution of the United States should be interpreted by the Declaration of Independence. Does the Senator mean that?

Mr. SUMNER. I do.

Mr. MORRILL. . . . Then I have pretty much done arguing with the Senator. [Laughter].

Id. at 730.

63. *Id.* at 730-31. Morrill said:

The third proposition is that he finds ample authority under the thirteenth amendment. If he does, he finds what no one else ever found before; and the honorable Senator from Massachusetts is utterly mistaken if he supposes that the civil rights bill was drawn from the thirteenth amendment at all. I said the other day, and I need not repeat it now, that I did not question the constitutionality of the civil rights bill; but it would have been constitutional before the thirteenth amendment; it was not drawn under that amendment, nor does it look to that at all as its source of authority. It looks to that other provision of the

The next day, Senator Matthew H. Carpenter, a Wisconsin Republican lawyer who avowed that he supported Sumner's proposal generally, attacked the bill, as it applied to churches, as violative of the first amendment. Freedom of religion, he contended, permitted all sects to discriminate on the basis of race. Mere incorporation did not give the government the right to interfere: "In other words," he said, "I think the ground upon which this common right of all citizens of this country to participate in the benefits of benevolent institutions should be based is not whether it happens or not to be incorporated, but whether it is supported at the public expense."[64] Yet his speech did generally give aid to Sumner. While he endorsed Morrill's criticism of Sumner's use of the Declaration of Independence, he did seek to rebut Thurman's notions of the limited remedies Congress could adopt.[65] Senator Garrett Davis, an unreconstructed Kentucky Democratic lawyer, endorsed all prior constitutional arguments against the bill, and added some dubious ones of his own.[66]

On February 5th Carpenter proposed a major amendment designed to prevent the rider's application to churches and to condition regulation of cemeteries, benevolent institutions, and schools, on the existence of support from public expense or endowment for public use, as opposed to regulation based on incorporation alone.[67] After some generalized debate on equality,[68] another Republican expressed constitutional misgivings about the church provision.[69] Sumner made a spirited defense of the inclusion of churches.[70] His prime authority was once again the Declaration of Independence.[71] But his irrelevant rhetoric only magnified Carpenter's constitutional doubts, and the latter ridiculed the reliance on the Declaration as a source of power especially when there were clear constitutional limitations.[72]

The following day, Senator John Sherman, the Ohio Republican lawyer, supported Sumner's amendment on the constitutional theory that the "privi-

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Constitution in the fourth article, which provides for the equal privileges and immunities of the citizens in the several States. That is where its authority is found.

64. GLOBE 42/2, 759-60. See also *id.* at 763: "The distinction seems to me to be broad and clear and well-founded between those voluntary institutions, whether incorporated or not, which we ought not to interfere with, and those great institutions which are supported by law and maintained by general taxation."

65. *Id.* at 761-62. Carpenter's legal theory in support of the substance of the bill was obscure. He dwelt most on the privileges and immunities clause, but identified this as protecting the right to enter professions and avocations of life, conformably with the Civil Rights Act of 1866. See Tansill, Avins, Crutchfield & Colegrove, *supra* note 2, at 72. His allusions to equal protection of the law are too brief to be meaningful.

66. GLOBE 42/2, 763-67.

67. *Id.* at 818, 843.

68. *Id.* at 819-21.

69. *Id.* at 821 (remarks of Senator Henry B. Anthony of Rhode Island).

70. *Id.* at 822-26.

71. *Ibid.* See, for one of the many examples: "but the Declaration has a supremacy grander than that of the Constitution, more sacred and inviolable, for it gives the law to the Constitution itself. Every word in the Constitution is subordinate to the Declaration." *Id.* at 825.

72. *Id.* at 826-27.

leges and immunities" designated by the fourteenth amendment as subjects for congressional protection were all the common law rights in the country, including the use of inns, carriers, and churches.[73] To him, such privileges were "as innumerable as the sands of the sea. You must go to the common law for them."[74]

III. Emphasis on Privileges and Immunities

These initial discussions of the Sumner rider are so confusing that a brief summarization may be appropriate before continuing the narrative. Sumner's defense of his proposal rested on a general notion that the whole Constitution and the Declaration of Independence authorized Congress to add its sanction to the existing law—that institutions created or regulated by law must give equal treatment to all citizens. Some of his supporters, such as Senator Sherman, espoused the view that these common-law rights were among the privileges protected by the fourteenth amendment. But Senator Frelinghausen's support for the bill was evidently based on his belief that it would not dictate the regulations to be imposed by the states, but would only require that such regulations as a state did impose on an institution would give equal protection to whites and Negroes alike; he evidently accepted the argument that Congress could enact measures which would ensure that individual proprietors would observe the state laws without discrimination. On the other side, Thurman initially argued that there was no provision in either the body of the Constitution or the fourteenth amendment which authorized the imposition of Congressional sanctions upon individuals who discriminated against potential Negro customers; the fourteenth amendment applied to states, not to individuals. Senator Morrill, himself a Radical Republican, felt that whatever common-law rights there were to accommodations at an inn were not "privileges" of a citizen within the meaning of the Constitution.

With Sherman's specific espousal of the view that the Sumner bill rested on the privileges and immunities clause, a subtle shift in the debate occurred. Whereas the previous speeches had been limited to a general exposition of divergent views, the speakers now began a more exacting analysis of this asserted constitutional basis for the rider. Of course, the equal protection argument continued to appear intermittently.

A. *"No State shall . . ."*

In an extensive speech,[75] Senator Thurman, a former Chief Justice of the Supreme Court of Ohio and a noted constitutional lawyer, undertook to challenge the premise on which he evidently assumed Sumner's proposal depended—that since the places covered by the bill were creatures of state law,

73. *Id.* at 843-44.
74. *Id.* at 843.
75. *Id.* at App. 26-30.

their proprietor's discrimination was in effect a state denial of the privileges of a citizen.

After some initial comments about the rider's potential interference with private property,[76] Thurman alluded to the fact that the legal theories offered in support of the proposal and its modifications were inconsistent. To be within the coverage of the bill, he noted, cemeteries, benevolent institutions and schools must be supported at public expense, and places of amusement have to be subject to a government license; yet inns and carriers are also covered. Inns themselves were not, as Sumner had declared, "the creature of the law."[77] In Ohio, under a former constitution, inns were licensed by the courts of common pleas, but, "since the adoption of the present constitution, every man has just the same right to set up and maintain an inn that he has to set up and maintain a shop or any other place of business; so that the inn in Ohio is not the creature of law at all." To Thurman, the common-law duty of innkeepers and carriers to receive all customers was no different than the common-law duties of members of all other occupations; such common-law duties did not make the proprietor a "creature of the law."[78] Sumner interrupted him, and this colloquy occurred:

> Mr. SUMNER. My language was "created or regulated by law." Further, if I do not interrupt him, in my judgment, I submit it to the Senator, the innkeeper, and also the common carrier, has something in the nature of a franchise under the law. Each has peculiar privileges and prerogatives, and is subject to peculiar responsibilities, the whole being the franchise which he derives from law, and which is regulated by law. The argument follows that in the exercise of that franchise he must conform to the fundamental principles of our institutions.
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> Mr. THURMAN. If the Senator's premise were true, there would be great reason for his conclusion; but his premise is not true. The

76. *Id.* at App. 27-28.

77. *Id.* at App. 28. Thurman had characterized Sumner's principle of classification in the bill as businesses which were "the creatures of law, or rather their occupations or powers are created by law."

78. *Id.* at App. 28-29. Thurman said:

> But then my friend will say, "Does not the law apply to the inn?" To be sure it applies to the inn; and so it applies to him, and so it applies to me, and to you, sir, and to us all. When he says that the law applies to the inn, and that it is part of the common law that the innkeeper must receive every guest who is not an improper person to be admitted, and must afford him accommodation if he possess accommodation to afford him—when he says that is the common law in regard to inns, he does not prove that the inn is the creation of law; he only states what is the common law in regard to the duties of an innkeeper; just as I might show what is the common law in regard to the duties of an attorney-at-law or of an agent, or what is the common law duty of a keeper of a store or of a shop. Why, sir, it is the common law that if you open a store for the retail of merchandise, and I am a peaceable, clean, healthy individual, I have just as much right to step into that store to buy goods as any other man has, and if you refuse me you violate my right. That is the common law which applies to a man who opens a store for the retail of goods, just as the other is the common-law duty of the innkeeper; but that does not prove that he is the creature of the law.

> right to keep an inn never was a franchise. The right to carry goods never was a franchise. What is a franchise? A franchise is a right that belongs to the supreme power in the State, in a monarchical government to the king, and which he is supposed to grant, or does actually grant to the subject, and which the subject of common right does not enjoy. It is a right derived from the supreme power which the citizen of common right does not possess. If a citizen of common right does possess it, it is no franchise. So the right to keep an inn is not a franchise, because every citizen of common right may set up an inn.[79]

Thurman's concession that "there would be great reason for his [Sumner's] conclusion" if innkeepers did have a franchise seems to have been made only for the sake of the debate; later, Thurman reiterated his belief that the fourteenth amendment applied only to states, not individuals. More important, is Sumner's implicit acceptance that to fall within the regulatory power of Congress, the institutions covered within the bill had to have at least a legal franchise of a quasi-monopoly nature. His assumption that common carriers had such a franchise was well founded. Indeed such carriers often had such governmental powers as eminent domain.[80] But, although inns at one time had a similar legal status,[81] the prevalence of competition had largely obliterated

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79. GLOBE 42/2, App. 29. Thurman also asserted that there was no franchise in the case of a common carrier.

80. There is good general discussion of this in Arterburn, *The Origin and First Test of Public Callings*, 75 U. PA. L. REV. 411 (1927); Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514, 614 (1911); 1 WYMAN, PUBLIC SERVICE CORPORATIONS §§ 1-5 (1911). See also Note, *Public Convenience and Private Rights*, 1 LAW J. 604 (1866), calling carriers a "public utility." For some representative cases about the monopoly characteristics of common carriers and their franchises and licenses, before the passage of the Civil Rights Act of 1875, *Ferries*: See Young v. Harrison, 6 Ga. 130 (1849); Richmond & L. Turnpike Road v. Rogers, 62 Ky. 135 (1864); Costar v. Brush, 25 Wend. 628 (N.Y. 1841); Pipkin v. Wynns, 13 N.C. (2 Dev.) 402 (1830); Clarke v. State, 2 McCord 47 (S.C. 1822). *Railroads*: See Costa Coal Mines R. Co. v. Moss, 23 Cal. 323 (1863); Messenger v. Pennsylvania R.R. Co., 37 N.J.L. 531 (1874); People v. Albany & V.R. Co., 37 Barb. 216 (N.Y. 1861). *Bridges*: See Ried v. Hanger, 20 Ark. 625 (1859); Waugh v. Chauncey, 13 Cal. 11 (1859); Enfield Toll-Bridge Co. v. Hartford & N.H.R. Co., 17 Conn. 40 (1845); Town of East Hartford v. Hartford Bridge Co., 17 Conn. 79 (1845); Townsend v. Blewett, 6 Miss. (5 How.) 503 (1841); Smith v. Harkins, 38 N.C. (3 Ired. Eq.) 613 (1845); Piscataqua Bridge v. New Hampshire Bridge, 7 N.H. 35 (1834); Newburgh & C. Turnpike Road v. Miller, 5 Johns. Ch. 101 (N.Y. 1821); Young v. Buckingham, 5 Ohio 485 (1832). *Canals*: See Barnett v. Johnson, 15 N.J. Eq. 481 (1856). *Turnpikes and toll roads*: See Lexington & O. R. Co. v. Applegate, 38 Ky. 289 (1838); Commonwealth v. Wilkinson, 33 Mass. (16 Pick.) 175 (1834). *Wharves*: See Martin v. O'Brien, 34 Miss. 21 (1857); Wiswall v. Hall, 3 Paige 313 (N.Y. 1832); Lincoln v. The Volusia, 6 Pa. L.J. 469 (1846). *Steamboats*: See United States v. The Echo, 25 Fed. Cas. 974 (No. 15,021) (C.C.N.D.N.Y. 1860).

81. The elaborate steps required to obtain a license for an English inn are set forth in TIDSWELL, THE INNKEEPER'S LEGAL GUIDE 29 (2d ed. 1864). A license would not be granted if there were a sufficient number of inns already, so competition was much restricted. *Id.* at 31. For a note on the limitation on inns in the United States, see EARLE, STAGE COACH & TAVERN DAYS 31 (1900). Cases involving the requirement of licensing for inns in the early period of the United States include: Pettibone v. State, 19 Ala. 586 (1851); State v. Johnson, 65 Me. 362 (1876); Lord v. James, 24 Me. (11 Shep.) 439 (1844); State v. Fletcher, 5 N.H. 257 (1830); Curtis v. State, 5 Ohio 324 (1832). In most states inns were licensed at an early date. REDFIELD, CARRIERS § 583 (1869). WANDELL, THE LAW OF INNS, HOTELS AND BOARDING HOUSES 33 (1888) declared that under N.Y. Laws of 1857, ch. 628, § 6, to obtain a license for an inn;

the privileged character of inns and hotels.[82] Yet even though some places would not fit his premise, Sumner continued to insist that all inns had a franchise and thus could be covered by the legislation. Apparently, he agreed that a bill regulating institutions not so franchised would be beyond the scope of Congress' power, even in the eyes of his supporters. This rationale would explain Sumner's constant use of the phrase "legal institution," and his confinement of the bill to inns and carriers, refraining from extending it to restaurants and other businesses.[83]

The next day, Senator Orris S. Ferry, a liberal Republican lawyer from

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The commissioners must be satisfied that the applicant is of good moral character, has sufficient ability to keep an inn, tavern or hotel, and the necessary accommodations to entertain travelers, and that an inn, tavern or hotel is required for the actual accommodation of travelers, at the place where such applicant resides or proposes to keep the same, all of which shall be expressly stated in the license granted by the board.

This, of course, is remarkably similar to a modern certificate of public convenience and necessity given to a public utility. See 73 C.J.S. *Public Utilities* § 42. And in State v. Stone, 6 Vt. 295, 297 (1834), the court said:

The persons thus licensed (as innkeepers) must provide suitable refreshments, provisions, and accommodations for travelers, put up a sign, have a shed, etc., *and have the exclusive privilege of keeping such houses* . . . . Where an innkeeper has been duly approbated and licensed, and paid his assessment, and is engaged in his proper business, it equally interferes with that business, if another person either keeps a house of public entertainment or sells liquor in small quantities.

(Emphasis added.) Sumner knew about this. STORY, BAILMENTS § 485 (5th ed. 1851) states: "In many of the States of America, inns and taverns are governed by special statute regulations, and no persons are permitted to assume the business of keeping them, unless by particular license from the public authorities." Sumner edited this edition. See Advertisement to the Fifth Edition printed immediately following Story's Dedication to Dane.

82. This was especially true in the large cities. See, *e.g.*, Commonwealth v. Mitchell, 2 Pars. Eq. Cas. 431, 437 (Pa. 1850) mentioning the great competition among hotels.

83. Restaurants were sometimes licensed for the purpose of taxation. See, *e.g.*, State v. Hogan, 30 N.H. 268 (1855). However, they were not typically given any exclusive privileges, as were inns. The distinction between inns and restaurants was well known during this period, at least in New York law. Cromwell v. Stephens, 3 Abb. Prac. (N.S.) 26 (N.Y. 1867); Carpenter v. Taylor, 1 Hilt. 193 (N.Y. 1856). See also Charge to Grand Jury, 30 Fed. Cas. 999 (No. 18,258) (C.C.N.C. 1875). In People v. Jones, 54 Barb. 311, 317 (N.Y. 1863) the court said: "a restaurant where meals are furnished is not an inn or tavern." Sumner was familiar with New York cases defining inns, as he quoted from one of them. GLOBE 42/2, 383. Indeed, he was probably quoting from § 475(1) of STORY, BAILMENTS, which, in the sixth edition (1856), the seventh edition (1863), and the eighth edition (1870) quotes in turn the same language from Wintermute v. Clark, 5 Sandf. 242, 247 (N.Y. Super. Ct. 1851), especially since immediately thereafter he quoted from § 476 of the same volume. GLOBE 42/2, 383. The text of STORY, BAILMENTS § 475(1) stated: "But the keeper of a mere coffee-house is not deemed an innkeeper." Since Sumner edited the fifth edition of STORY, BAILMENTS, published in 1851, he was no doubt familiar with this statement. See Advertisement to the Fifth Edition, printed immediately following Story's dedication to Dane. Likewise, Sumner quoted from PARSONS, CONTRACTS. See GLOBE 42/2, 383. It is a little uncertain from the pagination which edition or editions he was quoting from, since the quotation from GLOBE 42/2, 383, third column, top, regarding hotels, to page 627 of Parsons, corresponds with the first edition, while the quotation from the center of the third column, regarding conveyances, to page 288 of Parsons, corresponds with the fifth edition. However, all editions stated: "But a mere coffee-house, . . . or eating-room . . . is not an inn." 1 PARSONS, CONTRACTS 623 (1st ed. 1853); 2 PARSONS, CONTRACTS 145 (5th ed. 1866). Sumner also quoted from KENT, COMMENTARIES 596. See GLOBE 42/2, 383. So it is probable that Sumner knew the difference in legal status between an inn and a restaurant. A restaurant, under common law, did not have to serve everyone. REDFIELD, THE LAW OF CARRIERS § 591 (1869). "Redfield . . . [was] a work found as standard authority in the library of every railroad attorney." 2 CONG. REC. App. 100 (1874).

Connecticut, attacked the bill. Since there was a state civil remedy against carriers and innkeepers, a federal remedy was unnecessary, he contended. After briefly denying that theaters had to admit all customers, but without adverting to authority,[84] Ferry attacked the bill for including cemeteries and churches, and then turned to constitutionality. He dismissed Sumner's use of the thirteenth amendment as a "construction so extravagant that no one has followed him."[85] But when Ferry turned to the fourteenth amendment, Carpenter asked him whether it would not be a denial of equal protection of the laws for Mississippi to abolish the statute punishing murder if committed on a black man, and whether Congress could not then act. Ferry protested that Sumner's amendment had not been argued on the theory that state law remedies for Negroes alone had been abrogated. State law remedies for Negroes as well as whites existed, he urged; but if they were defective, the remedy lay with state legislatures.[86]

The first major modification came when the provision respecting churches was stricken because of first amendment doubts as to constitutionality,[87] although as an additional ground Senator Oliver P. Morton, an Indiana Republican, noted that even incorporated churches were "purely [private] voluntary organizations" not licensed by the state or within any power to regulate.[88]

B. *The "Privileges" Themselves*

At this point in the debate, the chairman of the Judiciary Committee which had twice killed Sumner's proposal joined Morrill in opposing reliance on the privileges and immunities clause. Senator Lyman Trumbull, a Republican from Illinois, began by criticising the whole Sumner proposal as a move which would hamper the amnesty bill. But then he went on to distinguish the proposal from the Civil Rights Act of 1866, which he had framed,[89] and declared that Congress could not compel equality in railroads. His colloquy with Senator Edmunds of Vermont follows:

> Mr. TRUMBULL. As to riding on a railroad, I think that the Senator from Vermont has not one particle more right to ride on a railroad today by existing law than the blackest man in the land. You need no law for that.
>
> Mr. EDMUNDS. Then Congress may compel equality, may it not?
>
> Mr. TRUMBULL. Not in regard to these matters.
>
> . . . .

84. GLOBE 42/2, 892.
85. *Id.* at 893. See also *id.* at 870-71.
86. *Id.* at 893-94. See also *id.* at 894-96, 3256-57.
87. *Id.* at 896-97, 899.
88. *Id.* at 898. See also *id.* at App. 43.
89. Tansill, Avins, Crutchfield & Colegrove, *The Fourteenth Amendment and Real Property Rights*, in OPEN OCCUPANCY VS. FORCED HOUSING UNDER THE FOURTEENTH AMENDMENT 68, 72 (Avins ed. 1963). See also Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 11 (1955).

> Mr. TRUMBULL. In regard to the rights that belong to the individual as man and as a freeman under the Constitution of the United States, I think we had a right to pass the civil rights bill. I thought so then, and think so now; but I think that we went to the verge of constitutional authority, went as far as we could go. We intended to do so, and I believe that we did. But you need no such law as this to ride on a railroad.[90]

A final attack on Sumner's bill came from Senator Thomas W. Tipton, a Nebraska Republican, on the ground it was unnecessary to have a federal remedy,[91] and at length a vote was taken. This vote resulted in a tie, 28 to 28 with 17 senators absent. All the Democrats, the liberal Republicans, and almost half of the Southern Republicans opposed Sumner. The Vice-President then cast a vote in favor of the Sumner amendment.[92]

With Sumner's amendment added to the amnesty bill, a number of the strongest supporters of amnesty arose to state that they would vote against the combined bill because they regarded Sumner's amendment as unconstitutional.[93] Saulsbury, the Delaware Democrat, even attacked the Sumner amendment as opening the door to international communism.[94] A vote on the combined measure was then taken, but its margin of 33 to 19 was less than the two-thirds required to pass the amnesty bill.[95]

The Senate returned to amnesty on May 8, 1872, and Sumner immediately moved to add his civil rights bill to the amnesty bill which had passed the House.[96] During the ensuing debate, Trumbull attacked his fellow Republicans with some warmth for loading Sumner's measure on to the amnesty bill. He exclaimed:

> I know of no civil right that I have that a colored man has not, and I say it is a misnomer to talk about this being a civil rights bill. . . . I know of no right to ride in a car, no right to stop at a hotel, no right to travel possessed by the white man that the colored man has not.[97]

Trumbull then decried the fact that "this cry that has gone out to the country of a supplemental civil rights bill, which has excited the colored people of this country, induced many of them to think that they are entitled to some rights that they have not got, has only tended to produce mischief and excitement throughout the land."[98] Trumbull continued on to assert that the only civil rights were those contained in the Civil Rights Act of 1866:

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90. GLOBE 42/2, 901.
91. *Id.* at 914.
92. *Id.* at 919.
93. *Id.* at 926-28. But Wilson, Sumner's colleague from Massachusetts, found the combination more palatable than amnesty alone. *Id.* at 920-21.
94. This is not an historical anachronism. See GLOBE 42/2, 928. And Wilson had, shortly before, referred to the Paris Commune as "communists." *Id.* at 920.
95. *Id.* at 928-29.
96. *Id.* at 3181.
97. *Id.* at 3189. Trumbull called Sumner's amendment a "social equality bill" the next day. *Id.* at 3254. This is just what the southern Democrats were calling it.
98. *Id.* at 3190.

> I understand by the term "civil rights," rights appertaining to the individual as a free, independent citizen; and what are they? The right to go and come; the right to enforce contracts; the right to convey his property; the right to buy property—those general rights that belong to mankind everywhere; and not a privilege that is conferred by a corporation, as a college for example. We have colleges in the country, and a student who applies there and pays his tuition fees, you may say, has certain rights there; but they are not what I understand to be embraced in the general broad term "Civil Rights."[99]

Sherman reminded Trumbull that the latter had authored and shepherded to passage the 1866 statute. Sumner's proposal, he stated, was consistent with that law; the supplement was necessary because colored people were frequently excluded from public conveyances, and "from various other facilities provided by the public for public use," which under common law they had a right to use. Sherman declared that the right to travel in a public conveyance which by law was open to all was as much a civil right as the rights protected under the 1866 Act, all of which were the "privileges and immunities of a citizen."[100] Sherman did not deny the right of one with private property to exclude whites or Negroes as he chose, but as to rights granted by common law, which state courts were failing to enforce, he asserted a federal remedy was necessary:[101]

> This [bill] does not assert a new right. This does not affirm that a negro shall have now what he has not a right to before the passage of the act. It only supplements the old remedy by giving him an additional remedy.[102]

Senator Arthur I. Boreman, a West Virginia Republican lawyer, objected to the inclusion of cemeteries and benevolent associations merely because they were incorporated. He maintained that incorporation was a mere matter of convenience, and that "it is nevertheless their private property," and that "nobody has a right to invade that property, to enter any person there without their permission, under the existing laws of the States."[103] In response to further assertions that the bill was not only unconstitutional[104] but unnecessary,[105] Sumner retorted that the bill implemented the "great principles and promises of the Declaration of Independence."[106]

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99. *Id.* at 3191.
100. *Id.* at 3192.
101. *Id.* at 3192-93.
102. *Id.* 3192.
103. *Id.* 3195. He declared:
> For one, sir, I am not willing to invade, nor shall I, by the passage of such a law as this, invade the private rights of the people of this country. There is no bound to this; there is no limit. I say I have the right with my friends to buy property where their friends and mine shall be interred when they go to their long home, and that nobody has a right to invade it. It is as sacredly private as my own homestead, as any other piece of property I may own.

104. GLOBE 42/2, 3196, 3249.
105. *Id.* at 3256-57.
106. *Id.* at 3264.

C. *The Limits of Congressional Power: Private Property*

Senator George Vickers, a Maryland Democratic lawyer, then objected that there was no power in the federal government to interfere with cemeteries and benevolent associations simply because incorporated by states, and moved to strike these institutions from the rider. Boreman immediately renewed his previously unheeded objection to this part of Sumner's bill by reaffirming his remarks of the previous day that incorporation does not convert a private association into a public institution, or alter the fact that their property remained private property. Sumner's coverage of private corporations was objectionable, he stated, because "this provision is a direct invasion of private right, and a violation, if not of the letter, of the spirit of the Constitution of the country."[107]

At that point, Senator Morton requested that the amendment be re-read. Senator Roscoe Conkling, the New York Republican corporation lawyer, who evidently had not theretofore been listening carefully,[108] then arose to state that apparently there was a wrong location of words, and that only tax-supported institutions ought to be covered. His proposed modification to that effect would even go further than Vicker's proposal. Morton concurred. The following colloquy then occurred:

> Mr. SUMNER. Yes. Allow me to ask the Senator, though—I take his idea—whether the term "incorporated" is not equivalent to "authorized by law?"
>
> Mr. CONKLING. It is equivalent to "authorized by law;" but the Senator will observe that he or I, in his State or mine, may under a general act or a special charter go on and organize an institution which he and his friends, a little group of individuals, ladies perhaps, endow. Many such exist in my own State. It is their private property. Nobody else has anything in the world to do with it . . . . I will take for illustration an institution established for the benefit of those unsound of mind. I have one in my mind now for persons whose minds are diseased. It is established by private funds, to be sure; but it is established under law. . . . It is a mere voluntary private adventure of humanity, if I may so say, of those engaged in it.
>
> Mr. EDMUNDS. Just as if it were a personal establishment.
>
> Mr. CONKLING. Just as if it were a personal establishment. Now, the criticism, the Senator from Massachusetts will see on the language as it stands, is just as broad as it might have been before in reference to the school question. Some Senator on the other side has said, if you establish equality of rights in reference to all benevolent institutions merely because they are incorporated you invade private rights, without any reference to color at all. That question does not come in, but it is an intrusion. You thrust people into it who do not belong there at all.[109]

107. *Id.* at 3265. See also Vicker's objections, *id.* at App. 43.
108. He had not even heard who had proposed the amendment. See *id.* at 3265.
109. GLOBE 42/2, 3266.

Sumner readily accepted Conkling's modification, thus striking all non-tax-supported charitable and cemetery corporations from the rider and deleting the fact of incorporation as a basis for compelling non-discrimination. Indeed, Sumner even accepted Boreman's modification that tax-supported cemeteries and charitable organizations must be "of a public character" to be covered.[110] But when Vickers suggested that institutions "authorized by law" should not be included, unless of a public character, Sumner disagreed. He gave as an example Harvard College and Amherst College, which were authorized by law although not tax-supported, which he wanted to include. Boreman had previously made this distinction:

> There is a marked difference between institutions of learning and cemetery companies. To institutions of learning authorized by law all persons are invited. To a cemetery company owned by private stockholders all persons are not invited, nor can they go without permission, unless it is given them by this law.[111]

A vote was taken on adding Sumner's civil rights amendment, as modified, to the amnesty bill, and a 28 to 28 tie resulted. Once again, the Vice-President broke the tie in Sumner's favor.[112] A vote on the amnesty bill combined with Sumner's bill resulted in 32 yeas, 22 nays, and it failed for want of a two-thirds majority.[113]

The deadlock was finally broken during Sumner's absence in an all-night session. Republican partisans of amnesty first passed a limited independent bill covering only public inns, licensed places of amusement, and common carriers,[114] after rejecting a Democratic motion to strike out theaters.[115] They then decisively rejected a motion to add Sumner's original bill to the amnesty bill, and passed the limited measure overwhelmingly.[116]

Sumner's disappointment was boundless. But his Republican colleagues told him plainly that this "half loaf" was better than nothing and "it was perfectly evident . . . from the expression in the Senate at that time that it was all we could get at this session of Congress."[117] Since the limited measure was not acted on by the House, the civil rights bill died for that session.[118]

IV. Emphasis on Equal Protection

When the First Session of the Forty-Third Congress met on December 1, 1873, two important events had occurred which were to influence significantly

110. *Id.* at 3267.
111. *Ibid.*
112. *Id.* at 3268.
113. *Id.* at 3270.
114. *Id.* at 3730, 3736.
115. *Id.* at 3735.
116. *Id.* at 3738.
117. *Id.* at 3739 (remarks of Senator Frederick A. Sawyer).
118. A brief attempt was made to revive it in the House of Representatives in the Third Session of the Forty-Second Congress, but this too failed. Cong. Globe, 42d Cong., 3d Sess. 85-86 (1872).

the course of debate on the civil rights bill. The first was the re-election of President Grant and a solidly Republican Congress.[119] The second was the decision in the *Slaughter-House Cases*,[120] in which the United States Supreme Court sharply reminded the bar that the fourteenth amendment, and particularly, the privileges and immunities clause, was not as broad as the "sands of the sea" or the common law, and that the amendment did not radically change the whole theory of federal-state relations.[121] The Court's decision thus tended to mute the argument that Sumner's bill could rest on a general, unspecified constitutional basis or on the privileges and immunities clause alone. Instead, most of the debate now centered on the constitutional basis originally urged by Frelinghuysen and other supporters of the bill—the equal protection clause.

A. *The House Debates*

Debate first commenced in the House, where a copy of Sumner's bill had been previously introduced.[122] Congressman Benjamin F. Butler, Republican Chairman of the Judiciary Committee, commenced his advocacy of the bill by stating:

> [T]he bill gives to no man any rights which he has not by law now, unless some hostile State statute has been enacted against him. He has no right by this bill except what every member on this floor and every man in this District has, and every man in New England has, and every man in England has by the common law and the civil law of the country. Let us examine it for a moment. Every man has a right to go into a public inn. Every man has a right to go into any place of public amusement or entertainment for which a license by legal authority is required. He has a right to ride in "any line of stagecoaches, railroad, or other means of public carriage of passengers or freight," and to be buried in any public cemetery; or he has a right in any "other benevolent institutions or any public school supported in whole or in part at public expense or by endowment for public use"—that is, while he behaves himself and pays the requisite cost, charges, and fees, and he has a right of action now against every man who interferes with that right unless there is some state of hostile legislation.
>
> Now, then, we propose simply to give to whoever has this right taken away from him the means of overriding that state of hostile legislation, and of punishing the man who takes that right away from him. This is the whole of that bill.[123]

119. The 42d Congress had 52 Republicans in the Senate to 17 Democrats and five others. The House had 134 Republicans and 104 Democrats, with five others. The Senate composition of the 43d Congress remained unchanged, but the House increased to 194 Republicans, 92 Democrats, and 14 others. U.S. BUREAU OF CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1957, 691 (1960).

120. 83 U.S. (16 Wall.) 36 (1873).

121. See Tansill, Avins, Crutchfield & Colegrove, *supra* note 89, at 76-80, 85.

122. 2 CONG. REC. 97 (1873).

123. *Id.* at 340.

To rebut the constitutional arguments against the bill, Butler stated:

> All legislation, therefore, that seeks to deprive a well-behaved citizen of the United States of any privilege or immunity to be enjoyed, and which he is entitled to enjoy in common with other citizens, is against constitutional enactment. . . . No State has a right to pass any law which inhibits the full enjoyment of all the rights she gives to her citizens by discriminating against any class of them provided they offend no law.[124]

Butler's initial explication of the bill sounds much like that of Sumner, his Massachusetts colleague. Once again the implication is that all men have a right recognized at common law to receive equal treatment at the inn, train, and licensed place of public amusement. Butler in particular should have been aware that, at least with regard to theaters, it was not a universally accepted rule that proprietors had to admit all who would pay the price of admission;[125] two Massachusetts cases had held directly to the contrary[126] and it appears that Butler himself was the attorney for the unsuccessful Negro plaintiff in that case.[127] Butler might be excused for failing to mention what he may have

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124. *Ibid.*

125. It is true that in Donnell v. State, 48 Miss. 661, 681 (1873), the court said: "So, too, all who applied for admission to the public shows and amusements, were entitled to admission, and in each instance, for a refusal, an action on the case lay, unless sufficient reason were shown." However, this case did not discuss any of the prior authorities on theaters, and it is believed that the above statement does not in fact represent the then current state of the law. For example, it would be difficult to reconcile the foregoing statement with the right of a theater proprietor to expel even a ticket holder. Burton v. Scherpf, 83 Mass. (1 All.) 133 (1861); Wood v. Leadbitter, 13 M.'& W. 838, 153 Eng. Rep. 351 (1845). The first case indicating that a ticket-holder could not be expelled was Drew v. Peer, 93 Pa. St. 234 (1880). Moreover, current legal thinking does not appear to support Donnell v. State, *supra*. Charge to Grand Jury, 30 Fed. Cas. 1005 (No. 18,260) (C.C.W.D. Tenn. 1875) comments on a decision of the Superior Court of Cleveland, Ohio, to the effect that a theater owner could exclude Negroes. Note, *Places of Amusement—Rights of Ticket-Holders*, 7 ALBANY L.J. 225 (1873), and Note, *The New York Civil Rights Bill*, 8 ALBANY L.J. 3 (1873) both indicate that places of amusement need not admit all persons. A HANDY-BOOK ON THE LAW OF THE DRAMA AND MUSIC 45-51 (London 1864) has an extensive discussion on the right of ticket-holders, but no mention of any right to buy a ticket or be admitted. See also Note, *The Law of the Theater*, 12 CENT. L.J. 390 (1881). Indeed the common understanding seemed to be that even ticket-holders had few rights which management was bound to respect. Note, *The Rights of the Theatre-Goers*, 12 WASH. L. REP. 449 (1884). Moreover, only a few years later, it was held that a theater could admit whom it wanted. Pearce v. Spalding, 12 Mo. App. 141 (1882); Purcell v. Daly, 19 Abb. N. Cas. 301 (N.Y. 1886). The point was finally settled in Wollcott v. Shubert, 217 N.Y. 212, 111 N.E. 829 (1916). It thus appears that the statement in Donnell v. State, *supra* did not reflect the then current state of the law.

126. Burton v. Scherpf, 83 Mass. (1 All.) 133 (1861); McCrea v. Marsh, 78 Mass. (12 Gray) 211 (1858).

127. Burton v. Scherpf, *supra* note 126. The original papers on appeal in this case are to be found in the Social Law Library, Boston. In these papers, one Butler, attorney for the plaintiff, attempted to sustain the verdict below by arguing that McCrea v. Marsh, *supra* note 126, was distinguishable on the ground that: "The contract was wholly or in part executed. The purchase and sale of the tickets made a contract between the parties which had been fulfilled so far as the ticket gave any rights to Plff. It had been redelivered by Plff. and received by Deft; and Plff. was in the enjoyment of his rights obtained thereby, when he was assaulted by Deft." Butler also noted: "The case finds that the plaintiff was ejected from a public Hall in the presence of an audience after

considered an aberrational ruling, at least if he were attempting to demonstrate the general recognition of the common-law rights as a basis for asserting that such rights were privileges of a citizen, a concept which he may have had in mind. But the claim for a universally accepted common-law rule—in spite of the Massachusetts decisions—is much more significant when considered together with Butler's defense of the constitutionality of the bill. Although not labeled as such, Butler's was an equal protection argument which assumed that all states accepted his conception of the common law, and therefore that deprivation of the rights of a Negro was, wherever it occurred, a state approved abrogation of his common-law rights. By refusing to recognize the Massachusetts exception to his rule, Butler may have contributed to the eventual ruling of the Supreme Court that the Civil Rights Act of 1875 was unconstitutional. For as finally drafted, the bill proscribed discrimination in inns, hotels and similar establishments. But if a state permitted discrimination on any arbitrary basis, a federal law proscribing discrimination would not be one assuring the equal protection of the laws and would not therefore be authorized by the amendment.[128]

Various Democrats read extensively from the *Slaughter-House Cases* to show Congress' lack of power to pass the bill.[129] Congressman Joseph H. Rainey, a South Carolina Negro Republican, complained that Negroes were discriminated against in restaurants,[130] hotels, conveyances, amusements, churches and cemeteries. Although not a lawyer, Rainey found power to pass

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having bought a ticket of admission and entered the Hall for the purpose of attending a concert to which all classes of people were invited and from which none were excluded by the public notices." Butler also argued: "How does this cause differ from that of a passenger who having paid his fare upon a railroad and entered the car is forcibly ejected therefrom. Moore v. Fitchburg R.R., 5 Gray 465." Defendant-appellant's short statement of points simply says: "Upon the facts reported the Deft. says that this action cannot be maintained because the Plff. had only a parol license to go into and remain in the concert room—that Deft. revoked the license and used no more force, upon Plff's refusal to leave, than was necessary to remove him. Wood v. Leadbitter, 13 M. & W. 838, Howlins v. Shippam, 5 B. & C. 221, McCrea v. Marsh . . ."

The leading lawyer's directory of this period is Livingston's *United States Law Register*, which was published in successive editions from 1849 to 1860. Out of 1309 Massachusetts lawyers, there are only two listings for Benjamin F. Butler, one in the firm of Butler and Webster in Lowell, Middlesex County, and one in the firm of Butler and Green, Boston. *Id.* at 384, 388. Congressman Butler had two offices during this period, one in Lowell and the other in Boston, each with a different partner. HOLZMAN, STORMY BEN BUTLER 18 (1961); TREFOUSSE, BEN BUTLER 28 (1957). In addition, research among the Butler papers in the Manuscripts Division of the Library of Congress reveals a letter from Green in Boston to Webster, dated September 22, 1859, about legal business of the firm of Butler and Webster. There is another letter of March 26, 1861, from A.B. Cutler to the law firm of Butler and Webster. Butler's Diary for 1860, on the page for February 8, 1860, shows payment of rent for his Boston office. Since he was the only "B. F. Butler" practicing law in Massachusetts at the time, and since the case arose in Lowell, his home town, there seems to be little doubt that the listing of "B. F. Butler" as attorney for the plaintiff is in fact Congressman Benjamin F. Butler.

128. See also 2 CONG. REC. 341 (1873), where Butler himself agreed with another Congressman that the federal remedy was only cumulative with the state remedy.

129. *Id.* at 342; 2 CONG. REC. 375-76, 378-80, 383-85, 405-07 (1874).

130. Restaurants were not included in any draft of the bill, either in the Senate or House. Cases distinguished them from inns, and there was no common-law duty to admit all persons to a restaurant. See note 83 *supra*.

the bill in all fifteen amendments to the Constitution.[131] One Democratic lawyer from Virginia noted that his state had no laws regulating conveyances or places of amusement, and hence the federal government could not interfere.[132] The bill was next defended by Congressman Robert B. Elliott, a Negro lawyer from South Carolina, who denied that the *Slaughter-House Cases* prevented Congress from passing the civil rights bill. The decision was distinguishable, he stated, since "the question which was before the court was not whether a State law which denied to a particular portion of her citizens the rights conferred on her citizens generally, on account of race, color, or previous condition of servitude, was unconstitutional because in conflict with the recent amendments."[133] Elliott denied

> that this Congress may not now legislate against a plain discrimination made by State laws or State customs against that very race for whose complete freedom and protection these great amendments were elaborated and adopted. . . . that the evils of which we complain, our exclusion from the public inn, from the saloon and table of the steamboat, from the sleeping-coach on the railway, from the right of sepulture in the public burial-ground, are an exercise of the police power of the State.[134]

The *Slaughter-House Cases* were decided on the ground that a state could legislate to protect public health and safety; but, he said exclusion from public inns, conveyances, schools and cemeteries was a violation of so much of the fourteenth amendment as provided that "no State shall 'deny to any person within its jurisdiction the equal protection of the laws,'" and that "all denial of the equal protection of the laws, whether State or national laws, is forbidden."[135] Elliott added:

> The fourteenth amendment does not forbid a State to deny to all its citizens any of those rights which the State itself has conferred, with certain exceptions, which are pointed out in the decision which we are examining. What it does forbid is inequality, is discrimination, or, to use the words of the amendment itself, is the denial 'to any person within its jurisdiction the equal protection of the laws.' If a State denies to me rights which are common to all her other citizens, she violates this amendment, unless she can show, as was shown in the Slaughter-house cases, that she does it in the legitimate exercise of her police power. If she abridges the rights of all her citizens equally, unless those rights are specially guarded by the Constitution of the United States, she does not violate this amendment.[136]

The civil rights bill, he urged, conferred no new rights, but simply dealt with state imposed discrimination.

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131. 2 CONG. REC. 343-44 (1873).
132. 2 CONG. REC. 373-76 (1874). He also noted that whites were occasionally ejected from railroads. *Id.* at 377.
133. *Id.* at 408.
134. *Ibid.*
135. *Id.* at 409.
136. *Ibid.*

Next to speak was Congressman William Lawrence, a former Ohio state judge and a Republican who had voted for the fourteenth amendment. He endorsed Elliott's remarks, and then proceeded to set forth his own constitutional analysis, replete with legal quotations and citations. All the rights in the bill were already protected by public law, he began:

> It should be observed that the bill does not give or propose to give or create any right where none existed before; but it simply declares that wherever public rights already exist by law in favor of citizens generally, none shall be excluded merely on account of race or color.[137]

As a source of congressional power to pass the bill, he adverted to the privileges and immunities and the equal protection clauses of the fourteenth amendment. He then stated:

> The object of this provision is to make all men equal before the law. If a State permits inequality in rights to be created or meted out by citizens or corporations enjoying its protection it denies the equal protection of the laws. What the State permits by its sanction, having the power to prohibit, it does in effect itself.[138]

Taken out of context, the third sentence of this quotation would indicate that Lawrence took the view that a state was obliged to enact anti-discrimination laws.[139] But his intended meaning became apparent later in the speech. After advocating a rule of "liberal construction" of the Constitution, Lawrence said:

> Adopting this rule, then, the word 'laws' must include all laws which prevail in a State—constitutions, treaties, statutes, common law, international law—in brief, all laws.
>
> When it is said 'no State shall deny to any person equal protection' of these laws, the word 'protection' must not be understood in any restricted sense, but must include every benefit to be derived from laws. The word 'deny' must include an omission by any State to enforce or secure the equal rights designed to be protected. There are sins of omission as well as commission. A State which omits to secure rights denies them . . .
>
> By the common law it is the duty of common carriers of passengers and freight to carry all orderly and well-conditioned persons. . . . [Quotation from Story omitted.]
>
> And no law-book has ventured to say the color of the person offering goods is any ground for refusal. . . . [Quotation from Story omitted.]
>
> The fourteenth amendment declares, in effect, that no State shall deny to any person within its jurisdiction the equal protection of the

137. *Id.* at 412.

138. *Ibid.* In the same vein, he said: "All these acts proceed upon the idea that if a State omits or neglects to secure the enforcement of equal rights, that it 'denies' the equal protection of the laws within the meaning of the fourteenth amendment." *Id.* at 414.

139. Compare Bell v. Maryland, 378 U.S. 226, 309-11 (1964) (Goldberg, J., concurring); Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing*, 52 CALIF. L. REV. 1, 25 n.85 (1964).

> laws;' that is, the equal benefit of these principles of common law shared by and existing for the protection of citizens generally. Still more, it declares that Congress *shall enforce* this equality of privileges.[140]

Lawrence then declared that public institutions supported by taxation should make equal provision for all, because the fourteenth amendment requires equal benefits from the laws which create them. By the same reasoning, he concluded that there was a right

> to an equal participation in the benefit to result from the law regulating common carriers. And this principle applies to every public benefit enjoyed by citizens generally under or by reason of public law.[141]

He then launched into a lengthy discussion of the legislative history of the fourteenth amendment, quoting copiously from speeches of the period. He stated that the amendment was designed to embody the principles of the Civil Rights Act of 1866, and discussed at length cases and other materials dealing with discriminatory state statutes to show the "evil" to be avoided. He concluded, citing more cases, that in passing the bill Congress was simply enforcing the fourteenth amendment.[142]

Representative William J. Purman, a Florida Republican lawyer who supported the bill, described, as examples of the state statutes which the bill was designed to prevent, several hypothetical acts of a "states-rights legislature" which excluded out-of-state residents from inns, poor people from publicly-licensed places of amusement, Methodists from common carriers, and Negroes from all of these.[143] He alleged that statutes excluding Negroes from such places were "virtually in existence in most of the States of the Union, especially in the Southern States. . . . [It] is the hostile pretended legislation that the passage of the bill under consideration will wipe out."[144]

A Virginia Republican then spoke, justifying the bill because a "hotel is a legal institution, originally established by common law and still subject to statutory regulations; railroads are legal institutions, chartered and vested with all their rights by legislative enactments."[145] But Congressman Milton I. Southard, an Ohio Democratic lawyer, declared that the Civil Rights Act of 1866 provided all of the privileges and immunities to which Negroes were entitled,[146] and another Democrat denied that any state statute existed barring Negroes from public accommodations.[147]

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140. 2 CONG. REC. 412 (1874).
141. *Ibid.*
142. *Id.* at 413-14.
143. *Id.* at 423-24.
144. *Id.* at 424.
145. *Id.* at 427 (remarks by Rep. William H. H. Stowell).
146. *Id.* at App. 1-3.
147. *Id.* at 454 (remarks by Rep. John D. C. Atkins).

Butler closed the debate by praising Elliott's analysis of the constitutional points. He stated that while the Democrats conceded that Negroes had all the rights of the bill, "because of prejudice the States will not enforce them."[148] Where states enforce the rights, the federal bill will remain inoperative, he noted, but where the states do not do their duty, the federal courts will intervene. The bill was then returned to the Judiciary Committee.[149]

Several days later, a Negro congressman complained that he and his colleagues were not served in hotels, railroad cars, and restaurants.[150] On January 17, 1874, Congressman Robert Hamilton, a New Jersey Democratic lawyer, stated that the bill was unconstitutional because "the Constitution does not act upon corporations or individuals; they are not prohibited from making a distinction between citizens in their relations with them, nor is any power given to Congress to enact laws upon that subject."[151] After discussing the limited nature of the privileges and immunities clause of the Fourteenth Amendment, he ended with a long quotation from the *Slaughter-House Cases*.[152]

B. *The Senate Resumes Its Consideration*

Debate on Sumner's bill in the form in which it had been annexed to the amnesty bill began in the Senate on January 27, 1874. Senator Ferry's suggestion that the bill be referred to the Judiciary Committee, was opposed by Sumner who urged that it already had received extensive consideration in the Senate. He appealed for immediate consideration and adverted to the Declaration of Independence and to "the outrages to which the colored race are exposed . . . in travel and at hotels."[153] Ferry replied that the Sumner bill was unconstitutional.[154]

Edmunds, who had previously been a staunch supporter of Sumner, now arose to concur in the proposal that the bill be referred to the Judiciary Committee. While supporting equal rights, even he suggested that some of Sumner's drafts had been in excess of the constitutional power of Congress. Stewart of Nevada joined in these constitutional doubts.[155] Both Edmunds and Stewart were Republicans who had voted for the fourteenth amendment. Frelinghuysen agreed that the bill should be referred, notwithstanding Sumner's objections,

148. *Id.* at 457.
149. *Id.* at 458.
150. *Id.* at 565-67 (remarks of Rep. Richard H. Cain). Restaurants were not included in the bill, which in itself is significant, since complaints were made of discrimination therein. However, there was no common-law duty to serve all people in a restaurant; hence although such discrimination was keenly felt, Congress felt it lacked constitutional power to alleviate it. See note 83 *supra*.
151. *Id.* at 741.
152. *Id.* at 741-42.
153. *Id.* at 946.
154. *Ibid.*
155. *Id.* at 947.

and Morrill of Maine joined in to renew his constitutional objections to Sumner's bill.[156] Ultimately, the bill was referred to the Judiciary Committee.

On March 11, 1874, Sumner died, leaving as his last request the passage of his civil rights bill.[157] Frelinghuysen reported it from the Judiciary Committee in virtually unchanged form on April 29, and opened debate by finally narrowing its constitutional basis to the equal protection clause of the fourteenth amendment. He thrice declared that "this bill therefore properly secures equal rights to the white as well as to the colored race."[158] After denying that "social equality" was involved, he explained:

> This bill does not disturb any laws, whether statute or common, relating to the administration of inns, places of public amusement, schools, institutions of learning or benevolence, or cemeteries, supported in whole or in part by general taxation (and it is only to these that it applies), excepting to abrogate such laws as make discrimination on account of race, color, or previous servitude.
>
> Inns, places of amusement, and public conveyances are established and maintained by private enterprise and capital, but bear that intimate relation to the public, appealing to and depending upon its patronage for support, that the law has for many centuries measurably regulated them, leaving at the same time a wide discretion as to their administration in their proprietors. This body of law and this discretion are not disturbed by this bill, except when the one or the other discriminates on account of race, color, or previous servitude.
>
> As the capital invested in inns, places of amusements, and public conveyances is that of the proprietors, and as they alone can know what minute arrangements their business requires, the discretion as to the particular accommodation to be given to the guest, the traveler, and the visitor is quite wide. But as the employment these proprietors have selected touches the public, the law demands that the accommodation shall be good and suitable, and this bill adds to that requirement the condition that no person shall, in the regulation of these employments, be discriminated against merely because he is an American or an Irishman, a German or a colored man.[159]

Next he turned to the constitutional question. He justified the bill under three heads: (1) the three post-Civil War amendments combined with recent history, (2) the privileges and immunities clause and (3) the equal protection clause of the fourteenth amendment. After quoting copiously from the *Slaughter-House Cases*, he said:

> It will be claimed that it is not one of the privileges of a citizen of the United States to visit inns or theaters. . . . that a State may prohibit them all. To that I agree. This bill does not say that a State shall afford any of these benefits to a citizen of the United States.
>
> But it is one of the privileges of a citizen of the United States, as such, not to be discriminated against on account of race or color by

156. *Id.* at 949.
157. *Id.* at 4786 (remarks by Rep. Alonzo J. Ransier).
158. *Id.* at 3451.
159. *Id.* at 3452.

the law of a State relating to inns, schools, &c., or in the administration of any institution depending upon the law of a State.[160]

Frelinghuysen then went on to declare that no state could make any discrimination in its laws against a class, whether such discrimination caused injustice or hardship or not, because this would violate the equal protection clause of the fourteenth amendment. He concluded that equal protection of the laws was a privilege likewise protected under the privileges and immunities clause. Therefore, he argued, although a state could change its laws as it sees proper in regard to inns, public conveyances and places of amusement, a state could not discriminate against any of its citizens. The remedy must be directed at business owners because:

> We cannot deal with the States or with their officials to compel proper legislation and its enforcement; we can only deal with the offenders who violate the privileges and immunities of citizens of the United States. . . . as you cannot reach the Legislatures, the injured party should have an original action in our Federal courts, so that by injunction or by the recovery of damages he could have relief against the party who under color of such law is guilty of infringing his rights.[161]

Thurman rose and stated that the bill was not only unconstitutional, but that it would oust the state courts of common-law jurisdiction.[162] Conkling, however, rebutted that the bill would merely give Negroes an alternative remedy.[163] On May 20, Senator Daniel D. Pratt, an Indiana Republican lawyer, who supported the bill, affirmed that although under state law Negroes discriminated against would be entitled to civil action for damages, this bill provided "a more efficient remedy."[164]

Thurman then renewed his oft-repeated constitutional objections. He noted that, like other parts of the Constitution, the fourteenth amendment was directed only to the States, and not to private individuals. In response to questioning, he stated that Congress could enforce the amendment by providing judicial review of cases involving claims arising thereunder.[165] The fourteenth amendment is directed to state laws, yet he objected the bill is aimed at the action of private individuals.[166] In response to more questioning,

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160. *Id.* at 3454.

161. *Ibid.* It is interesting to note that Section 4 of the bill punished state officers who discriminated in selecting people for jury duty. *Id.* at 3451. This provision was ultimately found constitutional. See *Ex parte* Virginia, 100 U.S. 339 (1880). It is possible that Frelinghuysen might have either provided a remedy by way of punishing judges who discriminated, or appellate review in the federal courts in such cases. See Strauder v. West Virginia, 100 U.S. 303 (1880).

162. 2 CONG. REC. 3455 (1874).

163. *Id.* at 3456.

164. *Id.* at 4082.

165. *Id.* at 4083-85.

166. *Id.* at 4085:

"No State shall make or enforce any Law which shall abridge the privileges or immunities of citizens of the United States." Does this bill deal with any such

he declared that the *Slaughter-House Cases* had clearly shown that the federal privileges and immunities did not embrace the businesses in the bill.[167]

The next day, Morton of Indiana addressed himself to the argument urged by Thurman that Congress lacked power to pass the bill because the fourteenth amendment was directed only at state action. He pointed out that it was possible to enforce the amendment only by acting on individuals:

> We cannot arrest or punish a State for the violation of this amendment, but we can punish any person who undertakes to violate the amendment under the cover of a State law. We [can] take from any official, from any person who undertakes under cover of State authority or under any pretense to violate the right of any person under this amendment, all protection and cover of the State law.[168]

The equal protection clause of the fourteenth amendment, he continued, meant that all persons must be given the equal benefit of the laws:

> Every discrimination against the negro as a class is denying to them the equal protection of the laws. For example, if a State should pass a law forbidding to negroes the right to bring suits in court, to sue for debts, . . . these things would be denying to them the equal protection of the laws. If the colored man has no right to bring a suit in court for the collection of a debt, a thing that does not pertain perhaps to his personal safety at all, yet it is denying to him the equal benefit, the equal protection of the laws.[169]

Senator Augustus S. Merrimon, a North Carolina Democratic lawyer, asked Morton whether the right to attend a theater was one based on United States citizenship. Morton like nearly everyone else thought that theaters were legally open to all and answered in the affirmative.[170] The fourteenth

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law of a State? No, sir, it does not profess to do so. It is not aimed at any law of a State. It is aimed against the acts of individuals; it is aimed against keepers of theaters, keepers of circuses, keepers of hotels, managers of railroads, stage-coaches, and the like. There is not one single sentence in the whole bill which is leveled against any law made or enforced by a State. The Constitution says that no State shall make or enforce any such law. This bill says to a State "Although you do not make any such law, although you do not enforce any such law, although your law is directly the opposite, although you punish every man who does any one of the acts mentioned in this bill, and punish him ever so severely, yet the Congress of the United States will step in and under the clause of the Constitution which says that you, the State, shall not make or enforce any such law, we, the Federal power, will seize the man whom you have punished for this very act, and will punish him again; we will treat the keeper of a theater as the State; we will treat the hotelkeeper as the State; we will treat the railroad conductor as the State; we will treat the stage-driver as the State; and although you may have punished each and every one of these men for the very acts enumerated in this bill, we, under the pretense that the States do make or enforce a law which deprives a citizen of his equal privileges and immunities, will seize that citizen again and subject him to a double punishment for the offense for which he has already suffered." That is what this bill is; and no sophistry can make it anything else.

167. 2 CONG. REC. 4087-88 (1874).

168. *Id.* at App. 358.

169. *Id.* at App. 359. This illustration was, of course, taken directly from the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. § 1981 (1964).

170. 2 CONG. REC. App. 360 (1874). He stated:

amendment, Morton added, "prevents any State from making any odious discrimination against any class of people."[171] He gave as an example a state law forbidding a colored man from entering railroad cars. He justified punishing private individuals on the theory that in discriminating they were acting under cover of such a law. To declare the law void would not punish the wrongdoer who was enforcing the state discriminatory law. Hence a penal offense against individuals was needed. He concluded that public conveyances were public institutions like schools or courts, to which all persons were equally entitled.[172]

On the following day, Senator John P. Stockton, a New Jersey Democratic lawyer, who had been denied a seat in the 39th Congress, and was therefore not around to vote against the fourteenth amendment, agreed that the bill simply re-enacted the common-law rule as to carriers and inns. He specifically adverted to the fact that inns were licensed by the local courts,[173] and yet protested against any interference with the innkeeper's right to regulate his guests.[174] After quoting copiously from the *Slaughter-House Cases*, he declared that "the whole operation of the [fourteenth] amendment . . . is to prohibit *State legislation* from a certain kind of legislation, precisely as by the Constitution it is forbidden a State to pass an *'ex post facto law.'* "[175]

Senator James L. Alcorn, a Mississippi Republican lawyer, justified including theaters in the bill because "the theater is a licensed institution," and, interestingly enough, launched into an extended defense of the utility of theaters.[176] Probably, this was a reaction to the prevalent notion that places of amusement were public nuisances, which should admit as few people as possible.[177] He also defended inclusion of hotels, as necessary to the

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A theater is a place of public amusement, licensed by law, carried on under the regulations according to which theaters or such places are generally conducted, and it is a place to which any decent, respectable, well-dressed person has a right to be admitted; and any discrimination against him on account of his color on the part of the State where that theater is located is a discrimination which that State is not allowed to make. So in regard to traveling in the stage-coach or upon the cars. If a State is at liberty to exclude a colored man from the cars on account of his color in traveling, then it has the power to make an odious discrimination because of race, the very thing that the fourteenth amendment intended to stamp out.

171. *Id.* at App. 360.

172. *Id.* at App. 360-61.

173. *Id.* at 4144. He said:

The innkeeper, by the common law of England and by the common law of most of the States of this land, altered by statutes of the States . . . but very slightly, goes to the county court; he proves that he has so many beds, accommodations for so many wayfarers, and he gets his license from the county court, with a recommendation from his neighbors and friends, to keep a wayside inn, wherein the weary traveler may rest. He is called upon every year to renew that license, for no man is authorized to keep a bar-room exclusively so on the highway; but he may keep a house of entertainment for those who are weary, for those who need it. Unless he agrees to do that, he cannot have a license.

174. *Ibid.*

175. *Id.* at 4146.

176. *Id.* at App. 305.

177. For some descriptions of opposition to theater in the United States, see HEWITT, THEATRE U.S.A. 46-47 (1959); 1 HORNBLOW, A HISTORY OF THE THEATRE IN AMERICA

traveler, and because they were licensed and bonded to serve all.[178]

In an all-night session which followed, one Democrat declared that the rights in the bill were not privileges of federal citizenship protected by the fourteenth amendment,[179] while another prophesied: "If this bill shall pass, I do not doubt that that court [United States Supreme Court] when the appropriate time comes, will declare that it is void."[180]

With the Republicans still unwilling to adjourn at 1:30 a.m.,[181] Senator William T. Hamilton, a Maryland Democratic lawyer, launched into a lengthy speech. He first stated that the fourteenth amendment gave Congress no power to regulate proprietors of businesses. Then after commenting at length on the vagueness of the term "other places of public amusement" in the statute,[182] Hamilton turned his attention to the legal status of inns:

> Those peculiar legal characteristics of inns arose when countries were sparsely settled and when it was important that responsible individuals should at all times be prepared to receive the traveler, a stranger, weary and distant from home it may be.[183]

But, he said, inns no longer receive any grant from the government and any one had a right to establish an inn. Licenses were no longer intended as a privilege, but merely for taxation.[184] He then declared:

> So far as I am concerned, in reference to inns, I would brush away all the old common-law notions that attached to them hundreds of years ago and that gave to the books pages upon pages of law. The old common-law rights and responsibilities of innkeepers, while still in the law good and applicable, is being practically discarded every day; so that there is hardly a case known in the books at this day in which the responsibility of innkeepers has been involved in any suit for not receiving guests, except it may be under the kind of legislation now here attempted in this bill. It is a thing of the past; and if this bill is passed the States ought to change the common-law rule and put inns on the same footing with other common branches of business. Competition is the ruling spirit everywhere, and innkeepers and hotel-keepers now are only too anxious to get guests.[185]

23-26, 131, 226-27, 233-34 (1919); HUGHES, A HISTORY OF THE AMERICAN THEATRE 3, 11, 34 (1951). Note the indictment in Commonwealth v. Twitchell, 58 Mass. (4 Cush.) 74, 75 (1849), which accused the defendant of establishing an unlicensed theatre "to the great encouragement of dissipation and idleness." *Cf.* Downing v. Blanchard, 12 Wend. 383, 385 (N.Y. Sup. Ct. 1834), which stated: "People are called away from their regular business—they spend their time to no purpose, and their money foolishly, if not viciously."

178. 2 CONG. REC. App. 305 (1874).

179. *Id.* at 4162-64 (remarks by Sen. James K. Kelley).

180. *Id.* at App. 315 (remarks by Sen. Augustus S. Merrimon).

181. *Id.* at 4166.

182. *Id.* at App. 361-62.

183. *Id.* at App. 362.

184. *Id.* at App. 363:

> I can do all these things; I am entitled to do all these things by virtue of my natural rights; and when gentlemen assert that a license is a privilege, it is a great error in language and in fact. A license is a tax instead of a privilege; it is a restriction, instead of a grant. I have a right to do these things, and Government interposes to restrict my right either for the purposes of revenue or otherwise.

185. 2 CONG. REC. App. 363 (1874).

Hamilton then read from Tidswell's *Innkeeper's Legal Guide* to the effect that under common law, inns could restrict themselves to various classes of people, and he accused the majority of changing the common law. He stated that Negroes could establish their own inns, and that some of them already had inns to which other colored people could go. He stated that there was no logical basis for limiting the bill to inns, and that eating-houses, grocery stores, shoemakers, tailors, and butchers were even more necessary for colored people than inns, yet the bill excluded them. Owners of houses and tenements who advertised to rent them could turn away Negroes, he noted, but only inns were singled out.[186]

As for theaters, Hamilton said that they were not necessities. A theater was licensed "because at one time it became so licentious in the opinion of moralists of the day that it was thought to be necessary to make theaters the subject of legislation . . . .They were at that day and are still discouraged and discountenanced by a great many people who think no good of them."[187] Many churchgoers would like to outlaw theaters, he stated, and Negroes would do well to spend their money in more useful ways. Commenting that places of amusement would not fall under the bill unless licensed, he declared:

> True it must have generally a license to exhibit. The license, however, is intended for revenue to the State, not to add to the natural right to follow a lawful calling. The honorable Senator from New Jersey in his speech has impliedly if not directly said that because a theater is licensed by the State, it is therefore a public institution and has its being given to it, and being a public institution and existing by virtue of State authority the United States can embrace it in its legislation under the fourteenth amendment.
>
> Not so; they are no less private enterprises because they may be taxed or licensed, and especially when licensed for the purposes of revenue.[188]

Finally, at the end of a twenty-hour session, the Senate passed the bill by a vote of 29 to 16. The affirmative votes were all cast by Republicans. Three Republicans, from Virginia, West Virginia and Wisconsin, and all the Democrats, voted in the negative.[189]

V. The Final Debates and Enactment

In the elections of 1874, the Republican Party suffered a political hemorrhage. While holdovers kept the Senate Republican by a much reduced margin, the Democratic Party gained a landslide victory in the House, in part due to public antipathy towards the civil rights bill.[190] Even Butler lost his seat in normally Republican Massachusetts.[191]

186. *Id.* at App. 363-64.
187. *Id.* at App. 364.
188. *Id.* at App. 365.
189. *Id.* at 4176.
190. 3 Cong. Rec. 951, 952, 978, 982, 1001 (1875); *id.* at App. 17, 20, 113.
191. Trefousse, Ben Butler 230 (1957).

When the "lame duck" Second Session of the Forty-Third Congress met in the early part of 1875, Butler and Congressman Lawrence, the Republican ex-judge from Ohio, engaged in the following colloquy during the course of the debate on the civil rights bill as revised by the House Judiciary Committee:

> Mr. LAWRENCE. This bill, as I understand it, adopts as to public inns precisely the rule of the common law.
>
> Mr. BUTLER. . . . Not only as to public inns, but in every other of its provisions the bill adopts precisely the rule of the common law.
>
> Mr. LAWRENCE. And the bill is necessary because the common law has been changed by local statutes.
>
> Mr. BUTLER. . . . The bill is necessary because . . . [of] prejudice.[192]

Congressman William E. Niblack, an Indiana Democratic lawyer who had voted against the fourteenth amendment, asked Butler why the bill was needed, if there was a common-law remedy. The latter replied that Negroes lacked funds to carry on a lawsuit, and that southern state judges would not give Negroes their rights under the law.[193]

Congressman William E. Finck, an Ohio Democrat who had voted against the fourteenth amendment, declared that its first section was a "command directed against the States in their organization as States," and did not authorize the federal government to regulate hotels, carriers, theaters, and schools.[194] He quoted copiously from the *Slaughter-House Cases*, and concluded that since the bill was not aimed at states, but at businesses, it was beyond Congress' power.[195] Another Democrat also stated that the bill was unnecessary because Negroes had common-law protection, and denied that state judges would not give them equal justice.[196] A Negro Republican from the South objected that common-law remedies were too "general."[197]

The last word of the evening came from Congressman J. Ambler Smith, a Virginia Republican lawyer but an opponent of the bill. After quoting from the *Slaughter-House Cases*, he declared that the bill violated the private property rights of business proprietors, and that even the states therefore could not pass anti-discrimination laws. He quoted from the decision of an Ohio court that theaters could exclude whomever they pleased.[198]

The next day, February 4, 1875, the last day of House debate, Congressman Robert S. Hale, a Republican former judge from New York, who had served with Finck in the 39th Congress, and had participated actively in the debates on the fourteenth amendment,[199] arose to rebut Finck. Hale com-

192. 3 CONG. REC. 940 (1875).
193. *Ibid.*
194. *Id.* at 947.
195. *Id.* at 949.
196. *Id.* at 952-53.
197. *Id.* at 959.
198. *Id.* at App. 156-57.
199. Tansill, Avins, Crutchfield & Colegrove, *The Fourteenth Amendment and Real*

menced by stating that, alone among Republicans, he had voted against the fourteenth amendment[200] because it gave Congress additional power to legislate not found in any prior amendment except the thirteenth amendment.[201] That additional power was the power to enforce the last sentence of the first section of the fourteenth amendment, which power he did not deem limited to the correction of state laws. In the course of his argument he was interrupted by Congressman Lucius Q. C. Lamar, a Mississippi Democratic lawyer, and later a United States Supreme Court Justice, as follows:

> Again, sir, suppose it were true that Congress was to be limited to rectifying abuses by State legislation, does any gentleman upon that side of the House or upon this deny that to-day State after State of the South does live under laws which are inconsistent with the fourteenth amendment; that practices are there permitted which are in violation of the fourteenth amendment? And if that be so, then cannot Congress interfere by a general law to overrule State legislation?
>
> . . .
>
> Mr. LAMAR. I ask the gentleman if he will indicate what legislation of what State violates the provisions of the fourteenth amendment?
>
> Mr. HALE, of New York. I am unable to indicate it at present; but I did not suppose any gentleman disputed it.
>
> Mr. LAMAR. I do dispute it.
>
> Mr. HALE, of New York. I supposed it was a matter of absolute notoriety. I never heard it questioned before, and I did not suppose any gentleman would question it. I do not propose to put my finger on the particular statute.
>
> Mr. LAMAR. I assure the gentleman from New York that if there exists in the entire range of all the statutes of all the States in the South one single act, one single provision of law inconsistent with any of the principles or provisions of any of the amendments to the Federal Constitution I am like himself ignorant of the existence of such provision.
>
> Furthermore, I say, sir, to him that *throughout the length and breadth of the southern section there does not exist in law* one single trace of privilege or of discrimination against the black race. If there is, I know nothing of it.
>
> Mr. HALE, of New York. Now, let me ask the gentleman whether under the laws of the State of Mississippi it is possible for a colored man to travel over the railroads or in any other public conveyances in that State with the same facilities and the same conveniences that a white man may travel?
>
> Mr. LAMAR. I answer my friend from New York with all the emphasis that I can give, that they do travel precisely with the same facilities and with the same conveniences, and a great many more as there are more of them, than the white people of Mississippi.

Property Rights, in OPEN OCCUPANCY VS. FORCED HOUSING UNDER THE FOURTEENTH AMENDMENT 77-79 (Avins ed. 1963).

200. Hale did not vote, and is not recorded as having been paired on the vote, when the fourteenth amendment first passed the House. CONG. GLOBE, 39th Cong., 1st Sess. 2545 (1866). After it was returned with a modification from the Senate, he voted for it on final passage. *Id.* at 3149. Finck voted against it both times.

201. 3 CONG. REC. 979 (1875).

Mr. HALE, of New York. Then, Mr. Speaker, the State of Mississippi is indeed an exception to the general rule. I am through, Mr. Speaker.

Mr. McKEE. Let me say that my colleague is correct. In Mississippi, under the laws and under the constitution—republican laws and republican constitution—the colored man has the same rights that a white man has. My colleague is legally correct, but practically my colleague is mistaken. I refer to the treatment of colored people on steamboats, in hotels, theaters, etc.

Mr. LAMAR. Practically my colleague is mistaken, and legally also.[202]

Congressman Ellis H. Roberts, a Republican newspaper editor from New York, interjected that he did not see any point to the colloquy as to whether state legislation guaranteed common-law rights when Negroes were in fact denied those rights. On this basis, he supported the legislation.[203] Congressman Alexander White, an Alabama lawyer, attacked the Democrats' opposition to federal action, claiming that the alternative was to "leave such rights to the State courts, with the common-law remedy, which would be tantamount to no right and no remedy."[204] The bill sustained yet another Democratic attack, using the *Slaughter-House Cases* as ammunition.[205] A Michigan Republican added that the bill was designed to prohibit exclusion from carriers, inns and theaters because of color.[206] Congressman William W. Phelps, a New Jersey Republican lawyer but an opponent of the bill, declared:

> Take again your provision for inns. Exact this, and you build upon a foundation which once existed, but which for years has been torn away. Governments used to give especial privileges and monopolies to the inn-keeper, and then the government in proper reciprocity had a right to impose obligations and duties . . . the reason of the law that used to govern them failing, the law itself fails. We no longer give to inn-keepers especial privileges—any monopoly in the business; we cannot therefore burden their business with any restrictions. Therefore I claim that an enlightened court will refuse to enforce the provisions.[207]

Phelps predicted that inns would be closed if the bill were passed. And Congressman James A. Garfield, an Ohio Republican lawyer who had voted for the fourteenth amendment, and who later would become the President, noted that the bill "is a declaration that every citizen of the United States shall be entitled to the equal enjoyment of all those public chartered privileges granted under State laws."[208]

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202. *Id.* at 980. Congressman George C. McKee, who interjected the comment, was a Mississippi Republican lawyer. When cases arose under the federal statute, the courts, of course, found no state discriminatory laws. See United States v. Washington, 20 Fed. 630 (C.C.W.D. Tex. 1883); Smoot v. Kentucky Cent. Ry. Co., 13 Fed. 337 (C.C.D. Ky. 1882); Charge to Grand Jury, 30 Fed. Cas. 999 (No. 18,258) (C.C.W.D.N.C. 1875).

203. 3 CONG. REC. 980 (1875).

204. *Id.* at App. 15.

205. *Id.* at 996.

206. *Id.* at 999 (Remarks of Rep. Julius C. Burrows).

207. *Id.* at 1002.

208. *Id.* at 1005.

Butler concluded the debate in an outburst of flamboyant theatrics which was to be the final notoriety of his House career in that Congress. The House thereafter passed the bill by a vote of 162 yea to 99 nay, with 28 not voting. Two Democrats, one from Pennsylvania and the other from Arkansas, voted yea; eleven Republicans, four from Tennessee, two from Virginia, and one each from Delaware, Georgia, Maryland, Missouri, and New Jersey voted nay. Otherwise, the vote was strictly on party lines. Fifteen Republicans who had voted for the fourteenth amendment, as members of the House, and Poland of Vermont, who had voted for it as a senator, voted yea; and four Democrats who had voted against the fourteenth amendment, and Nesmith of Oregon, who as a senator had been absent, voted nay.[209]

When debate on the House bill opened in the Senate, Senator Thomas F. Bayard, a Delaware Democratic lawyer, made a long speech on the constitutional defects of the bill. He denied that the advantages of public facilities were privileges and immunities of federal citizens within the meaning of the fourteenth amendment and quoted once again from the *Slaughter-House Cases*. The facilities in the bill were only subject to state regulations, he stated, and concluded that the subject was too trivial for the courts and would only breed litigation.[210] The Republicans remained unimpressed.[211]

The next day, February 27, 1875, the last day of Senate debate, Carpenter, the Wisconsin Republican who once had supported the bill, attacked the bill as unconstitutional. He, too, reiterated objections based on the *Slaughter-House Cases* and the inherent limitations of the privileges and immunities clause.[212] And Senator George R. Dennis, a Maryland Democrat, contented himself with predicting that the bill would be declared unconstitutional by the Supreme Court.[213] With a final belittling of constitutional objections by Edmunds, and a last thrust by Thurman that the Senate was discriminating in banning discrimination only on racial grounds,[214] the Senate commenced rejecting Democratic-sponsored amendments. The only one of interest here is an amendment sponsored by Senator Thomas W. Tipton, a Nebraska Republican lawyer who opposed the bill, that churches be substituted for theaters in the bill. This was laughed down.[215]

Edmunds then made a final speech. He first attacked the Democrats for their constant opposition to Negro progress and their continual cry that every new measure was unconstitutional. He analogized the right to use public facilities to the right to use public streets. Edmunds, who had voted for the fourteenth amendment and was now in charge of the civil rights bill, declared

209. *Id.* at 1011.
210. *Id.* at App. 103-05.
211. For example, Edmunds said: "The gentlemen on the other side have a stock of very good speeches." *Id.* at 1797.
212. *Id.* at 1861-63.
213. *Id.* at 1865.
214. *Id.* at 1866-67.
215. *Id.* at 1868-69.

that this amendment protected fundamental privileges and immunities, fundamental rights, which included the right to enjoy the same rights "without qualification and distinction upon arbitrary reasons, that exist in favor of all others." He said that this bill merely forbade anyone "to exclude from modes of public travel persons on the ground [of ancestry]," and that it was a "simple proposition of common right inherent in everybody [being] . . . put into a statute-book." Accordingly, he declared, these "common rights, which belong necessarily to all men alike . . . shall not be invaded on the pretense that a man is of a particular race or a particular religion."[216]

And then the bill passed, 38 yea, 26 nay, nine not voting. All the affirmative votes were cast by Republicans. Of these, eight had been senators who voted for the fourteenth amendment,[217] while seven had been representatives who likewise voted for the fourteenth amendment.[218] The Democrats, all in the negative, were joined by seven Republicans, four from the North, Schurz of Missouri, and two from the South.[219] The most significant vote against the bill was cast by Senator William Sprague, a Rhode Island Republican who had voted for the fourteenth amendment.

VI. Summary and Conclusion

While many of Sumner's remarks reflected his personal notions about the Declaration of Independence, isolation of what may be called the ultra-radical Republican position is still possible. Sumner, Sherman and several other Republicans took the view that, at common law, all men were entitled to equal and impartial enjoyment of the facilities and privileges furnished by certain institutions. These common-law rights, they reasoned, were privileges of a citizen protected by the Constitution. To ensure the recognition and enforcement of these rights, Congress could, in their view, directly order punishment for any individual who discriminated on the basis of race, ancestry or color. The institutions permissibly affected by the bill may best be classified, in Sumner's own word, as at least "franchised."

The ultra-radical position was constitutionally untenable in the eyes of some Republicans, including Senators Trumbull, Sprague and Morrill of Maine, who stoutly maintained that these common-law rights were not among the privileges of a citizen. Other Republicans, including Senator Frelinghuysen, supported the bill, but their view of its substantive effect was quite different from that of the ultra-radicals. Accordingly, they could concede that the common-law rights were not privileges of a citizen and still could justify the bill's constitutionality—but on the basis of the equal protection clause.

216. *Id.* at 1870.
217. Anthony, Chandler, Cragin, Edmunds, Howe, Ramsey, Sherman and Stewart.
218. Allison, Boutwell, Conkling, Ferry of Michigan, Morrill of Vermont, Washburn, and Windom.
219. Carpenter, Ferry of Connecticut, Lewis, Hamilton, Schurz, Sprague and Tipton.

As Frelinghuysen said at the beginning of the debates, and as most supporters of the bill eventually urged, the Act was intended to ensure that each citizen would receive the same protection given by state laws to all other citizens, without regard to color or ancestry. Because nearly all who supported the bill believed that every state recognized the individual's common-law right to enjoy the privileges and facilities of inns, public conveyances, theaters and other places of public amusement, the Act did not expressly state the limitation which most of its supporters conceded—that a citizen was not entitled by the Act to more rights than were granted to all citizens, without regard to race or color, by the law of the state. Finally, the majority basis for justifying direct federal intervention is ambiguous. Some supporters of the bill assumed that there actually existed state statutes specifically abridging the common-law rights of Negroes alone. Others apparently espoused the view that the federal government could intervene to protect the citizen's common-law rights even though the discriminatory action was that of an individual rather than of a state where a state omitted protection granted to others. This later view was apparently prompted by the belief that the states would refuse to enforce their laws to protect Negro rights.[220] The Democrats, of course, were opposed to the Sumner bill equally with the fourteenth amendment, and construed the amendment in a perhaps too narrow manner.

A synthesis of these debates, then, indicates that the fourteenth amendment was viewed in a surprisingly narrow manner—at least when compared to the "broad purposes" rationale offered today. Even in the extreme view, the discrimination which the amendment proscribed was only that which the proprietors of a narrow class of franchised institutions, better described as public utilities,[221] sought to assert against citizens. Indeed, even the extremists resisted Sumner's effort to extend his bill's coverage to private corporations. Senator Boreman took the view that the application of the bill to private corporations, even though incorporated under state law, would be an unconstitutional infringement of rights of private property owners. And Senator Conkling, who also had voted for the fourteenth amendment, indicated his concurrence with Boreman.

But the majority of the radical Republicans could not accept even this interpretation of the fourteenth amendment, but rather took the narrower view of congressional authority under the amendment that Congress could only intervene to ensure that rights conferred by a state on its white citizens were also granted by individuals to all citizens, including Negroes.

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220. Numerous complaints appeared throughout the debates that the common-law remedy was of no avail because Negroes could not get equal or effective justice in state courts. See, *e.g.*, 2 CONG. REC. 427, 457, 4081-82, 4785-86 (1874); 3 CONG. REC. 940, App. 15 (1875).

221. See Avins, *Anti-Discrimination Legislation in Housing: A Denial of Freedom of Choice*, in OPEN OCCUPANCY VS. FORCED HOUSING UNDER THE FOURTEENTH AMENDMENT 3, 8-10 (Avins ed. 1963).

Thus, in light of the foregoing, the modern notion that the Civil Rights Act of 1875 lends support to the proposition that discrimination by private business owners or private property owners is or can be banned under the fourteenth amendment is utterly untenable. Nor can one accept the view that the Radicals deemed Negroes to be the special pets of the law, entitled to any greater protection against discrimination than white persons. Indeed, it seems clear that the Radicals would not have banned racial discrimination in any business in which other arbitrary discrimination was legally permissible. Far from being an affirmation of the equal protection required by the fourteenth amendment, such special legislation for Negroes would have been a denial of equal protection to white persons who could have been rejected on non-racial grounds.[222] Thus, a century after the fourteenth amendment was proposed, we have come full circle, from the time when Sumner decried discrimination based on color of skin because it was as arbitrary as discrimination based on color of hair,[223] to the time when so gross a perversion of the fourteenth amendment is permitted that discrimination based on the color of hair is permissible but discrimination based on skin color is not.[224]

The principles of the fourteenth amendment remain the same today as they were 100 years ago, even though airplanes have replaced sailboats, taxi cabs have replaced horse-and-buggy cabs, and busses have replaced horse-drawn streetcars. Congress cannot regulate intrastate business under the fourteenth amendment. But if a state gives a monopoly or quasi-monopoly franchise to any business, and requires in return that all white persons be served without arbitrary discrimination, then the amendment gives the benefit of the same rule to Negroes and requires that the business not arbitrarily discriminate against Negroes.

Conversely, if the business has a legal right to arbitrarily exclude a white man it may arbitrarily exclude a Negro.

For example, if a white person had no legal right to prevent discrimination against him by a restaurant owner because he was sporting a beard, had voted the Republican ticket, or was a local John Birch Society leader, then the fourteenth amendment does not prohibit the restaurant owner from arbitrarily excluding Negroes simply because of their race. If a taxi driver, even though licensed, has, under state law, the right to leave a white man who has called him standing in the rain, for any reason whatsoever, then he may also leave a Negro standing in the rain. That the taxi-driver may have a monopoly or quasi-monopoly justifies state regulation under the due process

222. Thus, the oft-cited dictum of Mr. Justice Frankfurter in Railway Mail Ass'n v. Corsi, 326 U.S. 88, 98 (1945) (concurring opinion) is historically inaccurate.

223. CONG. GLOBE, 40th Cong., 2d Sess. 3026 (1868); CONG. GLOBE, 40th Cong., 3d Sess. 902 (1869).

224. See Martin v. City of New York, 22 Misc. 2d 389, 201 N.Y.S.2d 111 (1960); Gegner v. Graham, 1 Ohio App. 2d 442, 205 N.E.2d 69 (1964), *appeal dismissed*, 1 Ohio St. 2d 108, 205 N.E.2d 72 (1965).

clause of the fourteenth amendment,[225] but does not require it under the equal protection clause. A state may withhold legal protection from everybody; but the inconvenience to the majority of the people of such a withholding of protection is the deterrent which protects the minority. The refusal by a state legislature to extend a common-law rule requiring service to all, or even abolition of a pre-existing rule in a monopoly business, therefore, does not violate the equal protection clause, and Congress cannot interfere, regardless of the motive behind the move. It is only when a state by statutory or common-law rule gives a legal remedy against a business for arbitrarily refusing service to a white person that it must equally give such a remedy to a Negro. This—and no more—is the requirement of the fourteenth amendment.

225. Munn v. Illinois, 94 U.S. 113 (1877).

Federal Power To Punish Individual Crimes Under the Fourteenth Amendment: the Original Understanding

(By Alfred Avins)

The recent companion cases of *United States* v. *Guest*[1] and *United States* v. *Price*[2] have raised the question of what power Congress has to punish crimes committed by one individual against another. This question has been of considerable public interest as a result of the murders of several northern "civil rights" workers in southern states which have gone unsolved, and other acts of violence in recent years which, to a greater or lesser extent, have been traceable to racial tensions.

In the *Price* case, a unanimous United States Supreme Court held that private parties who conspired with public officials to murder three persons were equally acting under color of law with the officials in depriving the dead persons of life and liberty without due process of law in violation of the Fourteenth Amendment, and hence could be punished by federal law enacted to enforce that amendment. In the *Guest* case, on the other hand, there were four different opinions, some of which found a rather tenuous "state action" basis while others deemed it unnecessary. However, *obiter dicta* in the opinions of at least six justices appears to indicate that, to some extent at least, the majority has obliterated the "state action" requirement of the Fourteenth Amendment for the permissible exercise of congressional power, by holding that private conspiracies or violence designed to deter Negroes from exercising alleged Fourteenth Amendment rights may be punished by federal legislation enacted pursuant to Section Five of that amendment as an enforcement of the Equal Protection Clause. It is noteworthy that, unlike several recent cases which have largely ignored legislative history in construing the Fourteenth Amendment,[3] the opinions in the *Guest* and *Price* cases accept the relevancy of original understanding by the Congress, and the latter appends a copious quotation from the remarks of one of the reconstruction senators. Since the Court itself has accepted the hypothesis that the original understanding of the framers is controlling, an inquiry as to what that understanding was conforms strictly with the Court's own premises.

The purpose of this article is to examine the original understanding of the framers and to determine whether these cases, and particularly the *Guest* case, accurately reflects that understanding insofar as it holds that the federal government may punish crime pursuant to the Fourteenth Amendment, even though that crime has not been committed under state authority.

2. The Fourteenth Amendment Debates

The Equal Protection Clause has its genesis in the celebrated Hoar incident of *ante-bellum* days. As a result of a conspiracy to incite an insurrection of slaves, South Carolina pased a law which forbade freed Negroes, who were looked on as natural leaders of slave revolts, from entering the state, and required the imprisonment of Negro sailors on ships entering its ports.[4] In November, 1844, former Representative Samuel Hoar, a leading Massachusetts lawyer, was sent by that state's officials to South Carolina to test the constitutionality of the law in the federal courts. His arrival caused great public excitement, and he was threatened with personal violence. The state authorities refused, or expressed the inability to protect Hoar against mob violence, and on December 5, 1844, the South Carolina legislature passed a resolution expelling him from the state. He was therefore forced to leave without bringing his suit.[5] The incident caused great indignation in the North, and constituted a constant subject of reproach by northern members of the Congress against the South.[6] Representative John A. Bingham, the Radical Republican lawyer from Ohio who drafted the first section of the Fourteenth Amendment, gave as one of the reasons for introducing his amendment that the guarantee of privileges and immunities in Article 4, Section

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[1] 86 Sup. Ct. 1170 (1966).
[2] 86 Sup. Ct. 1152 (1966).
[3] See, e.g., Harper v. Virginia State Board of Elections, 86 Sup. Ct. 1079 (1966).
[4] See Cong. Globe, 31st Cong., 1st Sess., app. 1675 (1850). Congressional Globes will hereinafter be cited by congress, session, page, and year, viz.: 31 (1) Globe app. 1675 (1850).
[5] 13 Encyclopaedia Britannica 542 (11th ed. 1910); Biographical Directory of the American Congress, 1774–1927, p. 1103 (1928).
[6] See, e.g., 30 (2) Globe 418–19 (1849); 31 (1) Globe app. 123–24, app. 288–29, 1663 (1850); 33 (1) Globe 1154–55, app. 575, 1012–13, 1556 (1854); 34 (1) Globe 1598 (1856).

2 of the original Constitution "was utterly disregarded in the past by South Carolina when she drove with indignity and contempt and scorn from her limits the honored representative of Massachsettts, who went thither upon the peaceful mission of asserting in the tribunals of South Carolina the rights of American citizens." [7]

The brief for the Justice Department in the *Guest* case asserted that the Thirty-Ninth Congress which proposed the Fourteenth Amendment had before it testimony of various persons about private as well as official persecution of white southern unionists, northerners in the South, and Negroes.[8] The brief therefore concluded that the "inference is compelling that not only the Joint Committee, but Congress as a whole, and also the ratifying legislatures, regarded the Fourteenth Amendment as empowering Congress to deal effectively with the atrocities depicted in the testimony." [9] Apparently, the majority of the Supreme Court agreed with the Justice Department that this meant that Congress would be empowered to deal directly with private individuals committing crimes against other persons, without state sanction. The historical evidence does not, however, sustain this point of view.

It is true that evidence of crime in the South, of a political or racial nature, was widespread, in part brought on by disorganization and virtual anarchy consequent on the termination of the Civil War and the resulting collapse of economic and political institutions. The Justice Department's brief has cited testimony before the Joint Committee on Reconstruction [10] and the Schurz report,[11] both of which were widely circulated. Although much of this material was hearsay, nevertheless the Republicans in Congress believed, or professed to believe it, and the material is therefore of value in construing congressional intent.[12]

In addition, there were a considerable number of references on the floor of Congress to crime in the South. Even before the termination of the war, Representative William D. Kelley, a Radical Republican lawyer from Pennsylvania, warned the House that the southern state governments, if left on their own, would do nothing to protect the white loyalists or Negroes from private violence.[13] Senator Henry Wilson, a Massachusetts Republican, attacked murders and outrages being committed on freedmen to enforce the "black codes," while even Senator Reverdy Johnson, a Maryland Democrat and former Attorney-General of the United States, admitted "to a certain extent [the report] is true. . . ." [14] Representative Thomas D. Eliot, a Massachusetts Republican, said that houses were being burned and freedmen murdered in Mississippi.[15] Senator Lyman Trumbull, Chairman of the Senate Judiciary Committee and a former state supreme court justice of Illinois, who was virtual leader of the Senate Republicans in matters relating to reconstruction, read dispatches that murder of unionists and Negroes were imminent in the South, and asserted that "the negro really has no protection afforded him either by the civil authorities or judicial tribunals of the State." [16] Wilson added that these murders were going unpunished.[17] Representative Sidney Perham, a Maine Republican, cited the Schurz Report, and asserted that all the reports from the South indicated that loyalists, both white and colored, were being "murdered in cold blood," and that northerners and federal officers were being intimidated by threats of violence and murdered. He added that these murders were going unpunished, and that in Kentucky the state courts, instead of protecting unionists, were persecuting them at the instance of rebels.[18]

Towards the end of the session, Representative William Windom, a Minnesota Republican, made reference to southerners' "violent efforts to drive out the few Union people who remain among them; their murders of Unionists, and

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[7] 39 (1) Globe 158 (1866).
[8] Brief for appellant, pp. 35–36, in United States v. Guest, *supra*, n. 1.
[9] *Id.* at 37.
[10] *Id.* at 36.
[11] S. Ex. Doc. No. 2, 39th Cong., 1st Sess. (1865).
[12] But see the doubts expressed by Representative Henry J. Raymond, editor of the New York Times in 39 (1) Globe 40 (1866).
[13] 38 (2) Globe 289 (1865).
[14] 39 (1) Globe 40 (1866).
[15] *Id.* at 517.
[16] *Id.* at 941.
[17] *Id.* at app. 140. To the same effect, see 39 (2) Globe 103–04 (1866).
[18] 39 (1) Globe 2082–83 (1866).

destruction of their dwellings, schoolhouses, and churches. . . ."[19] Representative George W. Julian, a Radical Republican from Indiana, declared:

"A feeling scarcely less intolerant is evinced toward the few loyal white men in these States, who in many localities are living in constant dread of violence and murder, and are frequently waylaid and shot. Quite recently I have received a letter from a gentleman of intelligence and worth in one of the Southern States, in which he says that he and his friends and neighbors, who have been hunted in the mountains like deer all through the war because they refused to take up arms against their country, having had their houses plundered or burned, their property destroyed, and themselves reduced to beggary, are still living in constant dread of assassination; and he begs me, if possible, to procure for them from the Secretary of War transportation to the North."[20]

Somewhat later, Senator Oliver P. Morton, an Indiana Republican, stated:

"* * * so far from answering the purpose for which governments are intended, they [the southern Johnson governments] failed to extend protection to the loyal men, either white or black. The loyal men were murdered with impunity; and I will thank any Senator upon this floor to point to a single case in any of the rebel States where a rebel has been tried and brought to punishment by the civil authority for the murder of a Union man. Not one case, I am told, can be found."[21]

Instances of murder and assault against freedmen, and the burning of schoolhouses and other buildings which they were using, was given by the House Committee on Freedmen's Affairs as one of the reasons for prolonging the life of the Freedmen's Bureau.[22] The Joint Committee on Reconstruction, which proposed the Fourteenth Amendment, justified it, *inter alia*, because of the acts of cruelty, oppression, and murder [of freedmen], which the local authorities are at no pains to prevent or punish,"[23] and because of the persecution of southern white loyalists.[24]

The Department of Justice was therefore correct in asserting, and the Supreme Court was not in error in accepting, the proposition that the Fourteenth Amendment was framed to add a measure of protection to persons who would become the victim of crime. The Department's error and the Court's misapprehension, lies in misconceiving what remedy was provided by the Thirty-Ninth Congress in that amendment under the Equal Protection Clause. This point will now be examined.

3. THE DRAFTS OF THE FOURTEENTH AMENDMENT

On February 26, 1866, Bingham reported, for the Joint Committee on Reconstruction, a proposed constitutional amendment which, in altered form, was later to become all of the first section of the Fourteenth Amendment except for the declaration as to citizenship. This proposal stated:

"The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States, equal protection in the rights of life, liberty, and property."[25]

Bingham pointed out that this proposal was simply an amalgam of the Privileges and Immunities Clause contained in Article 4, Section 2, and the Fifth Amendment, coupled with a grant of power to Congress to enforce them. Bingham added that while these obligations already rested on the states, state officers had habitually disregarded them.[26]

About seven weeks earlier, Bingham had protested that northern anti-slavery men were unsafe if they went South.[27] He demanded security from the South for the future. He said that the guarantees of the existing Privileges and Immunities Clause were not enforced, and were disregarded. He added:

"I propose, with the help of this Congress and of the American people, that hereafter there shall not be any disregard of that essential guarantee of your Constitution in any State of the Union. And how? By simply adding an amendment to the Constitution to operate on all the States of this Union alike, giving

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[19] *Id.* at 3170.
[20] *Id.* at 3210. See also *id.* at app. 296 (Rep. Shellabarger).
[21] 40 (2) Globe 725 (1868).
[22] H.R. Rep. No. 30, 40th Cong., 2d Sess. 5, 26–29 (1868).
[23] S. Rep. No. 112, 39th Cong., 1st Sess. 11–12 (1866).
[24] 39 (1) Globe 1034 (1866).
[25] *Ibid.*
[26] *Id.* at 157.

to Congress the power to pass all laws necessary and proper to secure to all persons—which includes every citizen of every State—their equal personal rights; and if the tribunals of South Carolina will not respect the rights of the citizens of Massachusetts under the Constitution of their common country, I desire to see the Federal judiciary clothed with the power to take cognizance of the question, and assert those rights by solemn judgment, inflicting upon the offenders such penalties as will compel a decent respect for this guarantee to all the citizens of every state." [27]

Bingham's amendment was immediately attacked for giving Congress excessive power.[28] Representative Andrew J. Rogers, a New Jersey Democrat and a minority member of the Joint Committee on Reconstruction, attacked it for centralizing the government.[29]

The longest attack came from Representative Robert S. Hale, an ex-judge and New York Republican. Hale asserted that the proposal gave Congress power to supplant state civil and criminal codes. He rejected the suggestion of Representative Thaddeus Stevens that the provisions only gave Congress the right to interfere when state laws were unequal, and asserted that Congress would directly be able to assure protection to one individual against acts of another individual.[30] Hale attacked the amendment for centralizing power in the hands of the federal government.[31]

Representative Thomas T. Davis, a New York Republican, echoed Hale's fears. He objected that the proposed amendment "is a grant for original legislation by Congress." [32] Still a third New York Republican lawyer, Representative Giles W. Hotchkiss, asserted in opposition to the proposal that it gave Congress power to establish uniform laws for the protection of life, liberty, and property. Hotchkiss stated that he would be glad to support an amendment prohibiting state discrimination, but he opposed the Bingham draft because he, too, did not want Congress to have any such direct power. Representative Roscoe Conkling, a New York Republican lawyer who was a member of the Joint Committee on Reconstruction, likewise opposed the proposal as being too radical.[33]

The view that the Bingham proposal gave Congress direct power to legislate so as to punish individual crimes and conspiracies is supported by a statement of one of its supporters who was not a lawyer. The following colloquy occurred between Representative Hiram Price, an Iowa Regublican ,and Representative Edwin Wright, a New Jersey Democrat, which shows clearly that in Price's view the equal protection portion of the Bingham proposal would have given Congress power to punish violence directed at preventing persons from exercising their federal constitutional rights:

"Mr. PRICE. * * * I have learned within the last two weeks from a man who went from the state of Illinois into the State of Mississippi with seven companions, making eight in all, to work in a machine shop, and that there came back only six of them, the other two having been murdered between the shop and their boarding house. * * *

"Mr. WRIGHT. I rise to a question of order. I insist that the gentleman must confine himself to the subject under discussion. We are not trying murder cases.

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"Mr. PRICE. I say, sir, that the intention of the resolution before the House is to give the same rights, privileges, and protection to the citizen of one State going into another that a citizen of that State would have who had lived there for years.

"The SPEAKER. That is clearly in order. * * * The Chair sustains the gentleman from Iowa, as his remarks are clearly in order.

"Mr. PRICE. * * * Now, sir, if that is the intention of the resolution, if it is designed to protect a citizen of Pennsylvania, New York, Iowa, or any other free State in going into a southern State * * * then I am most decidedly in favor of it. * * *" [34]

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[27] *Id.* at 168.
[28] See, generally, Tansill, Avins, Crutchfield and Colegrove, *The Fourteenth Amendment and Real Property Rights*, in *Open Occupancy vs. Forced Housing Under the Fourteenth Amendment*, 68, 77–80 (Avins ed. 1963).
[29] 39 (1) Globe app. 183 (1866).
[30] *Id.* at 1063–64.
[31] *Id.* at 1065.
[32] *Id.* at 1087.
[33] *Id.* at 1095.
[34] *Id.* at 1066.

In urging his amendment, Bingham declared that although the federal government could protect American citizens abroad, it was powerless to protect them at home.[35] Instead, "citizens must rely upon the State for their protection." [36] However, Bingham did not assert any desire to punish individual crimes directed at preventing the exercise of constitutional rights. Quite the contrary, through the maze of his high-flown rhetoric runs the aim of punishing state officials who refuse to protect citizens, rather than punishing private individuals. For example, Bingham asked how a penal prohibition of state denial of equal protection could impair states' rights if all persons were entitled to such protection. He also added that federal courts did not have authority to redress denial of equal protection "which is being practiced now in more States than one of the Union under the authority of State laws * * *." [37] Bingham asserted that without his proposal the state legislatures might break their oaths to support the Constitution and pass unconstitutional acts, as they had done in the past. He said:

"The question is, simply, whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of States for violation of the oaths enjoined upon them by their Constitution? That is the question and the whole question. * * * if they [state legislatures] conspire together to enact laws refusing equal protection to life, liberty, or property, the Congress is thereby vested with power to hold them to answer before the bar of the national courts for the violation of their oaths and of the rights of their fellowmen." [38]

Bingham protested that if southerners regained control of their state governments they would pass laws of banishment and confiscation and imprisonment and murder which prevailed in the South during the Civil War. He observed that there was "no law anywhere upon our statute-books to punish penally any state officer for denying in any State to any citizen of the United States protection in the rights of life, liberty, and property." [39] He added: "where is the express power to define and punish crimes committed in any State by its official officers in violation of the rights of citizens and persons as declared in the Constitution?" [40] The following colloquy then occurred:

"Mr. HALE. I desire * * * to ask him, as an able constitutional lawyer, * * * whether in his opinion this proposed amendment to the Constitution does not confer upon Congress a general power of legislation for the purpose of securing to all persons in the several States protection of life, liberty, and property, subject only to the qualification that that protection shall be equal.

"Mr. BINGHAM. I believe it does in regard to life and liberty and property as I have heretofore stated it; * * *

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"Mr. HALE. The gentleman misapprehends my point, or else I misapprehend his answer. My question was whether this provision, if adopted, confers upon Congress general powers of legislation in regard to the protection of life, liberty, and personal property.

"Mr. BINGHAM. It certainly does this: it confers upon Congress power to see to it that the protection given by the laws of the States shall be equal in respect to life and liberty and property to all persons." [41]

At the instance of the Republican House leadership, the Bingham proposal was indefinitely postponed.[42] It was never reintroduced, but rather it was redrafted into the form of the present amendment. Representative James A. Garfield, the Ohio Republican lawyer who later became President, observed several years later that the Bingham draft first introduced was postponed at the instance of the House leadership because "it became perfectly evident * * * that the measure could not command a two-thirds vote of Congress, and for that reason the proposition was virtually withdrawn." Garfield further pointed out:

"Now, let it be remembered that the proposed amendment was a plain, unambiguous proposition to empower Congress to legislate directly upon the citizens of all the States in regard to their rights of life, liberty, and property. * * *

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[35] *Id.* at 1090.
[36] *Id.* at 1093.
[37] *Id.* at 1089.
[38] *Id.* at 1090.
[39] *Id.* at 1093.
[40] *Ibid.*
[41] *Id.* at 1094.
[42] *Ibid.* (Rep. Conkling), *id.* at 1095.

After a debate of two weeks * * * it became evident that many leading Republicans of this House would not consent to so radical a change in the Constitution, and the bill was recommitted to the joint select committee." [43]

When the revised version of the first section of the Fourteenth Amendment was reported out, Representative Thaddeus Stevens, leader of the House Radical Republicans, observed that this section "allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all." [44] Bingham, too, referred to the first section as giving Congress the power to protect citizens against unconstitutional state legislation.[45] Senator Jacob Howard, a Michigan Republican lawyer, reporting the same provision to the Senate on behalf of the Joint Committee on Reconstruction, also noted that the Equal Protection Clause was directed at abolishing "all class legislation," and that the fifth section of the amendment was designed to give Congress the power to carry out the guarantees of the first section.[46] Senator Luke Poland, a Vermont Republican, and a former chief justice of that state's supreme court, speaking in favor of the revised and final version of the first section, likewise noted that it was designed to "uproot and destroy all * * * partial State legislation" just as the previously passed civil rights bill was intended to do.[47] Senator Timothy Howe, a Wisconsin Radical Republican and a former state supreme court justice, in supporting the amendment, also urged that it would correct unjust legislation.[48] Senator John Henderson, a Missouri Republican, referred to the "provision securing equal protection of the laws against inimical State legislation." [49]

It is evident from the foregoing that the original intention of the framers was only to permit Congress to enact laws which affected the activities of state officials. The question may be asked, how was this expected to cure the private violence which Congress was concerned about in the South? The answer lies in an analysis of the Civil Rights Bill, the substantive principles of which the first section of the Fourteenth Amendment was designed to incorporate.[50] In introducing the bill, Senator Lyman Trumbull of Illinois, Republican Chairman of the Senate Judiciary Committee, observed that his bill would not apply in states which had equal laws.[51] Indeed, the second section, which was the penal enforcement provision, required that to be penalized the person depriving Negroes of their rights would have to be acting under color of law.[52] Senator Garrett Davis, a Kentucky Democrat, opposed the bill because state judges and officers could be punished for executing state constitutions and laws.[53] Trumbull replied that since Negroes had been freed under the Thirteenth Amendment, they were citizens and hence entitled to the privileges and immunities given citizens by Article 4, Section 2 of the original Constitution.[54] He therefore explained that state judges and other officials who refused Negroes the protection of the laws should be punished for not doing their duty under the constitution. But he added:

"These words 'under color of law' were inserted as words of limitation, and not for the purpose of punishing persons who would not have been subject to punishment under the act if they had been omitted. If an offense is committed against a colored person simply because he is colored, in a State where the law affords him the same protection as if he were white, this act neither has nor was intended to have anything to do with his case, because he has adequate remedies in the State courts; but if he is discriminated against under color of State laws because he is colored, then it becomes necessary to interfere for his protection." [55]

In the House, Representative William Lawrence, an Ohio Republican and a former state judge, made the same observation. He pointed out that there were two ways in which a state could deprive citizens of their rights, either by pass-

[43] 42 (1) Globe app. 151 (1871).
[44] 39 (1) Globe 2459 (1866).
[45] *Id.* at 2542.
[46] *Id.* at 2766.
[47] *Id.* at 2961.
[48] *Id.* at app. 219.
[49] *Id.* at 3035.
[50] See Tansill et al, *op. cit. supra*, n. 28 at 81.
[51] 39 (1) Globe 476 (1866).
[52] *Id.* at 475.
[53] *Id.* at 598.
[54] *Id.* at 600.
[55] *Id.* at 1758.

ing prohibitory laws, or by "a failure to protect any one of them." Thus, if a state should enact laws for the protection of one group of citizens, and simply omit to pass a law for the protection of others, this would constitute a denial of equal protection granted by the laws.[56] Lawrence further noted that the bill did not undertake to punish individual crimes against citizens respecting their life, liberty, or property, but rather constituted an enforcement of the Privileges and Immunities Clause of Article 4, Section 2 of the Constitution. Lawrence decried "States [which] should authorize such offenses [against life, liberty, or property], or deny to a class of citizens all protection against them. * * *"[57] He approved the punishment of state officers guilty of doing this.[58]

The following colloquy between Representative James Wilson, an Iowa Republican lawyer and Chairman of the House Judiciary Committee, who was in charge of the Civil Rights Bill, and Representative Benjamin F. Loan, a Missouri Republican lawyer, illustrates this point clearly:

"Mr. LOAN. Mr. Speaker, I desire to ask the chairman who reported this bill, why the committee limit the provisions of the second section to those who act under color of law. Why not let them apply to the whole community where the acts are committed?

"Mr. WILSON. That grows out of the fact that there is discrimination in reference to civil rights under the local laws of the States. Therefore we provide that the persons who under the color of these local laws should do these things shall be liable to this punishment.

"Mr. LOAN. What penalty is imposed upon others than officers who inflict these wrongs on the citizen?

"Mr. WILSON. We are not making a general criminal code for the States.

"Mr. LOAN. Why not abrogate those laws instead of inflicting penalties upon officers who execute writs under them?

"Mr. WILSON. A law without a sanction is of very little force.

"Mr. LOAN. Then why not put it in the bill directly?

"Mr. WILSON. That is what we are trying to do."[59]

Even though Bingham opposed the Civil Rights Bill for other reasons, his views were exactly the same on this point. He never contemplated punishing private individuals for private crimes. He said:

"* * * the care of the property, liberty, and the life of the citizen, under the solemn sanction of an oath imposed by your Federal Constitution, is in the States, and not in the Federal Government. I have sought to effect no change in that respect in the Constitution of the country. I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations by State officers of the bill of rights. * * * Standing upon this position, I may borrow the words * * * as truly descriptive of the American system: 'centralized government, decentralized administration.' That, sir, * * * is the secret of your strength and power.

"I hold, sir, that our Constitution never conferred upon the Congress of the United States the power—sacred as life is, first as it is before all other rights which pertain to man on this side of the grave—to protect it in time of peace by the terrors of the penal code within organized States; and Congress has never attempted to do it. There never was a law upon the United States statute-book to punish the murderer for taking away in time of peace the life of the noblest, and the most unoffending as well, of your citizens, within the limits of any State of the Union. The protection of the citizen in that respect was left to the respective States, and there the power is today. What you cannot do by direction you cannot do by indirection."[60]

The conclusion from the foregoing material is not in doubt. The Thirty-Ninth Congress, in proposing the Fourteenth Amendment, never contemplated the punishment of private individuals not acting pursuant to state law for crimes committed against other individuals, regardless of the motive. Instead, such law enforcement activities were to be left to state officials, where they had traditionally reposed. The remedy that Congress did propose was that if state officials were derelict in their duty, imposed by the first section of the Fourteenth Amend-

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[56] *Id.* at 1833.
[57] *Id.* at 1835.
[58] *Id.* at 1837. He said: "And if an officer shall intentionally deprive a citizen of a right, knowing him to be entitled to it, then he is guilty of a wilful wrong which deserves punishment."
[59] *Id.* at 1120.
[60] *Id.* at 1292.

ment, to protect the lives, liberty, and property of all persons equally, then under the fifth section Congress could enforce the first section by punishing such state officials for their willful dereliction. Thus, the theory was that if state officials carried out their federally-imposed duty of protecting all persons equally, crimes against southern white unionists, northern travelers in the south, and Negroes would be prevented by these state officials exercising their traditional law enforcement powers. But in no event did the framers in the Thirty-Ninth Congress contemplate that private criminals could be punished by federal authority under the fifth section of the Fourteenth Amendment. The defeat of the original Bingham draft shows that Congress wanted to foreclose even the possibility that such a power might be derived from the proposed amendment.

4. THE FIRST ENFORCEMENT ACTS

In urging the position that Congress could reach private conspiracies which did not involve public officers, in the *Guest* case, the Justice Department relied heavily in its brief on Section 241 of the Criminal Code,[61] which was originally derived from Section 6 of the Enforcement Act of 1870.[62] The Department's brief quoted extensively from the remarks of Senator John Pool of North Carolina, which, as previously noted, the Court appended to its opinion in the *Price* case.[63] The Department noted that:

"The most compelling evidence of the intent of the framers of the Fourteenth Amendment is, of course, to be found in the reports and debates of the Thirty-Ninth Congress which drafted the Amendment and proposed it to the States. But, unfortunately, those materials contain nothing really conclusive on the point at issue here." [64]

As shown above, this premise is highly dubious, depending, of course, on what one deems to be "really conclusive." The Department's brief then proceeds to assert that the Enforcement Act of May 31, 1870, which was involved in the *Guest* case, constituted a contemporaneous construction of the Fourteenth Amendment and the similarly worded Fifteenth Amendment, since many of the senators and representatives who voted for these amendments likewise voted for the statutes enforcing them. The brief accordingly concluded that these amendments were believed by such members of Congress to allow it to punish private violence not engaged in by state officials.[65] This line of reasoning contains several flaws.

The first of these flaws is the assumption that the dominant Radical Republicans were fastidious about constitutional niceties during reconstruction so that their legislation in fact represented true contemporaneous construction of the relevant constitutional provisions. We have on record the very frank confession of Representative John F. Farnsworth, an Illinois Republican lawyer who supported these amendments, and who was an experienced representative and prominent union general, that the contrary was in fact the case. Farnsworth said:

"* * * that I had given votes and done things during my twelve years' service in the House of Representatives which I cannot defend, I have no doubt * * *. I know we have done things during the war and during the process of reconstruction to save the Republic which could not be defended if done in peace. We were obliged to do some things * * * which will scarcely bear the test of the calm light of peace and constitutional law. We passed laws, Mr. Speaker, and the country knows it, which we did not like to let go to the Supreme Court for adjudication. And I am telling no tales out of school. * * *

"Sir, we have done some things under the necessity of the case, and under the war powers, and I am ready to do them again to save the nation's life, which may be a little beyond the verge of the constitutional power possessed by Congress in time of peace." [66]

In regard to the Enforcement Act itself, some remarks of Senator Jacob Howard of Michigan point in the same direction. Howard started out by observing that he had been dissatisfied with the Fifteenth Amendment while it was on its passage, and had offered a different version not limited to inhibiting state

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[61] 81 U.S.C. § 241.
[62] 16 Stat. 140, ch. 114 (1870).
[63] Brief for appellant in United States v. Guest, 86 Sup. Ct. 1170 (1966), at pp. 14–15.
[64] *Id.* at 33–34.
[65] *Id.* at 37–40.
[66] 42 (1) Globe app. 116 (1871). Bingham himself admitted engaging in unconstitutional hanky-panky in 1866. See 41 (2) Globe 1747 (1870).

or federal action.[67] Indeed, he had been a carping critic of the amendment's phraseology.[68] Howard observed that the amendment as passed inhibited only state and federal legislation, saying:

"It is a prohibition upon the two Governments, the Federal and the State Government, by which they are respectively disabled from passing any act by which this evil shall be created or encouraged. It does not, in terms, relate to the conduct of mere individuals, and a very 'strict construction' court of justice might, as I can well conceive, refuse to apply the real principles of the amendment to the case of individuals who themselves, as mere individuals, and not as authorized by Governments or Government officers, should undertake to deny or prevent a colored man the exercise of his right of suffrage; and I have some fear, I confess, that owing to the peculiar phraseology of this amendment some courts may give it that strict, and in my judgment, narrow construction." [69]

Howard proceeded to assert that Congress intended a broader purpose than the strict language of the amendment relating to federal or state discriminatory legislation. He said that it intended to assure Negroes the opportunity to vote. But he hesitated to say what the United States Supreme Court would construe the amendment to mean, and expressed the fear that the state courts would give it a "narrow construction" which would exclude the punishment of individuals for preventing Negroes from voting, "which was the great object we had in view in proposing this amendment. * * *" Howard protested against such a construction as being out of harmony with the advocates of the amendment, and because it would largely deprive Negroes of remedies "which was in the minds of its authors when it was under discussion in these Chambers." [70]

What was in the minds of the framers of the Fifteenth Amendment nobody knows, but what was in their speeches is a matter of record. The dominant Republicans, especially in the Senate, presented the apex of discord to the country, and the compromise conference report finally hammered out was the subject of keen disappointment.[71] But in the proposals, counterproposals, objections, cross-objections, disputes and solutions, which filled a large portion of the Congressional Globe for the third session of the Fortieth Congress, scarcely a word can be found indicating that anyone was interested in private individuals preventing Negroes from voting. There were too many other priority objections to the various drafts of the amendment. There were long discussions about uprooting state laws and constitutions wholesale,[72] but none about private conduct. If Congress was after the latter problem it was the best kept secret in the country, and its final product was a peculiarly poor job of legislative drafting.

The only possible conclusion is that everybody overlooked the problem of private violence. This is hardly surprising. Considering the confusion and haste which surrounded the amendment's proposal, it is very believable that Congress in the rush overlooked the matter entirely. This frequently occurs when legislation is enacted under time pressure. It is possible that had the question of private violence to prevent Negro voting been brought up in 1869 when the Fifteenth Amendment was upon its passage the draft would have been broadened to give the Congress the power to forbid such violence, although it is also possible that Howard would have found himself in the minority on this issue as he did in respect to other matters. Such a possibility is fortified by the rejection of the first Bingham draft of the first section of the Fourteenth Amendment. But in any event, whatever may have been in the minds of Howard and others in Congress regarding private violence to bar voting, none of it got into their speeches or into the Fifteenth Amendment itself. If the spirit exhibited in Howard's *ex post facto* self-serving declaration pervaded the Enforcement Act of 1870, the statute may be safely disregarded as a contemporaneous construction of either the Fourteenth or the Fifteenth Amendment.

The remarks of Senator Pool, upon which the Justice Department's brief so heavily relied, are also instructive. Pool was one of the two Republicans to vote against the Fifteenth Amendment,[73] and was not a member of Congress in 1866 when the Fourteenth Amendment was proposed. He observed:

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[67] 41 (2) Globe 3654–55 (1870).
[68] See Avins, *The Fifteenth Amendment and Literacy Tests: The Original Intent*, 18 Stanford L. Rev. 808, 813–14, 817–18, 820 (1966).
[69] 41 (2) Globe 3655 (1870).
[70] *Ibid.*
[71] See Avins, *op. cit. supra*, n. 68, *passim*.
[72] See, e.g., 40 (3) Globe 1036–37, 1039–40, 1427 (1869).
[73] *Id.* at 1041.

"* * * These Kuklux. * * * mean to render invalid and inefficient in its operation the provisions of the fifteenth amendment; but it is done in an indirect way. * * * I have not the fifteenth amendment before me, but I think it provides that no *State* shall debar a man from the right to vote because of his race, color, or previous condition. Standing at the ballot-box and keeping colored men away by force would hardly be a violation of the laws of the Union. They have not done that; that is not the purpose; the purpose is terrorism and intimidation and thus to prevent the exercise of the right to vote." (Emphasis in original.) [74]

In spite of this clear recognition that the Fifteenth Amendment limited only state action, about one month later Senator Pool proposed provisions purporting to enforce that amendment which punished private individuals who interfered with the right to vote, along with a broader provision which became the sixth section of the Enforcement Act and which punished private conspiracies to intimidate citizens in the exercise of their constitutional rights.[75] On the surface, at least, it once again appears that Congress was more concerned with securing the Negro vote for the Republican Party in the South[76] than in the constitutional limitations of the amendments it was purporting to enforce. In an age of notoriously low political morality one can well credit Representative Farnsworth's confession. There is thus good reason to discredit completely the Justice Department's theory of contemporaneous construction.

However, it would still be instructive to examine the debates on the Enforcement Act, taking them at face value, to see to what extent they actually did reflect the theory of the framers of the Fourteenth Amendment. On April 15, 1870, while the readmission of Georgia was under consideration, Senator Pool made a long speech about the activities of the Ku Klux Klan, which was very active in his home state of North Carolina. Pool commenced by admitting that crime was committed all over the country, and asserted that his state was freer of ordinary crimes of violence than most other areas. He added that as a practicing lawyer, he was able to state that ordinary crimes were efficiently punished. But Pool observed that political murders committed by the Ku Klux Klan were not punished because state officials were unable or unwilling to ferret out and punish the offenders. He concluded:

"If by acts of commission or omission a State will not protect its citizens, then the United States is bound to protect life and property when a case is made for its interference." [77]

Pool then observed that the purpose of the crimes committed by the Klan was to deter Negroes from voting or to force them to vote the Democratic ticket. He added that the local law enforcement officers do nothing to stop these political crimes, and indeed, asserted that the local sheriffs and their deputies were "winking at their proceedings." Pool added that the grand juries and petit juries were stacked with Klansmen, so that "there is no protection from the law." He declared that the large majority of the southern whites were opposed to the congressional reconstruction policy and to the Fifteenth Amendment and were determined to thwart it by violence.[78] He concluded that southern colored Republicans received no protection in life or property from law enforcement agencies of the state.[79]

Pool returned to the same point right before introducing his proposal in speeches quoted in the Justice Department's brief[80] and as an appendix to the *Price* opinion. On May 19, 1870, after adverting to his prior speech, Pool asserted that a state might not only "deny" to Negroes the right to vote by enacting positive legislation prohibiting it, but "by acts of omission it may practically deny the right." Pool added:

"The legislation of Congress must be to supply acts of omissions on the part of the States. If a State shall not enforce its laws by which private individuals shall be prevented by force from contravening the rights of the citizen under the amendment, it is in my judgment the duty of the United States Government

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[74] 41 (2) Globe 2722 (1870).
[75] *Id.* at 3612.
[76] Negro votes provide the margin of victory for President Grant's reelection in 1872: see 43 (1) Record 1314 (1873) (Rep. Ransier).
[77] 41 (2) Globe 2718 (1870).
[78] *Id.* at 2718–19.
[79] *Id.* at 2722.
[80] Brief, *op. cit. supra*, n. 63 at 14–15.

to supply that omission, and by its own laws and by its own courts to go into the States for the purpose of giving the amendment vitality there." [81]

Pool then observed that the word "deny" appears not only in the Fifteenth Amendment but in the Equal Protection Clause of the Fourteenth Amendment as well. He noted:

"It shall not deny by acts of omission, by a failure to prevent its own citizens from depriving by force any of their fellow-citizens of these rights. It is only when a State omits to carry into effect the provisions of the civil rights act, and to secure the citizens in their rights, that the provisions of the fifth section of the fourteenth amendment would be called into operation, which is, 'that Congress shall enforce by appropriate legislation the provisions of this article.'" [82]

Pool asserted that federal legislation could not prevent states from passing unconstitutional laws, and therefore it would have to penalize the individual citizen. He reasoned that if a state official is penalized under the federal law for violation of the constitutional rights of a person, "it operates upon him as a citizen, and not as an officer." Pool therefore concluded that Congress could just as well penalize a private citizen as a state officer in his private capacity.[83] Of course, this reasoning is exactly contrary to the original reasoning of the Civil Rights Bill and the Fourteenth Amendment. As previously noted, Bingham was interested in punishing state officers for violation of their oaths to support the Constitution. Necessarily, private citizens could not be punished since they took no such oath. Hence, a state officer who was indicated for violating a citizen's constitutional rights could be indicted as an officer, and not, as Pool thought, as a private person. Since Pool was not a member of the Thirty-Ninth Congress, his error is understandable.

Pool continued by discussing the need to penalize conspiracies to violate Fourteenth and Fifteenth Amendment rights.[84] He also advocated the trial of defendants in federal courts on the ground that state court juries were either friends of the defendants or intimidated by them. Returning to the constitutional point, he reiterated that since Congress could not legislate against the states, it would have to direct its legislation against individuals. Pool concluded:

"Mr. President, the liberty of a citizen of the United States, the prerogatives, the rights, and the immunities of American citizenship, should not be and cannot be safely left to the mere caprice of States either in the passage of laws or in the withholding of that protection which any emergency may require. If a State by omission neglects to give to every citizen within its borders * * * enjoyment of his rights it is the duty of the United States Government to go into the State, and by its strong arm to see that he does have the full and free enjoyment of those rights." [85]

Reading Pool's two speeches together, his meaning seems reasonably clear. He said that there was a state-wide conspiracy to deprive Republicans, especially if they were colored, of their right to vote, and that local law enforcement officers were collaborating with the conspiracy by not giving colored or other Republicans protection. Accordingly, the state officials were denying equal protection of the laws, in violation of the Fourteenth Amendment, a position which hardly seems disputable. Pool also observed that the word "deny" appeared in the Fifteenth Amendment, and might also cover state inaction in not affording requisite protection of facilities. This position, too, is quite plausible. Pool then asserted that the cure for such violations of the constitutional amendments by state officials was to substitute federal enforcement machinery which bore directly on the private criminals rather than on the negligent state officials, a position not sustainable by the legislative history of the Fourteenth Amendment, although plasible to a lawyer of the time, as will be noted more fully below. The position that a finding of a state denial of equal protection as a result of a state-wide conspiracy of law enforcement officials could be remedied by substituting federal prosecution for the inactive state machinery is a far cry from the *Guest* case opinions that the federal government could directly prosecute private conspiracies to violate federal rights by violence without an antecedent finding of state violation by wilful neglect to enforce equal protection. The fact

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[81] 41 (2) Globe 3611 (1870).
[82] *Ibid.*
[83] *Ibid.*
[84] *Id.* at 3611-12.
[85] *Id.* at 3613.

that the drafts of Pool's legislation did not mention this assumed antecedent is hardly surprising since it was common knowledge universally assumed.[86]

It might be noted in passing that the Justice Department's brief only mentioned the second of Pool's two speeches, and ignored the first one with which it was linked.[87] This may have caused confusion in the minds of some of the Supreme Court justices as to its true import.[88]

This point is reinforced by an examination of the other relevant debate. Senator George F. Edmunds, a Vermont Republican lawyer, pointed out that the real problem in the south was that local law enforcement agencies, namely sheriffs, judges, and jurors, did not want to enforce the law and extend equal protection in political cases.[89] Senator Timothy Howe, a Wisconsin Republican, noted that in Mississippi a white lawyer who killed a federal tax collector in cold blood for political reasons went unpunished because of community sentiment.[90] Senator William Stewart, a Nevada Republican lawyer who was in charge of the enforcement bill for the Judiciary Committee, approved of Pool's proposals to deal with Klan-inspired mob violence.[91]

Senator Oliver P. Morton, an Indiana Republican lawyer, observed that the Fifteenth Amendment left "completely under the control of the several States [the right] to punish violations of the right of suffrage * * *"[92] except as the Fifteenth Amendment took away state power to deny the right to vote on the grounds specified, and Edmunds agreed with him.[93] Senator William T. Hamilton, a Maryland Democratic lawyer, in speaking against the bill, noted that the Fourteenth and Fifteenth Amendments were phrased like Article I, Section 10 of the original Consttiution, as prohibitions against the states, and not like the Thirteenth Amendment or the Fugitive Slave Clause of Article 4, Section 2, which do not in terms address themselves to state action.[94] He added that private violation of the right to vote was not punishable by federal power.[95]

Senator Howard spoke in favor of enforcing the right to vote by federal instrumentalities since he considered it likely that southern governors would not interfere if Democratic mobs drove Negroes away from the polls.[96] Senator George H. Williams, an Oregon Republican, a former state judge, and later Attorney-General in President Grant's cabinet, objected to the bill "because it is indefinite and vague in all or nearly all of its provisions."[97] Williams, who had been a member of the Joint Committee on Reconstruction of the Thirty-Ninth Congress which reported out the Fourteenth Amendment, and who had participated actively in the debates on the Fifteenth Amendment, declared:

"Senators upon this floor, grave and learned Senators, whose Republicanism is beyond question, have expressed doubts as to the constitutionality of many of its provisions."[98]

Senator Eugene Casserly, a California Democratic lawyer and former corporation counsel of New York City, returned to Hamilton's point by noting that the Fifteenth Amendment was a limitation only on federal or state power, and operated in the same way as the negative limitations of Article I, Section 10 of the original Constitution. He added that the power to enforce the Amendment added nothing to the substantive provisions. He therefore concluded that Congress could not penalize the actions of individuals.[99] Casserly conceded that Congress could penalize the actions of state officers acting under state laws, but not private individuals acting on their own volition. Senator Matthew Carpenter, a Wisconsin Republican lawyer and a member of the Senate Judiciary Committee interrupted him to suggest that Congress might find power to protect voters under

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[86] See 42 (1) Globe app. 116 (1871), where Representative Samuel Shellabarger, an Ohio Republican lawyer in charge of the anti-Ku Klux Klan bill, answered Representative Farnsworth's assertion that the punishment of conspiracies was not linked to unconstitutional state acts by saying: "it assumes that the State has denied protection to some of its citizens."

[87] *Supra*, n. 80.

[88] See 34 U.S. Law Week, § 3, pp. 3165–66 (1965).

[89] 41 (2) Globe 1956 (1870). See also his remarks at 3563.

[90] *Id.* at 2611–12.

[91] *Id.* at 3559. See also *id.* at 3656, 3658.

[92] *Id.* at 3571.

[93] *Id.* at 3572.

[94] *Id.* at app. 353–55.

[95] *Id.* at app. 360.

[96] *Id.* at 3655.

[97] *Id.* at 3656.

[98] *Id.* at 3657.

[99] *Id.* at app. 472.

the first section of the Fourteenth Amendment. Casserly replied that the Fourteenth Amendment also dealt with state action alone and not individual action, so that Congress derived no more assistance from this than the Fifteenth Amendment.[100] He concluded that Congress had no power to deal with private violence since such criminal acts were not the acts of the state.[101]

Senator Stewart replied that the bill was necessary for the fall elections because the southern Democrats would drive Negroes *en masse* from the polls.[102] Senator Allen G. Thurman, a Democrat and a former chief justice of the Ohio Supreme Court, arose to concur with Casserly. He emphasized that the Fifteenth Amendment dealt only with the actions of states, or with state officials enforcing state laws, and not with the criminal acts of individuals.[103] Thurman, too, drew an analogy between the prohibitions laid on the states in Article I, Section 10, and the Fifteenth Amendment, and pointed out that neither was designed to affect private action. Senator Pool then interrupted him to ask what he would answer if a state passed a law that no election official should be punished for refusing to register or receive the vote of a Negro. Thurman replied that such a law would violate the Constitution, but that it could not be supposed that a state would enact such an unconstitutional law. To this Pool answered that the Fifteenth Amendment contemplated that a state might by positive legislation or by omission deny the right to vote to Negroes. He added that if a state failed to punish officers who would not receive ballots from Negroes, unless Congress punished them under its power to pass appropriate legislation the efficacy of the amendment would be broken down. Thurman retorted that such laws could be invalidated by the federal judiciary, but that Congress had no power to punish private individuals who did not hold state office.[104]

Senator John Sherman, the veteran Ohio Republican lawyer and legislator, then propounded a new theory. He professed agreement with Thurman, but asserted that the bill was only intended to limit state action. The following colloquy then occurred:

"Mr. SHERMAN. * * * What I mean is that all the provisions of the law are to prevent persons or officers, under color of State authority, from denying a man the right of suffrage. My colleague cannot deny that we can by appropriate legislation prevent any private person from shielding himself under a State regulation, and thus denying to a person the right to vote on account of race, color, or previous condition of servitude. Our right of appropriate legislation extends to every citizen of a State, the humblest as well as the highest.

"Mr. CASSERLY. I should like to ask the Senator from Ohio how a State can be said to abridge the right of a colored man to vote when some irresponsible person in the streets is the actor in that wrong?

"Mr. SHERMAN. If the offender, who may be a loafer, the meanest man in the streets, covers himself under the protection or color of a law or regulations or constitution of a State, he may be punished for doing it.

"Mr. CASSERLY. Suppose the State law authorizes the colored man to vote; what then?

"Mr. SHERMAN. That is not the case with which we are dealing. * * * This bill only proposes to deal with offenses committed by officers or persons under color of existing State law, under color of exisitng State constitutions.

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[100] *Id.* at app. 473.
[101] *Id.* at app. 474.
[102] *Id.* at 3658–59.
[103] *Id.* at 3661. Thurman observed:
"This, then, being simply a limitation on the power of the State, simply withholding from it one of the powers which it heretofore possessed, the power of fixing the qualifications of electors, or restricting that power in a single particular, it is as plain, it seems to me, as the sun at noon-day in a cloudless sky, that this amendment can only be held to speak of a State as a State * * * in her political character * * * and does not deal with individuals at all.

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"* * * The prohibition here is upon the State. Can you undertake to punish an individual who is not acting under the authority of the State, but directly against the statute law of the State, and who is punishable under that statute law by indictment in the courts of the State? And yet you undertake to say that that individual, thus acting contrary to the law of his State, liable to punishment by his own State in her own courts, can be taken away from the jurisdiction of his State * * * into a Federal court to be punished under an act of Congress.

"It is amazing to me that any lawyer can think for a moment that this bill in this respect where it acts on individuals—not officers of a State at all, mere private individuals, mere trespassers, mere breakers of the peace, mere violators of the State law—that this bill which seizes them and punishes them under this act of Congress and in the Federal Courts is warranted by the fifteenth amendment of the Constitution."
[104] *Id.* at 3662–63.

No man could be convicted under this bill reported by the Judiciary Committee unless the denial of the right to vote was done under color or pretense of State regulation. The whole bill shows that."[105]

Here we have an interesting theory underlying the legal basis of the bill which is certainly not apparent on its face. Yet the theory is by no means illogical. The Fifteenth Amendment uprooted many state constitutions and laws forbidding Negroes from voting. The Republicans complained during the debate that Democrats were continuing to follow these state constitutions and laws in spite of the Fifteenth Amendment.[106] Apparently, Sherman envisaged a Democratic mob which turned Negroes away from the polls as a private enforcement of these state laws; the mob was assuming the character of state agents in enforcing state laws.

Senator Garrett Davis, a Kentucky Democratic lawyer, seized on Sherman's admission that state action would have to be involved, and asserted that a state could only act through its officials, and not "by its isolated and straggling citizens." He therefore concluded that Congress could not penalize private citizens.[107] Davis further asserted that the amendment reached only state legislation,[108] a point on which Senator Joseph S. Fowler, a conservative Tennessee Republican, concurred.[109]

Senator Oliver P. Morton, an Indiana Republican, asserted that the debates on the Fifteenth Amendment would show that Congress, in the second section, did not intend to be confined to legislating against state officials or state laws. He argued that these debates in the Congressional Globe of the previous year indicated that Congress could penalize private persons who interfered with Negro voting.[110] Morton, who had participated in these debates, quoted no specific passage therein, and the comments previously made in conjunction with Howard's speech, namely that no such recorded debates dealing with private interference existed, apply here also. The pressing necessity of preserving Negro votes against Klan interference seems to have resulted in conjuring up some non-existent debates.

When voting on the bill commenced, Morton offered an amendment to punish private interference with Negro voting, which was carried on a party-line vote. A Democratic-sponsored amendment was then offered to limit this section to acts "under or by color of State authority." Thurman observed that it had been asserted in debate that this section applied only to persons acting under State authority. He supported the amendment to "show whether the Senate mean that that section shall apply only to persons acting under State authority or color of State authority, or whether Congress assumes to punish every ruffian as the embodiment of the State." No doubt Thurman was referring to the theory of his colleague, Sherman. However, this amendment was voted down by a strict party-line vote, with Sherman being absent.[111] It might be noted that Pool's section had been adopted without a roll-call only a short time before.[112]

Thurman then attacked the whole proceeding. He observed that these sections had been adopted in an all-night session, with senators absent or sleeping on sofas, "and only aroused from their slumbers when there was a division of the Senate or when their presence was necessary in order to make a quorum." He added that some of the bill was not grounded on the Fifteenth Amendment, but on Congress' power under the original Constitution to control federal elections. Trumbull also suggested that the bill be printed and postponed for this reason. But Stewart declared that the Senate was under time pressure.[113] The bill was then passed by a party-line vote.[114]

In the House, only a brief objection was made that the bill went beyond Congress' power by punishing private individuals.[115] In his speech supporting the bill, Bingham did not address himself to this point at all.[116] However, in the next session, when the Supplementary Enforcement Act[117] was passed, several House Democrats harped on the theme that the Fifteenth Amendment pro-

[105] *Id.* at 3663.
[106] See *id.* at 3568 (Sen. Sherman), 3658 (Sen. Stewart), 3758 (Sen. Williams).
[107] *Id.* at 3666.
[108] *Id.* at 3667.
[109] *Id.* at app. 421.
[110] *Id.* at 3670.
[111] *Id.* at 3684.
[112] *Id.* at 3679.
[113] *Id.* at 3688.
[114] *Id.* at 3690.
[115] *Id.* at app. 416 (Rep. Smith).
[116] *Id.* at 3883.
[117] Enforcement Act of 1871, ch. 99, 16 Stat. 433.

hibited only state interference with Negro voting, and did not authorize enforcement against private individuals.[118] Bingham merely replied that the Fourteenth Amendment gave Congress power "to correct and restrain by law the abuses of State authority." He added that the Enforcement Act of 1870 was principally designed to enforce the similarly worded Fifteenth Amendment without addressing himself at all to the question of whether Congress could punish private individuals.[119]

Democratic Senators likewise reiterated the point that the Fifteenth Amendment only prevents state discriminatory action, and does not restrain private individuals. They therefore concluded that the second section of the amendment, which gives Congress the power to enforce it, being ancillary to the first section, would not allow Congress to pass a law penalizing purely private action.[120] Thus, Senator Francis P. Blair of Missouri observed that the Fifteenth Amendment was worded in the same way as the negative prohibitions of Article I, Section 10 of the original Constitution, and no one had suggested that these were enforceable against individuals.[121]

The debates on the Enforcement Act of 1870, on which both the Justice Department and the majority of the Supreme Court so heavily relied, show, first of all, a considerable willingness to stretch the terms of the Fifteenth Amendment to cover the problem of private violence, which was overlooked when the amendment was upon its passage. To this extent, the act cannot be deemed a contemporaneous construction of that amendment or the Fourteenth Amendment, and rather represents action by Congress outside of its constitutional powers to meet what was felt to be a pressing political necessity. Secondly, such action was predicated upon what was deemed to be an intentional denial of equal protection to southern Republican voters, especially Negroes, by local state authorities, even though this basis for congressional action was not stated in terms in the bill. To that extent, Congress was indeed curing unconstitutional state inaction. The question presented to Congress was the punishment of private conspiracies to violate federal rights only when sheltered by intentional state refusal to afford protection to the victims. This latter constitutional underpinning has been wholly overlooked in the *Guest* case opinions.

With the presence of unconstitutional state refusal to act as the basis for federal intervention, the question was narrowed to what remedy was permissible and appropriate to enforce the amendments. Instead of directing its penalties to inactive state officers, Congress chose to substitute federal officers and machinery to afford protection directly to victims. How this remedy came to be used will now occupy our attention.

5. THE INFLUENCE OF PRIGG *v.* PENNSYLVANIA

The use by Congress of a remedy for unconstitutional state inaction by substituting federal machinery, although not warranted by the terms of the Fourteenth and Fifteenth Amendments, can only be understood in light of the profound influence on lawyers of the period of the case of *Prigg v. Pennsylvania*.[122] The Justice Department's brief in the *Guest* case has cited this case in passing for the proposition that Congress may enforce rights secured in the Constitution even without a specific grant of power,[123] without noticing the crucial significance of Bingham's disagreement with this point which led him to vote against the civil rights bill in 1866[124] and ultimately resulted in the first section of the Fourteenth Amendment.

The opinion of the Supreme Court in *Prigg v. Pennsylvania* was delivered by Mr. Justice Story at the apex of his reputation. He held that the Fugitive Slave Clause of Article 4, Section 2 of the original Constitution could be enforced by federal legislation, and in dictum declared that states could not be required to enforce it. He said:

"If, indeed, the Constitution guarantees the right, and if it requires the delivery, upon the claim of the owner, (as cannot well be doubted,) the natural inference certainly is, that the national government is clothed with appropriate authority and functions to enforce it. The fundamental principle applicable to all cases of this sort would seem to be that where the end is required, the means

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[118] 41 (3) Globe 1272 (Rep. Eldridge), pp. 123–24 (Rep. Woodward).
[119] *Id.* at 1283.
[120] *Id.* at 1635 (Sen. Vickers), app. 162 (Sen. Bayard).
[121] *Id.* at app. 158.
[122] 41 U.S. (16 Pet.) 539 (1842).
[123] Brief, *op. cit. supra*, n. 63 at 23.
[124] 39 (1) Globe 1291 (1866).

are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted. The clause is found in the national Constitution, and not in that of any State. It does not point out any state functionaries, or any state action to carry its provisions into effect. The states cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or entrusted to them by the Consitution. On the contrary, the natural, if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution." [125]

The impact of this opinion on legal thinking about the federal-state relations during the period stemmed from two primary sources. First, it constituted the constitutional basis for the Fugitive Slave Law of 1850,[126] which as part of the Compromise of 1850 had vast political consequences and served as a political irritant between the sections which led to the Civil War. Secondly, it was in the same section of the original Constitution as the Privileges and Immunities Clause, which for twenty years the North had been attempting to enforce in favor of freed Negroes,[127] and like this clause it was a general declaration of constitutional right not in terms phrased as a limitation on state action.

When the slaves were freed by the Thirteenth Amendment, it is not surprising that the machinery used to enforce the Privileges and Immunities Clause in their favor in the Civil Rights Act of 1866,[128] should be borrowed from the familiar machinery of the Fugitive Slave Law which enforced a similarly worded constitutional provision found in the same section. As Senator Trumbull, who drafted the bill and was in charge of it is Judiciary Committee Chairman, observed:

"Most of [the provisions of the bill] are copied from the late fugitive slave act, adopted in 1850 for the purpose of returning fugitives from slavery into slavery again." [129]

This point is further reinforced when it is remembered that notwithstanding Trumbull's long-winded perorations on the need to make freedmen really free by enforcing the Thirteenth Amendment, as Senator Lot M. Morrill, a Maine Republican lawyer later observed, the civil rights bill was deemed to be supported under the old Privileges and Immunities Clause, and not the Thirteenth Amendment at all.[130] Trumbull himself recognized this by citing cases interpreting that clause in his opening speech,[131] as he later virtually admitted.[132]

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[125] Prigg v. Pennsylvania, 41 U.S. (16 Pet. 539, 615–16 (1842). The dictum that states lacked concurrent power to enforce the fugitive slave provision was denied in Weaver v. Fegely, 29 Pa. 30 (1857).

[126] Act of Sept. 18, 1850, c. 60, 9 Stat. 462. See Ableman v. Booth, 62 U.S. (21 How.) 506 (1859).

[127] See e.g. 30 (2) Globe 418–19 (1849) (Rep. Hudson); 31 (1) Globe app. 124 (1850) (Sen. Davis, Mass.); 31 (1) Globe app. 1654–55 (1850) (Sen. Winthrop); 33 (1) Globe app. 1012 (1854) (Sen. Sumner); 35 (1) Globe 1964 (1858) (Sen. Fessenden); 35 (1) Globe 1966–67 (1858) (Sen. Fessenden, Wilson); 35 (2) Globe 952 (1859) (Rep. Granger); 35 (2) Globe 980 (1859) (Rep. Clark Cochrane); 35 (2) Globe 984 (1859) (Rep. Bingham).

[128] 14 Stat. 27 (1866).

[129] 39 (1) Globe 475 (1866). See also Trumbull's defense of using the Fugitive Slave Law for enforcement machinery, *id.* at 605. He declared that "we propose to use the provisions of the fugitive slave law for the purpose of punishing those who deny freedom. * * *" *Ibid.*

[130] 42 (2) Globe 730 (1872). Morrill said:

* * * the honorable Senator from Massachusetts is utterly mistaken if he supposes that the civil rights bill was drawn from the thirteenth amendment at all. * * * I did not question the constitutionality of the civil rights bill; but it would have been constitutional before the thirteenth amendment; it was not drawn under that amendment, nor does it look to that at all as its source of authority. It looks to that other provision of the Constitution in the fourth article, which provides for the equal privileges and immunities of the citizens in the several States. That is where its authority is found."

[131] 39 (1) Globe 474–75 (1866).

[132] *Id.* at 600, where Trumbull said:

"* * * the cases were * * * introduced * * * for the purpose of ascertaining, if we could, by judicial decision what was meant by the term 'citizen of the United States;' and inasmuch as there had been judicial decisions upon this clause of the Constitution, in which it had been held that the rights of a citizen of the United States were certain great fundamental rights, such as the right to life, to liberty, and to avail one's self of all the laws passed for the benefit of the citizen to enable him to enforce his rights; inasmuch as this was the definition given to the term as applied in that part of the Constitution. I reasoned from that, that when the Constitution had been amended and slavery abolished, and we were about to pass a law declaring every person, no matter of what color, born in the United States a citizen of the United States, the same rights would then appertain to all persons who were clothed with American citizenship."

Reference to the House debates is even more illuminating. Representative James F. Wilson, an Iowa Republican lawyer in charge of the bill for the House Judiciary Committee, stated that the bill was merely enforcing the Privileges and Immunities Clause.[133] Wilson, like Trumbull, linked the substantive provisions of the Privileges and Immunities Clause with the enforcement provisions of the second section of the Thirteenth Amendment because of serious constitutional doubts that Congress had the power to enforce the original constitutional provision unaided. He, too, observed that most of the enforcement machinery was "based on the act of September 18, 1850, commonly known as the 'fugitive slave law,' the constitutionality of which has been affirmed over and over again by the courts." [134] Furthermore, to quiet the very serious constitutional doubts of a number of fellow-Republicans,[135] Wilson read the passage previously quoted from *Prigg* v. *Pennsylvania* which interpreted the companion Fugutive Slave Clause as showing the power of Congress to enforce the rights of citizens in the Privileges and Immunities Clause and the Due Process Clause of the Fifth Amendment, and declared that this case showed that Congress already had the power to do what Bingham's previously introduced constitutional amendment would have given them the power to do, namely, to enforce the rights of citizens.[136] Bingham, on the other hand, although agreeing wholeheartedly with the objects of the civil rights bill, was of the opinion that *Prigg* v. *Pennsylvania* was inapplicable, and that enforcement of the rights of citizens was left to the good faith of the states. Such a position was certainly an arguable one, since Mr. Justice Story had indicated that the federal government could not only set up machinery to return fugitive slaves, but that states could not be required to do so. Bingham, however, noted:

"The Constitution does not delegate to the United States the power to punish offenses against the life, liberty, or property of the citizen in the States, nor does it prohibit that power to the States, but leaves it as the reserved power of the States, to be by them exercised." [137]

To remedy this want of power to enforce the existing Constitution, Bingham introduced his first draft amendment.[138] The effect of this draft would have been to embody the rule of *Prigg* v. *Pennsylvania* into a constitutional amendment. But as previously noted, many Republicans were opposed to giving Congress power to pass a uniform law to protect life, liberty, and property, similar to the uniform law for the return of the fugitive slaves.[139] Hence, as Bingham later declared, when came to redraft the first section of the Fourteenth Amendment, he imitated the framers of the original Constitution in Article I, Section 10, by imposing negative limitations on the powers of the states.[140] As Bingham wrote in 1871:

"The fourteenth amendment, it is believed, did not add to the privileges or immunities before mentioned [in the original Constitution], but was deemed necessary for their enforcement as an express limitation upon the powers of the States. It had been judicially determined that the first eight articles of amendment of the Constitution were not limitations on the power of the States, and it was apprehended that the same might be held of the provision of the second section, fourth article." [141]

Of course, the first section of the Fourteenth Amendment, after the declaration as to citizenship, is so obviously similar to Article I, Section 10, that Democratic lawyers, in casting about for grounds to oppose Republican bills, guessed

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[133] *Id.* at 1117–18. He declared:
"Mr. Speaker, I think I may safely affirm that this bill, so far as it declares the equality of all citizens in the enjoyment of civil rights and immunities, merely affirms existing law. We are following the Constitution. We are reducing to statute form the spirit of the Constitution. We are establishing no new right, declaring no new principle. It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen. * * * If the States would all practice the constitutional declaration, that 'The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States' (Article four, section two, Constitution of the United States,) and enforce it * * * we might very well refrain from the enactment of this bill into a law."
[134] *Id.* at 1118.
[135] *Id.* at 1266–67 (Rep. Raymond); *id.* at 1291–93 (Rep. Bingham); *id.* at 1293 (Rep. Shellabarger); *id.* at app. 156–59 (Rep. Delano).
[136] *Id.* at 1294.
[137] *Id.* at 1291.
[138] *Id.* at 1034.
[139] See, e.g., *id.* at 1095 (Rep. Hotchkiss).
[140] 42 (1) Globe app. 84 (1871).
[141] H.R. Rep. No. 22, 41st Cong., 3rd Sess. 1 (1871).

that the former was patterned after the latter. But there was no public evidence of this until 1871 from Bingham, and the inferential evidence from the two drafts appears in none of the speeches, even by Democrats, and apparently was forgotten. Considering the times, this is not as improbable as it might seem at first. In the four years between 1866 and 1870 the country had gone through a legal and political revolution. The exciting events of the times, such as the reconstruction acts pressed on the South, the impeachment of President Andrew Johnson, and the extension of the franchise to Negroes, would have necessarily drawn so much attention as to push more technical questions into the background. The redrafting of the relatively non-controversial first section of the Fourteenth Amendment, which was deemed "surplusage" anyway,[142] because it only reenacted what was already in the Constitution, by comparison is such a technical matter that if it was overlooked, or its significance was unnoticed, this cannot cause surprise.

Indeed, it is of significance that the first time this redrafting was brought up in debate was in 1871. Representatives Farnsworth and Garfield, both Republican lawyers who had participated in the debates preceding the proposal of the Fourteenth Amendment, warmly speaking in its favor as well as voting for it,[143] brought up the redrafting, by reading extensively from the 1866 Globe to refresh their recollection.[144] If the very participants had to read from the Globe to aid their memory, it is hardly to be wondered at that senators and later members of Congress who were not participants might have forgotten this fact.

Accordingly, Republicans who forgot about the redraft or were unfamiliar with it continued to act as if *Prigg* v. *Pennsylvania* applied to the Fourteenth Amendment, and by analogy to the Fifteenth Amendment, even though Bingham's revisions, by converting it into a negative limitation on state action, had made it inapplicable. The constant citation of this case by both Republicans and Democrats during the reconstruction period shows that many members of Congress were following this familiar, although wholly inapplicable, constitutional landmark.[145] Insofar, therefore, as the Republicans were acting *bona fide*, their mistake was a completely reasonable one. No better illustration of this point can be made than the fact that Senator Pool himself, in urging his section which was to go into the Enforcement Act of 1870, referred at length to the enforcement machinery of the Civil Rights Act of 1866, which had been set up under the authority of *Prigg* v. *Pennsylvania*, as a guide to the interpretation of the fifth section of the Fourteenth Amendment.[146]

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[142] James, *The Framing of the Fourteenth Amendment*, 123–24, 134–35, 145 (1956).

[143] 39 (1) Globe 2462 (1866) (Garfield), *id.* at 2539 (Farnsworth).

[144] 42 (1) Globe app. 115–16, 150–52 (1871).

[145] See, e.g. 39(1) Globe 1270 (1866). (Rep. Kerr) ; *id.* at 1836 (Rep. Lawrence of Ohio) ; 41 (2) Globe 3485 (1870) (Sen. Thurman) ; *id.* at 3804 (Sen. Bayard) ; 41(3) Globe app. 166 (1871) (Sen. Bayard) ; 42(1) Globe app. 231 (1871) (Sen. Blair) ; *id.* at app. 219 (Sen. Thurman) ; *id.* at app. 229 (Sen. Boreman) ; *id.* at 795 (Rep. Blair of Mich) ; 43(1) Record 413 (1874) (Rep. Lawrence). It is interesting to note that when Representative Benjamin F. Butler, a Massachusetts Republican lawyer, reported a bill for the Committee on Reconstruction to protect southern Republicans, as an enforcement of the Fourteenth Amendment, he modeled the legal machinery "almost exactly upon the fugitive slave law of 1850." See H.R. Rep. No. 37, 41st Cong., 3rd Sess. 4 (1871), Representative Samuel Shellabarger, an Ohio Republican lawyer who had participated in the debates on the Civil Rights Act of 1866 and the Fourteenth Amendment, declared that the latter amendment, in its first section, was similar to the Fugitive Slave Clause of Article 4, Section 2, and that under the authority of *Prigg* v. *Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), Congress could enforce the Fourteenth Amendment with its own machinery. He did not mention the Bingham redraft in 1866. 42(1) Globe app. 70 (1871). Similarly, Representative David P. Lowe, a Kansas Republican ex-judge, declared :

"Again, the second section of the fourth article of the Constitution further provides that—[Fugitive Slave Clause quoted].

"The similarity in expression of this section to the one quoted in the fourteenth amendment [first section] is so apparent that its construction must lead to a just understanding of the latter. * * * Under the second section of the fourth article a statute was enacted in 1793 providing for the capture and surrender of fugitive slaves, and in the case of *Prigg* v. *Pennsylvania* * * * Mr. Justice Story uses the following language in reference to the fugitive slave law of 1793, as affected by the Constitution. * * * [quotation omitted].

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"Here, therefore, the doctrine is squarely enunciated by one of the purest and ablest of the eminent jurists that have adorned our Supreme bench that where a State refuses to comply with the requisitions and demands of the supreme law the Federal Government may give effect to its Constitution and laws through its own agency. This doctrine is ample for the exigencies of the present bill. The decision of the Supreme Court in this case has been followed in very numerous cases, and the doctrine must be considered settled, if any thing can be settled by adjudication." 42(1) Globe 375 (1871).

[146] 41(2) Globe 3611, app. 470 (1870).

6. CONCLUSION

The majority of the opinions in the *Guest* case rests on two errors, one piled on top of the other. The first error was that of the Republican senators during the reconstruction period, in applying the theory of *Prigg* v. *Pennsylvania* to interpret the fifth section of the Fourteenth Amendment. The error of the United States Supreme Court was in taking the product of that erroneous interpretation and applying it without noticing its limitation, namely, that as an antecedent a state or its officials would have to refuse equal protection. The result has been to revert back to the first Bingham draft and to read the word "state" right out of the Fourteenth Amendment.

The Fourteenth Amendment does not give Congress the power to punish private individuals violating the rights of others whatever their motive. Nor does it permit Congress to punish conspiracies to violate federal rights. Any such action is beyond the constitutional power granted to Congress under the fifth section.

The remedy given to Congress by the framers to assure equal protection lies in its right to proceed against state law enforcement officers who refuse to accord equal protection to all persons. It is the duty of the states, by their officials, to afford all persons the same protection which the laws grant to any person in the states. If a state official wilfully neglects to afford such protection, he violates the constitutional right of the person so affected. Congress may, under the fifth section, enforce the first section by punishing such official for this wilful refusal. But it may not proceed directly to punish the private criminals who violate the rights of citizens. Insofar as the majority of the opinions in the *Guest* case hold to the contrary, they are inconsistent with the original understanding of the framers and are erroneous.

THE KU KLUX KLAN ACT OF 1871: SOME REFLECTED LIGHT ON STATE ACTION AND THE FOURTEENTH AMENDMENT

(By Alfred Avins)

1. INTRODUCTION

Recent violence around the country, and particularly in the South, which has resulted from racial tensions, has spurred a demand that the federal government undertake to punish private individuals directly for crimes of violence which are asserted to infringe Fourteenth Amendment rights.[1] A majority of the justices of the United States Supreme Court have indicated in the freshly decided case of *United States* v. *Guest*[2] that Congress possesses this power under the Fourteenth Amendment, and at least one commentator has concurred in this view.[3]

These assertions that Congress may penalize private violence directly are contrary to the view of the landmark post-reconstruction cases which hold that the Fourteenth Amendment's first section is only directed at "state action."[4] The basis for rejecting this concept, at least in part, has been grounded by the Justice Department in the *Guest* case on an alleged contemporaneous construction of the Fourteenth Amendment by the Ku Klux Klan Act of 1871,[5] which was passed by the votes of Republicans, some of whom voted for the Fourteenth Amendment, and presumably were familiar with its meaning. Since this statute purported to enforce the Fourteenth Amendment, the reasoning is that it constituted a congressional interpretation of the amendment's meaning which is more persuasive than later Supreme Court cases.[6]

The position that a contemporaneous congressional construction of a constitutional amendment should carry weight in interpreting that amendment is certainly a well-grounded one. In view of the fact that the Ku Klux Klan Act was the most extensive congressional attempt during reconstruction to prevent

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[1] See N.Y. Times, June 9, 1966, p. 1, col. 3.
[2] 86 Sup. Ct. 1170 (1966).
[3] Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 Yale L.J. 1353 (1964).
[4] Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1883); United States v. Cruikshank, 92 U.S. 542 (1876).
[5] Act of April 20, 1871, ch. 22, 17 Stat. 13.
[6] Brief for appellant in United States v. Guest, supra, n. 2, at pp. 37-40.

racial and political crimes of violence pursuant to the fifth section of the Fourteenth Amendment, the debates thereon warrant careful attention. This article will analyze those debates for the reflected light they cast on the power of Congress to punish private individuals under the Fourteenth Amendment.

2. THE HOUSE DEBATE

A. The bill is introduced

At the opening of the first session of the Forty-Second Congress, considerable apprehension was expressed by the Republicans about the insecurity of life and property in the South, and the House adopted a resolution creating a committee to investigate this.[7] On this the Republican majority was split almost in half, with the Democrats making up the balance of power. Several Republicans, particularly Representative Benjamin F. Butler of Massachusetts, wanted to enact immediate legislation to protect southern Republicans,[8] and Butler got into a lengthy wrangle with Speaker James G. Blaine by accusing fellow Republicans of siding with the Democrats in using the investigation to head off legislation for them.[9]

During the course of this discoursive debate in Congress, on March 23, 1871 President Grant sent a message to Congress asking for additional legislation to curb violence in the South because of the inability of state authorities to control it.[10] In response to this message, on March 28, Representative Samuel Shellabarger, an Ohio Republican lawyer, reported a bill to enforce the Fourteenth Amendment from the committee to which the President's message had been referred. The first section of the bill gave a right of action in federal court to any person whose constitutional rights were being violated under color of state law, a section which is still part of the United States Code.[11] The second section punished conspiracies to violate constitutional rights by committing murder or other specified crimes. The third section provided that when domestic violence so obstructed law enforcement as to deprive citizens of their constitutional rights, and when state officials could not or would not protect those rights, failure of these officials to apply for federal assistance to suppress the violence would amount to a denial of equal protection of the laws, giving the President the right to intervene with federal military forces to suppress this violence. The fourth section declared that when state authorities conspired with such armed groups in violating constitutional rights, the President could suspend the writ of *habeas corpus* and institute martial law.[12]

Shellabarger opened the House debate by tying the first section to the Civil Rights Act of 1866[13] and declared that it was but a means of enforcing the Privileges and Immunities Clause of the Fourteenth Amendment against unconstitutional state action. The second section, in his view, was designed to cure the vagueness of the sixth section of the Enforcement Act of 1870[14] by defining what crimes would be punishable if perpetrated with the purpose of depriving citizens of their constitutional rights. He declared that the second section was constitutional for the same reason that the act of 1870 was constitutional; because if a state refused to protect the constitutional rights of citizens under the fifth section of the Fourteenth Amendment Congress might do so. He denied that the bill usurped exclusive state criminal jurisdiction, and observed

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[7] Cong. Globe, 42nd Cong., 1st Sess. 116–7 (1871) (Congressional Globes will hereinafter be cited by Congress, session, page and year, viz.: 42(1) Globe 116–7 (1871)). See also *id.* at 180–2.

[8] For Butler's report in the prior session on this point, recommending protective legislation, see H.R. Rep. No. 37, 41st Cong., 3rd Sess. (1871). See also his proposed bill at 42(1) Globe 173–5 (1871).

[9] 42(1) Globe 123–130 (1871).

[10] *Id.* at 236. The message read:

"A condition of affairs now exists in some of the States of the Union rendering life and property insecure, and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of the State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States. * * *"

[11] 42 U.S.C. sec. 1983.

[12] 42(1) Globe 317 (1871).

[13] 14 Stat. 27 (1866).

[14] 16 Stat. 140 (1870), now 17 U.S.C. Sec. 241.

that Congress could directly enforce the provisions of the Constitution against individuals,[15] citing Article Four, Section Two, and in particular the fugitive slave laws. Shellabarger cited *Moore* v. *Illinois* [16] for the proposition that Congress might duplicate a state criminal code, and *Prigg* v. *Pennsylvania* [17] for the proposition that Congress could enforce the fifth section of the Fourteenth Amendment directly against individuals. The third section, Shellabarger asserted, was a remedy against state denial of equal protection, adding that the federal government did not have to wait until the state denying protection to citizens asked for federal aid. The fourth section was based on *Ex parte Milligan*.[18] Thus, the entire speech shows that the state was designed to remedy state denials of equal protection by direct federal intervention against individuals.[19]

The first rebuttal to the bill was delivered by Representative Michael C. Kerr, a much respected Indiana Democratic lawyer.[20] He asserted that the states possessed exclusive jurisdiction to make criminal codes,[21] and that the negative limitations in that amendment were similar to the limitations of Article I, Section 10, which could not be enforced by Congress against individuals.[22] He cited *Cohens* v. *Virginia* [23] for the proposition that Congress had no general power to punish felonies, and concluded with a broadside attack on the bill as dangerous to liberty and states' right.[24]

Debate continued, with Representative William L. Stoughton, a Michigan Republican lawyer, setting forth testimony detailing Ku Klux Klan crimes. He asserted that the Klan was "an auxiliary of the Democratic Party," [25] and further remarked:

"The relation of the Democracy to this order is precisely that of the receiver of stolen property to the thief. The murder of leading Republicans, terrifying the colored population, and putting whole neighborhoods in fear so that the Ku Klux can control an election, is heralded as a Democratic victory. * * * We may as well concede, Mr. Speaker, that if this system of violence is to continue in the South the Democratic party will secure the ascendency." [26]

He concluded that—

"When thousands of murders and outrages have been committed in the southern States and not a single offender brought to justice, when the State courts are notoriously powerless to protect life, person, and property, and when violence and lawlessness are universally prevalent, the denial of the equal protection of the laws is too clear to admit of question or controversy. Full force and effect is therefore given to section five, which declares that 'Congress shall have power to enforce by appropriate legislation the provisions of this article.'" [27]

Representative George F. Hoar, a Massachusetts Republican lawyer, declared that in South Carolina a state-wide conspiracy was intimidating the Republican majority by acts of violence from exercising their rights. He asserted that they had taken possession of the juries so that no matter what the evidence, Republicans always lost and Democrats always won. He added that although same was punishable under state law, the criminal remedies were not enforced for this class on account of any crime committed against them. Hoar concluded that such a government, although republican in theory, was not so in fact because it was "a government administered by a conspiracy under the pretense and under the form of republican security." [28] He added:

"But I may be asked, how do you distinguish the right to interfere in a case like this from the right to interfere in any case where there may be an imperfection in the administration of justice or incomplete security for human rights?

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[15] He cited Jones v. Van Zandt, U.S. (5 How.) 230.
[16] 55 U.S. (14 How.) 13 (1852).
[17] 41 U.S. (16 Pet.) 539 (1842).
[18] 71 U.S. (4 Wall.) 2 (1867).
[19] 42 (1) Globe app. 68–71 (1871).
[20] He became the first Democratic Speaker of the House after reconstruction.
[21] 42 (1) Globe app. 46 (1871).
[22] *Id.* at 48.
[23] 19 U.S. (6 Wheat.) 264 (1821).
[24] 42 (1) Globe app. 49–50 (1871).
[25] *Id.* at 320.
[26] *Id.* at 321.
[27] *Id.* at 322. But Representative George W. Morgan, an Ohio Democrat, denied that political crimes were widespread, and asserted that the South had been provoked by corrupt carpetbagger governments. *Id.* at 330–2.
[28] *Id.* at 333.

Sir, criminals escape punishment in Massachusetts, in Vermont. A railroad company does not stand a fair chance for an impartial verdict before a Wisconsin jury. Is Congress to interfere? My answer to that is this: that it is not possible to draw an absolute logical line between these two cases. The difference is a difference of degree. To authorize the interference of Congress there must be, not merely those imperfections and failures in the administration of law which are attendant upon all civil governments alike, but there must be a clear case of denial of government. We cannot interfere to deal with the incidental evils which attend upon republican government; but we should interfere where * * * these evils have attained such a degree as amounts to the destruction, to the overthrow, to the denial to large classes of the people of the blessings of republican government altogether." [29]

Hoar went on to inquire what were the privileges and immunities of citizens, protected by the first section of the Fourteenth Amendment. He quoted from the oft-cited case of *Corfield* v. *Coryell* [30] that they included protection of life, liberty, and property. Without noticing that the Privileges and Immunities Clause protected only citizens, while the Equal Protection Clause protected all persons, including aliens, Hoar reasoned that the latter clause would be surplusage if confined exclusively to "unlawful acts by the State authorities." He therefore asserted:

"Now, it is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection. If every sheriff in South Carolina refuses to serve a writ for a colored man and those sheriffs are kept in office year after year by the people of South Carolina, and no verdict against them for their failure of duty can be obtained before a South Carolina jury, the State of South Carolina, through the class of officers who are its representatives to afford the equal protection of the laws to that class of citizens, has denied that protection. If the jurors of South Carolina constantly and as a rule refuse to do justice between man and man where the rights of a particular class of its citizens are concerned, and that State affords by its legislation no remedy, that is as much a denial to that class of citizens of the equal protection of the laws as if the State itself put on its statute-book a statute enacting that no verdict should be rendered in the courts of that State in favor of this class of citizens." [31]

In short, Hoar declared that a denial of justice might arise through a habitual refusal to act as well as through a law prohibiting action. He added that where the dominant group in a state was hostile to the rights of the minority, as the pro-slavery men in the South were to the anti-slavery men before the Civil War,[32] state officials might take no action and let mobs commit crimes unhindered. He concluded that a far greater danger to liberty was to be apprehended from such lawlessness than from federal intervention.[33]

Representative Washington C. Whitthorne, a Tennessee Democratic lawyer, after minimizing Klan activities and crimes and extolling returning southern prosperity, took the novel position that the fifth section of the Fourteenth Amendment was intended to allow enforcement of all other sections except the first, a remarkable assertion which was certainly contrary to both the language and history of the amendment. He added that the bill was vexatious and would usurp state power.[34] Representative William O. Kelley, a Philadelphia Radical Republican, replied that the South was steeped in poverty and ignorance, and that the Klan was bent on driving out all northern immigrants by violence. He declared that Democrats were always attacking new measures as unconstitutional, and asserted that the Klan was warring on Republicans and preventing the flow of northern capital to the South.[35]

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[29] *Id.* at 333–4.
[30] 6 Fed. Cas. 546 (No. 3, 230) (C.C. Pa. 1823).
[31] 42 (1) Globe 334 (1871).
[32] He may well have been thinking of the incident in December, 1844, when his own father, ex-Representative Samuel Hoar, was driven out of South Carolina by a mob. See Biographical Directory of the American Congress, 1774–1927, p. 1103 (1928); 30 (2) Globe 418–9 (1849) (Rep. Hudson); 31 (1) Globe app. 123 (1850) (Sen. Clay); *id.* at app. 124 (Sen. Davis, Mass.), 33 (1) Globe app. 1012 (1854) (Sen. Sumner); 34 (1) Globe 1598 (1856) (Rep. Comins).
[33] 42 (1) Globe 334–5 (1871).
[34] *Id.* at 335–8.
[35] *Id.* at 338–341.

A Kentucky Democrat delivered a long tirade against the despotism which would result from the bill, the inequities of carpetbagger reconstruction governments in the South, and the exaggerations of Klan activity.[36] Representative Austin Blair, a Republican lawyer and former Governor of Michigan replied that the southern state governments had failed to protect people against Klan whippings and murders.[37] He added that the second section of the bill was necessary to protect the fundamental rights of citizens, and to clarify the Enforcement Act of 1870. He declared:

"We cannot indulge much in constitutional hair-splitting while citizens of the United States are denied the right to live. It will not do to be over particular as to the matter of whose duty it is to protect the citizens against armed bands of assassins who will not wait for our decisions. It ought to be the duty of both the State and the nation to do this; and if the State will not, the nation must." [38]

Blair concluded by sneering at Democratic constitutional misgivings.[39] A Tennessee Republican likewise asserted that states were not punishing klansmen, and also ridiculed persistent Democratic attacks on all measures as being unconstitutional.[40]

B. Farnsworth's attack

The first Republican attack on the bill came from Representative John F. Farnsworth, an Illinois Republican lawyer and veteran member of Congress, who had spoke and voted for the Fourteenth Amendment, and had been a Union general during the Civil War. He opened by asserting that the second section, stripped of surplusage, merely punished murder and other crimes. Shellabarger interrupted to say that it punished only conspiracies to violate constitutional rights.[41] To this Farnsworth replied that the allegation of conspiracy added nothing, since the Fourteenth Amendment spoke of States, citizens, and persons. Hence he reasoned that if Congress could punish a conspiracy it could punish the same act done individually. Farnsworth also noted, with Shellabarger's concurrence, that under the third section of the bill a denial of equal protection could be created by mere inaction of state officers.[42]

Farnsworth then launched into an extended recapitulation of the legislative history of the first section of the Fourteenth Amendment, reading copiously from the Congressional Globe for 1866. He recounted how a proposed constitutional amendment had been reported by Representative John A. Bingham, an Ohio Republican lawyer, which would have directly permitted Congress to enforce the privileges and immunities of citizens, and equal protection to all persons. He read excerpts from the speeches of Republicans opposing the proposal as giving Congress too much power. Farnsworth then observed that the proposal was shelved in favor of the present version of the Fourteenth Amendment. He read from the opening speech of the late Representative Thaddeus Stevens, made May 8, 1866, in advocating the first section of the Fourteenth Amendment as a limitation on state legislation, particularly emphasizing that Stevens was leader of the House Radical Republicans. The following colloquy then occurred:

"Mr. FARNSWORTH. * * * Whatever law protects the one shall protect the other, and the same redress shall be afforded by law to one as to the other.

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"Mr. SHELLABARGER. Read that just as Mr. Stevens said it. * * * You put in two words.

"Mr. FARNSWORTH. I did, yes. The gentleman is very captious; he certainly stands upon slippery ground if he needs to be so technical.

"Mr. SHELLABARGER. Read just what Mr. Stevens said.

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[36] *Id.* at 351–7 (Rep. James B. Back). See also *id.* at app. 74–75 (Rep. Fernando Wood); *id.* at 357 (Rep. Charles A. Eldridge).

[37] *Id.* at app. 72. He observed:

"* * * the State Governments fail to afford protection to the people. The Klans are powerful enough to defy the State authorities. In many instances they are the State authorities. And if you deny to the General Government the authority to intefere, then there is no remedy anywhere. To wait until the State calls for assistance to suppress the disorders is to wait, in many instances, for a voice from the grave. The States are prostrate before a power they cannot control."

[38] *Id.* at App. 78.

[39] *Id.* at App. 73–4.

[40] *Id.* at App. 310 (Rep. Horace Maynard).

[41] *Id.* at App. 113.

[42] *Id.* at App. 114.

"Mr. FARNSWORTH. Does not every man in the House know that Mr. Stevens is talking about the law of the State, not the administration of the law? This is what he says: 'That the law which allows a white man to testify shall allow a black man also.'

"Mr. SHELLABARGER. Mr. Stevens said that every man should have equal means of protection, and if my friend says the administration of the law is not the means of protection——

"Mr. FARNSWORTH. This is what he says: 'Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress.' What does he mean by 'means of redress?'

"Mr. SHELLABERGER. Execution of the laws.

"Mr. FARNSWORTH. My friend is a very able lawyer; why is he so technical? Mr. Stevens is speaking of the means of redress afforded by the law, not by the justice of the peace, or the constable, or the jury. * * *

"Mr. SHELLABARGER. By the administration of the law also.

"Mr. FARNSWORTH. * * * we all know, and especially those of us who were members of Congress at that time, that the reason for the adoption of this amendment was because of the partial, discriminating, and unjust legislation of those States, under governments set up by Andrew Johnson, by which they were punishing and oppressing one class of men under different laws from another class." [43]

Farnsworth continued to emphasize his position that the first section of the Fourteenth Amendment covered only discriminatory state legislation and not a failure to protect by officials, by citing other speeches only mentioning such legislation as the evil in view, while Shellabarger, emphasizing his point, noted that the third section assumed that a state had denied protection to some of its citizens before the bill would become operative.[44] Farnsworth concluded that, unlike Hoar, he was not in favor of centralization. He denied that the fifth section of the Fourteenth Amendment authorized the passage of the bill, which he said would create "one grand, despotic, central Government at Washington * * *." [45]

c. Bingham's exposition

Bingham spoke right after Farnsworth. He commenced by asserting that as a general principle Congress had always, since 1789 when the original Constitution was ratified, had the power to enforce the Constitution both against individuals as well as states, giving as an illustration a statute passed in 1795 allowing the President to call forth the militia to execute the laws of the Nation when these laws could not be executed by ordinary judicial proceedings because of opposition by large combinations.[46] Citing other precedents as well, he concluded that the general power of the national government to act on both states and combinations of individuals "is a closed question, absolutely closed." [47] Bingham therefore concluded that

"If it was competent heretofore to give the President power to enforce by arms the faithful execution of the laws against unlawful combinations of men, surely it is equally competent, to make the fact of such combinations a crime punishable in your courts." [48]

Bingham then launched into an exposition of why he had revised the first draft of the first section of the Fourteenth Amendment. He quoted Farnsworth's speech in 1866 in favor of the Equal Protection Clause, and asserted that the fifth, or enforcement, section applied to this clause as well as all others in the amendment. He declared that he changed the amendment to conform to the form of the negative limitations on the states as found in Article I, Section 10 of the original Constitution, following some language by Chief Justice John Marshall

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[43] *Id.* at app. 115–6.
[44] *Ibid.*
[45] *Id.* at app. 117. He observed:
"The first section of the amendment requires no legislation; 'it is a law unto itself;' and the courts can execute it. If it requires 'enforcing' legislation, what kind does it require? Certainly not a law which goes a long way beyond the scope of the provision. The Constitution cannot be extended by the law. It is very clear to my mind that the only 'legislation' we can do is to 'enforce' the provisions of the Constitution upon the laws of the State."
[46] 1 Stat. 424, ch. 36 (1795). He also cited Martin v. Mott, 25 U.S. (12 Wheat.) 10 (1827).
[47] 42(1) Globe app. 81–82 (1871).
[48] *Id.* at 83.

in *Barron* v. *Baltimore*.[49] Bingham then launched into a peroration on the bill of rights as the privilege of citizens. After reviewing these rights, he asserted that the general power of the national government to enforce its laws applied to the Fourteenth Amendment equally with other provisions, and "does not depend on the plighted faith of the States as States to support it." Rather, he asserted that the Constitution "relies on individual duty and obligation." Bingham added that the national government need not rely on States to execute the limitations on their power, although they had concurrent power with the national government to do so. Bingham said that Congress should provide in advance "against the denial of rights by States, whether the denial be acts of omission or commission, as well as against the unlawful acts of combinations and conspiracies against the rights of the people." He added:

"The States never had the right, though they had the power, to inflict wrongs upon the free citizens by a denial of the full protection of the laws; because all State officials are bound by oath or affirmation to support the Constitution. As I have already said, the States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had not remedy. They denied trial by jury, and he had no remedy * * * If I am not right in asserting that the negative limitations imposed by the Constitution on States can be enforced by law against individuals and States, then the Government was wrong from the administration of Washington down * * *."[50]

Bingham gave as an example of enforcing a negative limitation on a state against an individual, a case where a state set up a system of slavery and one individual tried to enslave another pursuant thereto. Bingham asserted that Congress could directly punish the individual for acting pursuant to such a state law. He adverted to the Enforcement Act of 1870,[51] which set aside the constitutions and laws of half the states and punished individuals depriving Negroes of the right to vote pursuant to those state laws. He concluded that the federal government could only punish men, and not states.[52]

In Bingham's view, the statute was perfectly consistent with the Fourteenth Amendment as a limitation on states only. In his eyes, any individual attempting to enforce an unconstiutional state law could be punished by the federal government. Likewise, any combination strong enough to be able to force a state official to violate their constitutional duty by depriving a citizen of his privileges or equal protection could likewise be punished. Thus, a Klan group which was so powerful that it could intimidate a state judge, prosecuting attorney, and sheriff, into not affording protection to Negroes, by trying the murderers of Negroes, by which this combination compelled a state to deny equal protection of the laws, would be punishable under federal authority pursuant to the fifth section. One such case, at least, was reported to the House only a month before Bingham's speech.[53]

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[49] 32 U.S. (7 Pet.) 243 (1833). He declared:

"I answer the gentleman, how I came to change the form of February to the words now in the first section of the fourteenth article of amendment, as they stand * * *. I had read—and that is what induced me to attempt to impose by constitutional amendments new limitations upon the power of the States—the great decision of Marshall in Barron vs. the Mayor and City Council of Baltimore, wherein the Chief Justice said, in obedience to his official oath and the Constitution as it then was:

" 'The amendments [to the Constitution] contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them.' —7 Peters, p. 250.

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"In reexamining that case of Barron, Mr. Speaker, after my struggle in the House in February, 1866, to which the gentleman has alluded, I noted and apprehended as I never did before, certain words in that opinion of Marshall. Referring to the first eight articles of amendments to the Constitution of the United States, the Chief Justice said: 'Had the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention.' Barron vs. The Mayor, etc., 7 Peters, 250.

"Acting upon this suggestion I did imitate the framers of the original Constitution. As they had said 'no State shall emit bills of credit, pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts;' imitating their example and imitating it to the letter, I prepared the provision of the first section of the fourteenth amendment as it stands in the Constitution * * *." 42(1) Globe app. 84 (1871).

[50] *Id.* at 85.

[51] 16 Stat. 140 (1870).

[52] 42(1) Globe App. 85–86 (1871).

[53] H.R. Rep. No. 37, 41st Cong., 3rd Sess. 2 (1871).

D. Further views

After another Democratic tirade against the alleged despotism the bill would inaugurate,[54] Representative Aaron F. Perry, an accomplished Ohio Republican lawyer,[55] opened his speech in favor of the bill by asserting that large armed bands were operating in the South, depriving citizens of their Fourteenth and Fifteenth Amendment rights, "unhindered and unpunished by the State authorities." He added that they were "in fact organizations in aid of the Democratic party." He asserted that their purpose was to drive all Republicans away from the polls, or to drive them out of the South by violence. He added:

"Where these gangs of assassins show themselves the rest of the people look on, if not with sympathy, at least with forbearance. The boasted courage of the South is not courage in their presence. Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice. Of the uncounted scores and hundreds of atrocious mutilations and murders it is credibly stated that not one has been punished." [56]

Perry then undertook a defense of the constitutionality of the bill. He asserted that Congress could punish, as in the first section, deprivations of constitutional rights "under color of State authority," or, as in the second section, unlawful combinations "with at least the tacit acquiescence of the State authorities." He cited the Guaranty Clause of Article Five, Section Four of the Constitution, as authority for allowing the federal government to put down unlawful violence "if the State authorities be in complicity with it; if it be directed against rights secured by the Constitution and laws of the United States. * * *" [57] He concluded that the Equal Protection Clause is a command "that no State shall fail to afford or withhold the equal protection of the laws." [58]

Next, a Louisiana Republican declared that Congress could protect citizens "when the State governments criminally refuse or neglect those duties which are imposed upon them." [59] Representative James Monroe, an Ohio Republican and a former theology professor, declared that he interpreted the Constitution with "what may be termed the logic of the popular mind and heart . . . a kind of logic that does not always come in a form which the courts approve. . . ." He asserted that in "every free constitution there is a kind of natural growth" which did not come from amendments, but rather from extending God-given principles. By applying these extensions of principles he found power to pass the bill.[60] Another Democratic interlude about usurpation of state criminal jurisdiction and military despotism followed.[61] A Pennsylvania Democratic lawyer admitted the constitutionality of the first section of the bill dealing with

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[54] 42(1) Globe 361–4 (1871) (Rep. Thomas Swann, Md.). See also *id.* at 364–7 (Rep. William E. Arthur, D.–Ky.).

[55] He had declined a proffered appointment by President Abraham Lincoln to the United States Supreme Court.

[56] 42(1) Globe App. 78 (1871).

[57] *Id.* at App. 79. He added:

"Neither the Legislatures nor the Governors of the seceding States would invite the President to suppress violence in the respective States, because they were in open complicity with it. If intervention depended on their consent nothing could have been done. If the complicity of the State authorities had been merely negative and silent, it would have been in legal effect the same." *Id.* at App. 80.

[58] *Ibid.*

[59] *Id.* at 368 (Rep. Lionel A. Sheldon). He said:

"It evidently was not contemplated that any State government would refuse to protect its citizens or neglect to make the attempt. . . .

"Suppose the State governments are indisposed to act in the suppression of disorders, or refuse or neglect to punish for crimes against the citizens of the United States, where is there relief? In such case has the nation no power; is the Government under no obligation to go to the rescue of the injured? . . . Shall it be said that the citizen may be wrongfully deprived of his life, liberty, and property in his own country and at his own homestead, and the national arm cannot be extended to him because there is a State government whose duty it is to afford him redress, but refuses or neglects to discharge that duty? Such a theory may be palpable to the minds of men who have been too educated in the technicalities which make a remedy depend on whether the form of action is trespass or case, but it must be impalpable logic, indeed, to those whose lives, liberties, and property are all at that mercy of organized bands of marauders, who can safely defy the power or command the inactivity of the State authorities."

[60] *Id.* at 370.

[61] *Id.* at 371–4 (Rep. Stevenson Archer, Md.). See also *id.* at app. 135–9 (Rep. James R. McCormick, Mo.).

deprivation of constitutional rights under color of state law, but asserted that suits in federal court would cause delay and expense. But he asserted that the second section was unconstitutional because Congress could not punish crimes within the states.[62] Representative Jesse H. Moore, an Illinois Republican, also declared that southern outrages were in part provoked by the maladministration of reconstruction governments, and added that he would vote for the bill only if the second section, which he believed unconstitutionally usurped state criminal jurisdiction, was amended.[63]

Representative David P. Lowe, a Kansas Republican lawyer, opened a defense of the bill by asserting that southern state and local governments "have been found inadequate or unwilling to apply the proper corrective" against Klan-inspired violence.[64] He said that the bill was justified by the first and fifth sections of the Fourteenth Amendment. The fact that lawlessness was not being carried out pursuant to state authority was not, in his view, decisive of Congress' constitutional power where the state "permits the rights of citizens to be systematically trampled upon. . . . " He urged that the amendment does not merely extend to negativing state laws, because no enforcement under the fifth section would be needed. Lowe concluded that a state which did not prevent crime could not be excused because it had proper laws against crime on its books. In such a case, he argued that Congress could give citizens protection through its own agencies, citing the fugitive slave laws and *Prigg* v. *Pennsylvania*[65] to support this doctrine.[66] To him, direct federal protection was the only available remedy.[67] Two North Carolina Democrats then attacked the maladministration of the Republican-controlled state government as giving rise to Klan activities, and asserted that these activities were grossly exaggerated.[68]

Representative John B. Hawley, an Illinois Republican lawyer, commenced by stating that the federal government had power to enforce the Constitution and to protect citizens by military force, citing statutes as early as 1792 empowering the President to call out troops to suppress illegal combinations.[69] He added that unless Congress could pass laws protecting citizens in exercising constitutional rights, they would be left unprotected. He used the inability to speak against slavery in the South in *antebellum* times as an example of this. He concluded that the national government since 1789 did not have to rely on the states to enforce the Constitution.[70]

But Hawley declared that the second section was beyond Congress' power to enact if interpreted to mean that Congress could pass a general criminal code. Shellabarger interrupted to say that the enumeration of crimes in the draft was intended only to point out the ways in which a violation of constitutional rights could be perpetrated by conspirators which would make them punishable, and that murder or other crimes, if not designed to violate constitutional rights, would not be reached by the bill. Hawley urged that the second section be amended to make this clear, because Congress had no constitutional power to pass a general criminal code, but it did have power to punish combinations to prevent persons from exercising constitutional rights such as the right to vote or hold federal office.[71]

Debate continued, with a Negro South Carolina Republican detailing Klan murders of both white and colored Republicans, and noting that county officers in the northern portion of the state had resigned or fled to the state capital

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[62] *Id.* at app. 86–87 (Rep. John B. Storm).
[63] *Id.* at app. 110–3.
[64] *Id.* at 374.
[65] 41 U.S. (16 Pet.) 539 (1842).
[66] *Id.* at 375.
[67] *Id.* at 376. He declared:
"What less than this will afford an adequate remedy? The Federal Government cannot serve a writ of *mandamus* upon State Executives or upon State courts to compel them to observe and protect the rights, privileges, and immunities of citizens. There is no legal machinery for that purpose. There can be none. The case has arisen . . . when the Federal Government must resort to its own agencies to carry its own authority into execution."
[68] *Id.* at 376–8 (Rep. Alfred M. Waddell); *id.* at 378–380 (Rep. Francis E. Shober). See also *id.* at 384–7 (Rep. Joseph H. Lewis, D.-Ky.).
[69] *Id.* at 380–1.
[70] *Id.* at 382.
[71] *Id.* at 382–3.

for safety because of it."[71] Representative H. Boardman Smith, a freshman New York Republican lawyer, said that Congress could punish criminal acts designed to deprive a citizen of his constitutional rights by analogy to its right to punish assaults on a letter-carrier or murder of a federal judge, but Farnsworth indicated disagreement with this.[72]

Representative James G. Blair, a Liberal Republican lawyer from Missouri, made a strong attack on the bill. He declared that since the Thirteenth, Fourteenth, and Fifteenth Amendments were only directed at the action of states, they could not be enforced against private criminals.[74] He distinguished cases under the Fugitive Slave Clause of Article Four, Section Two, on the ground that it did not refer to state action specifically. Blair asserted that Congress had no more power to punish conspiracies than individual crimes, and that a thousand Ku Klux Klan outrages could not create power where none existed.[75] An Illinois Democrat added that the negative limitations of the Fourteenth Amendment could only be enforced by the courts by declaring void state statutes passed contrary thereto.[76]

Representative Ellis H. Roberts, a New York Republican, observed that the Ku Klux Klan was an organized, state-wide or multi-state conspiracy of a military form engaged in murdering both white and black Republicans in politically doubtful areas for the purpose of carrying the election in 1872 for the Democrats. He pointed out that the crimes were not sporatic, but systematic, and politically motivated.[77] He concluded that even "carpetbaggers" had a right to national protection from political violence in the states of their adoption.[78] Representative Kelley of Pennsylvania declared:

"That is the point. In what southern State has any Ku Klux been tried or convicted. I would like the gentleman to name one such case in all the southern States."[79]

Another Democratic interlude followed, one more consisting of declamation on the maladministration of southern Republican carpetbagger governments, warnings against federal centralization, and minimization of crime in the South.[80] A Mississippi Republican asserted that the Klan was an ally of the Democratic party, and that the murders, arson, and other crimes it committed in his state were politically-inspired.[81] Representative John Beatty, an Ohio Republican and former Union general, along with setting forth in detail the political crimes of the Klan[82] declared:

"Now, certain States have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and unquestionable. It consists of the sworn testimony of ministers of the Gospel who have been scourged because of their political opinions, of humble citizens who have been whipped and wounded for the same reason, of learned judges within whose

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[71] *Id.* at 389-392 (Rep. Robert B. Elliott). See also the statement of Rep. Joseph H. Rainey, another South Carolina Negro Republican:

"The question is sometimes asked, Why do not the courts of law afford redress? Why the necessity of appealing to Congress? We answer that the courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity. What benefit would result from appeal to tribunals whose officers are secretly in sympathy with the very evil against which we are striving?" *Id.* at 394.

[73] *Id.* at 393.

[74] *Id.* at app. 208–9. He observed:

"Suppose we should adopt an amendment to the Constitution granting the right to Mr. Jacob Albright to keep a 'dram shop' during life, and further provide that no State should abridge the right or privilege thus granted, and then add a further clause saying that 'Congress shall have the power to enforce it by "appropriate legislation," ' would it be considered that that provision would confer upon Congress the right to legislate with reference to assaults and batteries committed on Mr. Albright? No one would dare assert such an absurd proposition. And yet that is identically what is sought to be done here under the thirteenth, fourteenth, and fifteenth amendments, and the bill under consideration."

[75] *Id.* at app. 209–210.

[76] *Id.* at 396 (Rep. Edward Y. Rice).

[77] *Id.* at 412–3. He remarked: "As this violence increases, there is joy in one political party throughout the land. Boasts go forth that the States in which these outrages are flagrant will vote for a conservative candidate for President in 1872." *Id.* at 413.

[78] *Id.* at 414.

[79] *Id.* at 416.

[80] *Id.* at 415–8 (Rep. Benjamin T. Diggs, Del.); *id.* at 418–420 (Rep. John M. Bright, Tenn.); *id.* at app. 88–94 (Rep. Richard Duke, Va.); *id.* at 421–5 (Rep. Boyd Winchester, Ky.); *id.* at 430–1 (Rep. Henry D. McHenry, Ky.); *id.* at app. 131–141 (Rep. William W. Vaughn, Tenn.).

[81] *Id.* at 425–7 (Rep. George C. McKee).

[82] *Id.* at 428–9.

circuits men were murdered, houses burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty of punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons." [83]

Representative Henry D. McHenry, a Kentucky Democratic lawyer, made the point that since the first section of the Fourteenth Amendment, like Article I, Section 10 of the Constitution, was a limitation on state power only, therefore "No power is given to Congress to enforce upon the citizen a punishment or penalty for the wrong and delinquency of a State." [84] He added that a state can only protect people by its civil and penal codes and that even if these were deficient Congress had not power to supply the deficiency.[85] This was exactly contrary to the position of Representative John P. Shanks, an Indiana Republican lawyer who was not in the Thirty-Ninth Congress, and who declared:

"I do not want to see it [the bill] so amended that there shall be taken out of it the frank assertion of the power of the national Government to protect life, liberty, and property, irrespective of the act of the State." [86]

E. Garfield's position

The following day, April 4, 1871, Representative James A. Garfield, an Ohio Republican lawyer who had spoken and voted for the Fourteenth Amendment, and who was in ten years to become President of the United States, made a lengthy legal analysis of the bill and the Fourteenth Amendment. He commenced by extolling local government and local administration of justice, and by reading from speeches on the civil rights bill in 1866 showing that protection of persons and property were under the exclusive control of state governments before the amendment. He noted that the Enforcement Act of the previous year had been passed pursuant to Congress' power to control federal elections coupled with the Fifteenth Amendment, and not under the Fourteenth Amendment.[87]

Garfield weighed his words carefully. He pointed out:

"I hope gentlemen will bear in mind that this debate, in which so many have taken part, will become historical, as the earliest legislative construction given to this clause of the amendment. Not only the words which we put into the law, but what shall be said here in the way of defining and interpreting the meaning of the clause, may go far to settle its interpretation and its value to the country hereafter." [88]

Garfield then launched into an examination of Bingham's rejected proposed amendment of February 13, 1866, giving Congress direct power to enforce its privileges and immunities of citizens, and secure to all persons equal protection of life, liberty, and property. He read excerpts from the speeches of Republicans who both supported and opposed it. He then noted that this first draft was buried after "it became evident that many leading Republicans of this House would not consent to so radical a change in the Constitution . . ." [89] Garfield continued that the revised first section of the Fourteenth Amendment was reported to the House, and presently stands, except for the declaration as to citizenship, by the late Representative Thaddeus Stevens, the Radical Republican lawyer and leader in the House from Pennsylvania, who was chairman on the part of the House of the Joint Committee on Reconstruction, for that committee. Garfield asserted that Stevens felt that the first section fell short of his wishes, but was the most

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[83] *Id.* at 428.

[84] *Id.* at 429. He also asserted that under Article Three of the Constitution the federal courts could not be given any such power. *Id.* at 430.

[85] *Id.* at 431. He noted:

"How can a government protect a man who has been murdered? It can punish the murderer. It can protect the man who has been assaulted and beaten only by giving him a pecuniary consideration for the injury done him. Do our States fail in these remedies? What Southern State has not a penal code to punish wicked men for their crimes and misdemeanors?"

[86] *Id.* at app. 141. Shanks also said: ". . . I ask you, when he goes into a State where he is not protected, how he will get protection from the national Government if the Government has no power to overrule the legislative action of a State which denies . . . the protection which, under our laws, we have promised to accord him? If he is to be protected at all there ought to be some power in the national Government to afford that protection. . . ."

[87] *Id.* at app. 149–150.

[88] *Id.* at app. 150.

[89] *Id.* at app. 150–1.

that could be obtained at the time. Bingham then interrupted to answer that Stevens' remark had no relation to the first section; but Garfield refuted this.[90]

He then reviewed Stevens' speech and several others, and noted that the first section "was throughout the debate, with scarcely an exception, spoken of as a limitation of the power of the States to legislate unequally for the protection of life and property." He pointed out that no republican opposed the revised draft on the same grounds that the original draft was opposed, namely giving Congress too much power, but several of them regretted "that the article was not sufficiently strong." Garfield rejected the Democratic attacks made at the time, that the first section centralized the government, as being political declamations. He concluded that the final form of the first section "received many Republican votes that the first form to which I have referred could not have received." Comparing the two forms, he noted that the rejected amendment would have allowed Congress to legislate directly on citizens, while the form adopted, with the fifth section, expends itself on states.[91]

Garfield then asserted that Shellabarger and Hoar were reading the Privileges and Immunities Clause of the Fourteenth Amendment too broadly if they thought that it gave Congress the right to legislate directly for the protection of persons and property within the states.[92] He also conceded that the Equal Protection Clause related to the administration of the laws, as well as their enactment.[93] He therefore observed that Congress had the power to enforce the amendment under the fifth section by making it a penal offense for any person, whether official or private, to invade the rights of citizens, or by violence, threats, or intimidation, deprive him of his rights, as "a part of that general power vested in Congress to punish the violators of its laws." In other words, a private criminal who interferes with the state in giving equal protection would be, in his view, punishable by federal authority. Garfield then adverted to the evidence of Klan activity, and declared:

"But the chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or by a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is clearly made out, I believe the last clause of the first section empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection.

"Now if the second section of the pending bill can be so amended that it shall clearly define this offense, as I have described it, and shall employ no terms which assert the power of Congress to take jurisdiction of the subject until such denial be clearly made, and shall not in any way assume the original jurisdiction of the rights of private persons and of property within the States—with these conditions clearly expressed in the section, I shall give it my hearty support. These limitations will not impair the efficiency of the section, but will remove the serious objections that are entertained by many gentlemen to the section as it now stands."[94]

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[90] *Id.* at app. 151. Garfield declared:
"My colleague can make but he cannot unmake history. I not only heard the whole debate at the time, but I have lately read over, with scrupulous care, every word of it as recorded in the Globe. I will show my colleague that Mr. Stevens did speak specially of this very section."

[91] *Ibid.* He observed:
"The one exerts its force directly upon the States, laying restrictions and limitations upon their power and enabling Congress to enforce these limitations. The other, the rejected proposition, would have brought the power of Congress to bear directly upon the citizens, and contained a clear grant of power to Congress to legislate directly for the protection of life, liberty, and property within the States. . . .
"Mr. Speaker, unless we ignore both the history and the language of these clauses we cannot, by any reasonable interpretation, give to the section, as it stands in the Constitution, the force and effect of the rejected clause."

[92] *Id.* at app. 152.

[93] *Id.* at 153. Garfield declared:
"It is not required that the laws of a State shall be perfect. They may be unwise, injudicious, even unjust; but they must be equal in their provisions, like the air of heaven, covering all and resting upon all with equal weight. The laws must not only be qual on their face, but they must be so administered that equal protection under them shall not be denied to any class of citizens, either by the courts or the executive officers of the State.
"It may be pushing the meaning of the words beyond their natural limits, but I think the provision that the States shall not 'deny the equal protection of the laws' implies that they shall afford equal protection."

[94] *Ibid.*

Garfield declared that he wanted these amendments "because I am unwilling that the interpretation which some gentlemen have given of the constitutional powers of Congress shall stand as the uncontradicted history of this legislation." He advocated passage of a "proper bill," adding:

"It is against a dangerous and unwarranted interpretation of the recent amendments to the Constitution that I feel bound to enter my protest." [95]

Shellabarger interrupted Garfield to say that he understood Garfield's remarks to mean that since the first section of the Fourteenth Amendment was a limitation only on state power, under the fifth section Congress could not directly legislate to secure the privileges and immunities of citizenship. Since the Fifteenth Amendment was also a negation, Shellabarger asked Garfield how the latter justified his vote for the Enforcement Act of 1870. The latter replied that under that logic some of the provisions of the Enforcement Act would be unconstitutional, but the act could be justified under the original Constitutional provision giving Congress the right to regulate the times, manners, and places of federal elections. In addition, Garfield justified his vote because of the double negative also placed on the United States in the Fifteenth Amendment, which did not appear in the Fourteenth Amendment. Garfield concluded that the United States could punish a person for depriving a citizen of equal protection under color of state authority, but it had no power to punish a mere violation of state law.[96]

E. Additional debate

Further coroboration of the crimes in North Carolina committed by the Ku Klux Klan was set forth by a Republican from that state, who asserted that they were perpetrated on Republican voters to drive them from the polls and carry the state for the Democratic Party, and that these political crimes were never punished by state authorities.[97] Representative Benjamin F. Butler, the well-known Massachusetts Republican, charged that the Klan had taken over several southern state governments, and was intent on driving the Republican Party out of the South. He asserted that it was a Democratic political engine, and set forth a large quantity of testimony about its activities and crimes. He added that even in states with Republican officials, they were either powerless to enforce the law, or negligent in doing so. Butler pointed out that the Klan had murdered many Republican local officials, state legislators, and even judges. He concluded that Congress could protect citizens when states denied them protection, and relied on the fugitive slave laws and statutes existing since 1794 which allowed the President to call out troops to enforce federal laws as precedents.[98]

Representative John Coburn, an Indiana Republican ex-judge, likewise distinguished Klan crimes from ordinary offenses on the ground that they were politically-inspired, organized by thousands of men, and screened from state punishment by other conspirators.[99] He, too, recounted the evidence of these political crimes at length, and the lack of any convictions in court for them.[100] Coburn then reasoned:

"The failure to afford protection equally to all is a denial of it.

"Affirmative action or legislation is not the only method of a denial of protection by a State, State action not being always legislative action. A State may by positive enactment cut off from some the right to vote, to testify or to ask for redress of wrongs in court, . . . and many other things. This positive denial of protection is no more flagrant or odious or dangerous than to allow

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[95] *Ibid.*

[96] *Id.* at app. 153–4.

[97] *Id.* at 436–440 (Rep. Clinton L. Cobb).

[98] *Id.* at 441–451. He said:

"Is it one of the rights of a State not to protect its citizens in the enjoyment of life, liberty, and property, and thereby deny him the equal protection of the laws, so that, when the General Government attempts to do for the protection of the citizen what the State has failed to do, is it to be held an interference with the rights of the State? Pardon me; it seems to me that such action is only a necessary and proper interference with the wrongs of a State. A State has no constitutional or other right reserved to itself to deny or neglect to its citizen the equal protection of the laws." *Id.* at 448.

[99] *Id.* at 457. He declared:

"The commission of isolated outrages is not what is complained of, but of crimes perpetrated by concert and agreement, by men in large numbers acting with a common purpose for the injury of a certain class of citizens entertaining certain political principles. A mere assault and battery, or arson, or murder . . . is a very different thing, and need and does cause no alarm; nor yet does the more formidable existence of local regulators. The law is believed to be sufficient to cover such cases, ..."

[100] *Id.* at 457–9.

certain persons to be outraged as to their property, safety, liberty, or life; than to overlook offenders in such cases; than to utterly disregard the sufferer and his persecutor, and treat the one as a nonentity and the other as a good citizen. . . . A systematic failure to make arrests, to put on trial, to convict, or to punish offenders against the rights of a great class of citizens is a denial of equal protection in the eye of reason and the law, and justifies, yes, loudly demands, the active interference of the only power that can give it. . . .

"It may be safely said, then, that there is a denial of the equal protection of the law by many of these States. It is therefore the plain duty of Congress to enforce by appropriate legislation the rights secured by this clause of the fourteenth amendment of the Constitution." [101]

Coburn then relied on Chief Justice Marshall's opinion in *Cohens* v. *Virginia* [102] for the proposition that Congress could enforce the Constitution directly against individuals. He concluded that whenever a state denied equal protection Congress could open federal courts to the victim, which he deemed was more effective than the use of state courts, and less disruptive than dealing with the state governments.[103] Once again, the Democrats replied to all of this by attacking southern reconstruction governments as corrupt and inefficient, and denouncing the bill as despotic.[104] They again insisted that the Fourteenth Amendment, like the tenth section of the first article of the Constitution, was a negative limitation on state statutes, which required only judicial enforcemen.[105]

The following day, Representative Henry L. Dawes, a Massachusetts Republican lawyer, defended the constitutionality of the bill with some generalized references to the right of Congress to enforce the Constitution directly on individuals. He did not address himself to the specific wording of the Fourteenth Amendment, but rather merely observed that the federal judicial power extended under Article Three to hearing cases arising under the Constitution and laws of the United States.[106]

G. The amended second section

Shellabarger then offered an amended bill, which confined that portion of the second section laid under the Fourteenth Amendment to conspiracies to deprive any person of the equal protection of the laws, or equal privileges and immunities under the laws, or for the purpose of preventing state authorities from securing equal protection to all persons, or injuring any such official for enforcing equal protection.[107]

The bill was defended by Representative Jeremiah M. Wilson, a Republican former State judge from Indiana. He opened by declaring:

"The question is directly presented whether or not Congress possesses the constitutional power to enact laws securing to the citizens in a State the equal protection of the laws, where the State fails to do so through inability to execute the laws, or refuses to enact laws to that end, or enacts laws making unjust discriminations . . . . if it be true that a State can willfully withhold the execution of her laws with reference to the protection of particular individuals or a particular class of individuals; if it be true that when a State by the intimidation of the authorities, or the corruption of courts, or juries, or witnesses, cannot secure to all persons the equal protection of the laws; if it be true that under any of these circumstances Congress has no power to enact a law by which the citizen may be protected, it is time that the country should know it." [108]

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[101] *Id.* at 459.
[102] 19 U.S. (6 Wheat.) 264 (1821).
[103] 42 (1) Globe 459–460 (1871). See also *id.* at app. 182 (Rep. Ulysses Mercur, R.-Pa.).
[104] *Id.* at app. 155 (Rep. Pierce Young, Ga.); *id.* at 440–1 (Rep. William P. Price, Ga.); *id.* at 451–4, 456 (Rep. Samuel S. Cox, N.Y.); *id.* at 461 (Rep. William R. Roberts, N.Y.); *id.* at app. 157–162 (Rep. Edward I. Golladay, Tenn.); *id.* at app. 257–9, 261 (Rep. William S. Holman, Ind.).
[105] *Id.* at 455 (Cox); *id.* at app. 160 (Golladay); *id.* at app. 304–5 (Rep. James H. Slater, Ore.). See also *id.* at app. 259, where Holman said:
"A State, as used in the Constitution, always means the organized political body. No State shall 'deny.' . . . A State can only act through her legislative department, and if any State does violate either one of these provisions of this first section of the fourteenth amendment, it must be done by some affirmative act of law, and then, sir, what is the remedy? . . . The Federal courts—the Supreme Court of the United States, to which is confided the duty of vindicating the Constitution from infraction, either by the acts of Congress or the acts of any State, declares the statute null and void."
[106] *Id.* a 476.
[107] *Id.* at 477–8.
[108] *Id.* at 481.

Wilson thereupon undertook to refute Kerr's speech and other Democratic speeches by showing that there was no analogy between the Fourteenth Amendment and Article I, Section 10, of the original Constitution; he did not even refer to Bingham's admission about copying this in his discourse. Instead, he made a sweeping assertion that Congress could enforce the Constitution against conspirators. Wilson then added that the Equal Protection Clause gave everyone an affirmative right to such protection. He construed the word "deny" to mean "fail or refuse to provide for." [109] Wilson argued:

"But it is argued that this word 'deny' only means that a State shall not affirmatively by statutory enactment discriminate between persons subject to its jurisdiction. Such a construction would simply amount to this: It would make this a constitutional provision that a State should not indulge in legislation discriminating against any of its citizens, giving to one one measure of protection and to another a different measure of protection, a character of discrimination in legislation which would be an insult to the age, and could not, therefore, have been contemplated by the framers of this article." [110]

Of course, such legislation was precisely what the framers were interested in; southern states were alleged to have many such laws. Manifestly, his analysis was historically erroneous. He then shifted to more tenable ground, declaring that the word "state" included executive and judicial branches as well as legislative branches, and added that a state may "deny" protection if the former branches will not enforce the laws enacted by the latter. He reasoned that if a refusal to legislate equally was a denial of equal protection, "upon what ground can it be pretended that a refusal to execute, or a failure to do so, through inability, equally with reference to all persons, is not also a denial?" [111] Wilson concluded that Congress had a sound discretion to choose any appropriate remedy, and ought to pass the bill to curb politically-inspired violence in the South which state authorities were not able to prevent.[112]

Representative Burton C. Cook, an Illinois Republican lawyer who had voted for the Fourteenth Amendment, and who had suggested the amendment which Shellabarger proposed, then arose to explain the constitutional theory underlying this amendment. He declared that Congress had the right to enforce every right secured by the Constitution, but avowed that no Republican believed that Congress could punish assault and battery when committed in combination in a state, or could enforce the laws of a state, except "when the State may be unable to do so by reason of lawless combinations too strong for the State authorities to suppress." [113]

Cook then declared that Congress could legislate to protect any constitutional right, whether expressed by affirmative or negative provision, the denial of which would give a right to appeal from a state court to the United States Supreme Court. He added that it could punish combinations organized to deprive citizens of their constitutional rights, or even individuals so acting. One such combination would be one designed "to prevent the Governor from calling upon the President . . . to aid the State in protecting the citizen [and] would be an offense against the United States." [114] Cook declared:

"Suppose the combination in the State is too strong for the State laws to restrain it; and suppose a hundred men not engaged in that combination at all should form a conspiracy, by force, intimidation, or threats to prevent the Governor from calling upon the national power to protect the right of the citizen, that would be an offense against the Constitution of the United States." [115]

Cook gave as a further illustration, a conspiracy to prevent a State court clerk from certifying a record on appeal to the United States Supreme Court, or a conspiracy to advocate the election of persons to national office. He reasoned that since under the Equal Protection Clause, all persons were entitled to protection from the legislative, executive, or judicial branches of the State government, a—"combination of men by force and intimidation, or threat not to prevent the Governor of a State . . . [from securing aid] to protect the rights of all citizens alike, or to induce the Legislature of a State by unlawful means to deprive

[109] *Id.* at 481–2.
[110] *Id.* at 482.
[111] *Ibid.*
[112] *Id.* at 483–5.
[113] *Id.* at 485.
[114] *Ibid.*
[115] *Id.* at 486.

citizens of the equal protection of the laws, or to induce the courts to deny citizens the equal protection of the laws . . . is the offense against the Constitution of the United States, and may be defined and punished by national law. And that, sir, is the distinct principle upon which this bill is founded." [116]

In other words, Cook's amendment, in his own view, which Shellabarger adopted, punished only conspiracies to obstruct State officials in performing their constitutional duty of affording all persons equal protection. It did not punish conspiracies to commit crimes against individuals, even if such crimes were motivated by a desire to deprive them of equal protection.

Several Republicans emphasized that the Ku Klux Klan crimes were exclusively aimed at black and white Republicans to aid the Democrats, and that evidence of them was ample.[117] One of them accused "the courts of these States and officers of the law and juries [of conspiring] to defeat justice . . ." and asserted that "the State is powerless, by reason of conspiracy among its rebel officers, to afford protection to its loyal citizens." [118] The Democrats once again took the position that the reports of Klan-sponsored crimes were exaggerated, that southern disorders were provoked by maladministration, and that the bill was despotic.[119]

On April 6, 1871, the last day of House debate, Representative Ulysses Mercur, a Republican ex-judge from Pennsylvania who had voted for the Fourteenth Amendment, declared that the Equal Protection Clause "cannot be enforced by a bill in equity to compel specific performance of it; but if a State denies this equal protection, the United States Government must step in and give that protection which the State authorities neglect or refuse to give." He further observed that the word "state" in the Fourteenth Amendment included executive and judicial as well as legislative branches of government. He concluded:

"If, then, the three branches of a State government persistently and continuously deny to any person within its jurisdiction the equal protection of the laws, it is a denial by the State . . . the word 'deny' in this section . . . very obvious[ly] . . . means to refuse, or to persistently neglect or omit to give that 'equal protection' imposed upon the State by the Constitution." [120]

Representative Charles W. Willard, a Vermont Republican lawyer, began his analysis of the bill by cautioning the House that it could go to the verge of its constitutional powers but not beyond, and that clear line of demarkation existed between federal and state powers which could not be transcended. He added that one of the exclusive state powers was criminal law enforcement, and that the bill originally introduced by Shellabarger, and the modified form thereof reported from a special committee by him, as far as the second section was concerned, was an unconstitutional extension of federal power. The fact that the crime was motivated by a desire to deprive another of his constitutional rights did not, in Willard's view, bring the offense within Congress' power. But he approved of the bill with the latest amendment to the second section, since it only punished a conspiracy to deprive another of equal protection or equal privileges and immunities.[121]

Willard then launched into a detailed analysis of the Fourteenth Amendment. He pointed out that under the fifth section, legislation must be within the scope of the first section. Accordingly, while it could enforce equal protection as a state duty, it could not punish private crimes as such.[122]

H. Burchard's analysis

Representative Horatio C. Burchard, an Illinois Republican lawyer, also favored having Congress go to the "extreme verge" of its constitutional powers to suppress the political violence in the South which state courts were not putting down. He said that the sixth section of the Enforcement Act of 1870 should be sufficient for this purpose. However, as new legislation was deemed necessary, he examined the original Shellabarger bill and the "substitute for the second section which, * * * will, if adopted, bring the legislation clearly within the con-

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[116] *Ibid.*
[117] *Id.* at 486–7 (Rep. James N. Tyner, Ind.); *id.* at 487–8 (Rep. William E. Lansing, N.Y.); *id.* at 165–7 (Rep. William Williams, Ind.).
[118] *Id.* at app. 167 (Williams).
[119] *Id.* at 478–481 (Rep. James M. Leach, N.C.); *id.* at app. 162–5 (Rep. John T. Bird, N.J.); *id.* at 509–510 (Rep. Charles A. Eldridge, Wisc.).
[120] *Id.* at app. 182.
[121] *Id.* at app. 187–8.
[122] *Id.* at app. 188–190.

stitutional powers of Congress and satisfy the scruples of those who might object to the original bill." [123] He justified an extensive analysis of the Fourteenth Amendment by saying:

"True, there is an ultimate tribunal to pass upon the legality of these measures, but the words of many distinguished gentlemen who have spoken upon this bill, and above all the legislation endorsed by gentlemen who took part in framing the amendment under which authority is claimed, will become guides in construing the extent of the new powers added to the constitution." [124]

Burchard said that he heartily sympathized with the objects of the bill, and found the first section constitutional and desirable. But he asserted that the original draft of the second section, which punished conspiracies to commit certain crimes in order to deprive persons of their constitutional rights, was an unconstitutional invasion of exclusive state criminal jurisdiction. Emphasizing that the first section of the Fourteenth Amendment limited only the actions of states, he pointed out that the fifth section, allowing Congress to enforce the first section, was equally limited.[125] Burchard then pointed out:

"In the enforcement of the observance of duties imposed directly upon the people by the Constitution, the General Government applies the law directly to persons and individual acts. It may punish individuals for interference with its prerogatives and infractions of the rights it is authorized to protect. For the neglect or refusal of a State to perform a constitutional duty, the remedies and power of enforcement given to the General Government are few and restricted. It cannot perform the duty the Constitution enjoints upon the State. * * * Nor do prohibitions upon States authorize Congress to exercise the forbidden power. It may doubtless require State officers to discharge duties imposed upon them as such officers by the Constitution of the United States. A State office must be assumed with such limitations and burdens, such duties and obligations, as the Constitution of the United States attaches to it. The General Government cannot punish the State, but the officer who violates his official constitutional duty can be punished under Federal law. What more appropriate legislation for enforcing a constitutional prohibition upon a State than to compel State officers to observe it? Its violation by the State can only be consumated through the officers by whom it acts. May it not then equally punish the illegal attempts of private individuals to prevent the performance of official duties in the manner required by the Constitution and laws of the United States?" [126]

Burchard then noted that federal courts had repeatedly held that they could require local officers to levy state-imposed taxes when necessary to satisfy judgments against their county or city, although the officers' powers came from state laws. He added that Congress could "provide to punish conspiracies to prevent the performance of duties it can compel such officers to discharge." He therefore reasoned that Congress could require state officers to afford equal protection and could punish private persons who interfered with state officers in affording such protection.[127]

Burchard proceeded to observe that the Due Process Clause was only a limitation on state officials, and did not relate to private lawlessness. The Equal Protection Clause, in his view, was also only a limitation on state authority, but reached all branches of state government, so that if the legislature neglected to provide laws granting the same protection, or the judiciary did not enforce the law, or the executive permitted the law to be disregarded, the state has denied equal protection.[128] He quoted from one of Bingham's speeches in 1866 to show that it was not intended that Congress could enforce the first section of the Fourteenth Amendment on private individuals by general affirmative legislation. He therefore concluded that Congress could not punish ordinary

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[123] *Id.* at app. 312–3.
[124] *Id.* at app. 313.
[125] *Id.* at app. 313–4.
[126] *Id.* at app. 314.
[127] *Id.* at app. 314–5.
[128] *Id.* at app. 315, where he declared:
"If the State Legislature pass a law discriminating against any portion of its citizens, or if it fails to enact provisions equally applicable to every class for the protection of their person and property, it will be admitted that the State does not afford the equal protection. But if the statutes show no discrimination, yet in its judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction which is accorded to another, or if secret combinations of men are allowed by the Executive to band together to deprive one class of citizens of their legal rights without a proper effort to discover, detect, and punish the violations of law and order, the State has not afforded to all its citizens the equal protection of the laws."

crimes, but could set aside unconstitutional state laws, and could punish state officials who willfully and wrongfully execute such laws, or neglect their constitutional duty of providing equal protection. He also said:

"That willful and wrongful attempts of individuals to prevent such officers performing such duties can be punished by the United States.

"Mr. Speaker, such is the scope of this bill, if the amendment proposed by the committee is adopted." [129]

Burchard then praised the amendment for eliminating the dubious provision found in the second section of Shellabarger's first draft concerning the punishment of private individuals for crimes against other individuals, on the ground that the Fourteenth Amendment reaches only conspiracies to prevent states from affording equal protection, and not crimes against individuals. He added that the amended bill would "Punish conspiracies to deny the equal protection of the laws through the means and agencies by which such protection is afforded." [130]

I. Passage of the House bill

Farnsworth then moved to further amend Shellabarger's revised second section by limiting it to punishment for interfering with federal officers engaged in securing equal protection.[131] He expressed approval of the modifications already made to this section, but he objected to making it a federal crime to obstruct state officers. He gave as an illustration a case where a man assaulted a town constable engaged in serving process necessary to protect another man in his equal legal rights. Farnsworth asked:

"Now, can it be claimed that the fourteenth amendment, or, any other provision of the Constitution, authorizes us to provide by law for punishing a man in the State of Illinois for resisting a town constable in the discharge of his duty?" [132]

Representative Luke P. Poland, a former chief of justice of the Vermont Supreme Court, who as a Republican United States Senator in 1866 had spoken and voted for the Fourteenth Amendment when on its passage, arose to say that he largely agreed with Farnsworth's first speech, and was opposed to the first draft of the second section of the bill, because the Fourteenth Amendment gave Congress no power to punish ordinary offenses against individuals. He added:

". . . the last clause of the fourteenth amendment provides that no State shall deny, the equal protection of the laws to its citizens. Now, in my judgment, that is a constitutional enactment that each State shall afford to its citizens the equal protection of the laws. I cannot agree with several gentlemen upon my side of the House who insist that if the State authorities fail to punish crime committed in the State therefore the United States may step in and by a law of Congress provide for punishing that offense; . . .

"But I do agree that if a State shall . . . make proper laws and have proper officers to enforce those laws, and somebody undertakes to step in and clog justice by preventing the State authorities from carrying out this constitutional provision, then I do claim that we have the right to make such interference an offense against the United States; that the Constitution does empower us to

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[129] *Ibid.*

[130] *Ibid.* Burchard declared:

"The gravamen of the offense is the unlawful attempt to prevent a State through its officers enforcing in behalf of a citizen of the United States his constitutional right to equality of protection. It is with this view that this legislation is competent. The civil rights and enforcement bills heretofore passed provided for the punishment of those acting as State officers who attempted to execute the laws of a State in conflict with the Constitution of the United States. Is not an individual acting as a State officer, upon whom, as such officer, the Constitution and laws of the United States impose the performance of those duties, also amenable to the laws of the United States for their non-performance? If the refusal of a State officer, acting for the State, to accord equality of civil rights renders him amenable to punishment for the offense under United States law, conspirators who attempt to prevent such officers from performing such duty are also clearly liable."

[131] The revised draft of the second section read: "That if two or more persons . . . shall conspire together for the purpose . . . of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or to injure any person in his person or property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, each and every person so offending shall be deemed guilty of a high crime, ..." Farnsworth wanted it to read: "or for the purpose of preventing or hindering the constituted authorities of the United States within any State from giving or securing to all persons within such States the equal protection of the laws." *Id.* at 513.

[132] *Ibid.* Shellabarger, of course, disagreed with this analysis.

aid in carrying out this injunction, which, by the Constitution, we have laid upon the States, that they shall afford the equal protection of the laws to all their citizens. When the State has provided the law, and has provided the officer to carry out the law, then we have the right to say that anybody who undertakes to interfere and prevent the execution of that State law is amenable to this provision of the Constitution, and to the law that we may make under it declaring it to be an offense against the United States." [133]

Bingham then offered a substitute for the committee bill, which, insofar as it related to the punishment of private individuals under the Fourteenth Amendment, was identical to the Shellabarger revision.[134] Thereafter, Farnsworth withdrew his amendment to the second section.[135]

Shellabarger made a final speech in favor of the bill. With great rhetoric he recounted the Ku Klux Klan political crimes in the South, which he deemed different from ordinary crimes because they were directed against the government and its laws. Republicans alone were always killed, and for political reasons. He attacked the Democratic Party as a virtual sponsor of the crimes, and as the intended political beneficiary thereof. He concluded that Congress could put down such a conspiracy which was strong enough to thwart the power of the states.[136]

After some additional amendments were adopted, Bingham withdrew his substitute, on the grounds that the Shellabarger redraft was substantially like his version. The bill then passed the House on a party-line vote of 118 yea to 91 may, with the severest Republican critics of the original draft, including even Farnsworth, voting for it.[137]

3. THE SENATE DEBATE

A. Initial discussion

The Senate commenced debating the Ku Klux Klan even before passage of the House bill. Senator John Sherman, an Ohio Republican, made a long speech setting forth in detail the murders, whippings, and burning of buildings committed by the Klan in North Carolina to terrorize white and colored Republicans.[138] Sherman asserted that these crimes differed from ordinary crimes because the victims were all Republicans, the criminals were all Democrats, and the motive was always political. He added that nobody was ever punished because the grand juries would not indict and the petit juries would not convict.[139]

A joint committee was therefore proposed to investigate the Klan.[140] Senator Adelbert Ames, a Mississippi Republican "carpetbagger," made a long speech supporting the investigation and setting forth in detail the political murders committed in that state and in Louisiana. These murders were asserted to be in the hundreds.[141] Debate continued in this vein for several days with Republicans setting forth the crimes and Democrats either denying their existence, denying that they were either political or uniformly unpunished, or excusing them as having been provoked by maladministration and corruption in southern state governments under Republican domination.[142] Senator Frederick A. Sawyer, a South Carolina Republican, declared that the Klan was so powerful in several counties in his state that county officials had resigned upon its orders.[143]

Senator Allen G. Thurman, an Ohio Democrat and a former state supreme court chief justice, cautioned Congress against exceeding its constitutional power. He noted that a Republican representative from Ohio had introduced a bill which assumed that Congress had plenary power to punish crime within the states. He asserted that such a bill was clearly unconstitutional, but feared that under the excitement and stress caused by crimes in the South it would be rushed through anyway.[144] The Kentucky Democratic Senators opposed further action, minimiz-

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[133] *Id.* at 514.
[134] *Id.* at 514–5.
[135] *Id.* at 515.
[136] *Id.* at 516–9. See also *id.* at 511–2 (Rep. Legrand W. Perce, R.-Miss.).
[137] *Id.* at 522.
[138] *Id.* at 154–7.
[139] *Id.* at 157–9. See also *id.* at 165–6.
[140] *Id.* at 180–2, 189–192.
[141] *Id.* at 195–8. See also *id.* at 569–571.
[142] *Id.* at 198–209, 220–3, 236–240.
[143] *Id.* at 210.
[144] *Id.* at 221–2. The reference was undoubtedly to Shellabarger's bill. See *id.* at 232.

ing crime in their state and asserting that the state authorities were punishing it, a point disputed by the Republicans.[145]

On March 31, 1871, Senator John Pool, a North Carolina Republican, delivered a three-hour speech on the activities of the Klan in his state, liberally interspersed with current political history. He pointed out that it contained forty to sixty thousand members, all executing political crimes pursuant to order and shielding the others from state authorities. Accordingly, there were no convictions, and the state government was helpless to deal with the Klan. Pool also declared that Klansmen were instructed to pack the grand and petit juries to frustrate convictions, and to rescue fellow conspirators from prison if convicted. He asserted that many of the sheriffs were Klansmen themselves, and that the Klan had manipulated the Democratic-dominated legislature to impeach the incumbent Republican governor for moving against them with military forces, and to repeal the anti-Klan law.[146]

Several days later Senator Francis P. Blair, a Missouri Democratic lawyer who had been a Union general and Republican representative before accepting the Democratic vice-presidential nomination in 1868, made a lengthy speech to demonstrate that Congress lacked power to afford relief against the Klan. His position was that the Fourteenth Amendment reached only discriminatory state statutes. He sneered at the reports of Klan outrages as being unreliable, and attacked the southern reconstruction government as corrupt and incompetent.[147]

In reply to Blair, Senator Oliver P. Morton, an Indiana Republican lawyer who had not sat in the Thirty-Ninth Congress, said of the Equal Protection Clause:

"If a State fails to secure to a certain class of people the equal protection of the laws, it is exactly equivalent to denying such protection. Whether that failure is willful or the result of inability can make no difference, . . . The meaning of the Constitution is, that every person shall have the equal protection of the laws. It is in its nature an affirmative provision, and not simply a negative on the power of the States. Will it be pretended that the meaning would be changed if it read, 'every person in the United States shall be entitled to the equal protection of the laws?' It means to confer upon every person the right to such protection, and therefore gives to Congress the power to secure the enjoyment of that right. Whenever the Constitution confers a power or guaranties a right it gives also the means of exercising the power and protecting the right.

"The Government can act only upon individuals. It cannot prevent the Legislature of a State from passing an act, or compel the passage of an act. . . . There can be no legislation to enforce it as against a State. A criminal law cannot be made against a State. . . . The legislation which Congress is authorized to enact must operate, if at all, upon individuals.[148]

Morton added that this principle was recognized under the Fifteenth Amendment by the Enforcement Act of 1870.[149] He said that Congress could penalize organizations created to deny others the equal protection of the laws by federal statute.[150]

Morton then launched into a description of the Klan offenses. He asserted that white and colored Republicans in the South were being murdered for political reasons.[151] He added that the states were not punishing these crimes, and that state courts were powerless to do anything about them, or provide any legal remedy for them. States could not protect the victims because klansmen systematically perjured themselves in court, procured their appointment to juries in order to acquit their co-conspirators, regardless of the evidence, and intimidate officers, sheriffs, and even judges. Morton concluded that the klan intended

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[145] *Id.* at 343–350, app. 94–5 (Sen. Garrett Davis and John W. Stevenson of Kentucky, both Democrats, and Sen. Oliver P. Morton of Indiana, John Sherman of Ohio, and Henry Wilson of Massachusetts, all Republicans).

[146] *Id.* at app. 100–110.

[147] *Id.* at app. 117–134. See the reply of Senator Joseph R. West, a Louisiana Republican. *Id.* at 434–6.

[148] *Id.* at app. 251.

[149] 16 Stat. 140 (1870).

[150] 42(1) Globe app. 251 (1871).

[151] *Id.* at app. 251–2. He said:

"We are not at liberty to doubt that the purpose is by these innumerable and nameless crimes to drive those who are supporting the Republican party to abandon their political faith or to flee from the State. A single murder of a leading Republican will terrify a whole neighborhood or county. The whipping of a dozen Negroes, because they are Negroes and asserting their right to the equal enjoyment of liberty, property, and the expression of their opinions, will have the effect to terrify those who live for miles around." *Id.* at app. 252.

to dominate the South politically through violence.[152] Several Democratic senators asserted that the evidence of Klan activity was unreliable hearsay and rumor.[153]

Senator Frederick T. Frelinghuysen, a New Jersey Republican and former state-attorney-general, after noting that southern states were not protecting citizens against Klan-inspired crimes,[154] said:

"A State denies equal protection whenever it fails to give it. Denying includes inaction as well as action. A State denies protection as effectually by not executing as by not making laws. . . . It is a poor comfort to a community that have been outraged by atrocities, for the officials to tell them, 'We have excellent laws on our statute-books.' It is the citizen's right to have laws for his protection, to have them executed, and it is the constitutional right and duty of the General Government to see to it that the fundamental rights of citizens of the United States are protected.

"How is the United States to protect the privileges of citizens of the United States in the States? It cannot deal with the States or with their officials to compel proper legislation and its enforcement; it can only deal with the offenders who violate the privileges and immunities of citizens of the United States." [155]

Frelinghuysen, who was not in Congress when the Fourteenth Amendment was proposed, said that he would never unconstitutionally invade state powers. He added that the "Federal Government should only interfere to protect the citizen of the United States in his privileges when the State clearly and persistently fails to do so."[156]

As to remedies, Frelinghuysen said that since there was no way to prevent a state legislature from passing an unconstitutional law, the only way to effectuate the Fourteenth Amendment's prohibition's against unconstitutional state legislation was to give the party aggrieved an original civil action in federal court against any other person violating his constitutional rights under color of such state law. But he did not think that Congress could or should enact any general criminal code to redress violations of constitutional rights. The United States could interfere only when the State will not or cannot protect the privileges and immunities of citizens. . . ." [157]

Senator Daniel D. Pratt, an Indiana Republican lawyer, referred to a Senate committee report of 423 pages setting forth Klan activities in North Carolina. He asserted that it was composed of thousands of Democrats bent on effectuating their policies by murder and other violent crimes, and that none of them had been convicted.[158] He, too, reasoned that the failure of the states to afford equal protection constituted a denial thereof.[159] He further argued that even if a state makes proper laws, there is a denial of equal protection if the executive or judiciary fails to carry them into effect, as he declared was occurring. He concluded:

"We cannot reach by law the grand jury which refuses to indict these criminals, nor can we punish the petit jury which refuses to convict. The State officers, the constables and sheriffs, who refuse to do their duty are beyond our reach. We cannot touch any State official for malfeasance, or misfeasance, or non-feasance; but we can say to all these unprofitable servants, to all the civil agencies in the States, 'Your failure is our occasion and opportunity. We will describe and punish as crimes against the United States that class of offenses against citizen-

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[152] *Id.* at app. 252–3.
[153] *Id.* at 464–6 (Sen. Casserly, Stockton and Thurman).
[154] *Id.* at 499.
[155] *Id.* at 501.
[156] *Ibid.*
[157] *Id.* at 501–2.
[158] *Id.* at 503–5.
[159] *Id.* at 506, where he said:

"Though the laws do not in terms discriminate against them, still the fact is that they invoke their protection in vain in a great many localities, counties, and districts. There is either such a condition of public sentiment that they cannot be executed, or there is a complicity with their oppressors on the part of the officers who should, but do not, execute them.

"Now, sir, is not this state of things a practical denial of the equal protection of the laws? One of the definitions of the verb 'deny' is 'not to afford; to withhold.' Now, can it with fairness be said this equal protection is not denied, when it is withheld, when it is not afforded? Is there not a positive duty imposed on the States by this language to see to it—not only that the laws are equal, affording protection to all alike, but that they are executed, enforced; that their protection is not withheld, but afforded affirmatively, positively, to all in equal degree. . . . So long as the States do their duty in affording protection, there is no pretext for intervention by Congress. When they fail, that instant the right of Congress attaches to secure what the States fail to do. . . ."

ship which you fail to punish. . . . You have brought this necessity upon yourselves by refusing to obey a plain constitutional duty not to withhold from any one the equal protection of your laws. You have omitted this duty habitually where the friends of the Government were concerned. The record of a conviction does not exist in your midst where you have punished a member of this order of outlaws." [160]

B. Debate on the House bill

At this point, the previously-passed House bill was referred to the Senate Judiciary Committee, and reported out by Senator George F. Edmunds, a Vermont Republican lawyer who had voted for the Fourteenth Amendment. He added an amendment to the second section punishing conspiracies to defeat the due course of justice in any state or territory with intent to deny equal protection of the laws to any citizen. He said that the House bill covering conspiracies to prevent state authorities from affording equal protection was intended to cover this, but that the language was vague, and needed revision. He added that conspiracies to obstruct justice in state courts were only punishable if the equal protection intended to be thwarted was on account of some group to which the victim belonged. He observed that in respect to the third section, the President could not interfere unless state authorities were refusing protection.[161] The Democratic reaction was once again to sneer at evidence of Klan activities as being unreliable, attack the southern reconstruction governments, and charge generally that the bill was unconstitutional and despotic.[162]

Next Senator Lyman Trumbull, the veteran Republican Chairman of the Senate Judiciary Committee and a former justice of the Illinois Supreme Court, through whose hands most of the reconstruction measures had passed, observed that the Privileges and Immunities Clause of the Fourteenth Amendment, like the similar clause of Article Four, Section Two of the original Constitution, only protected the rights of national citizenship, and that protection of life and property was left to the states. He said that the Due Process and Equal Protection Clauses were similar to the negative prohibitions laid on the States by Article One, Section Ten, and were to be enforced in the same way, namely, by a judicial declaration that contrary state laws were invalid. But Trumbull added that if a combination became so formidable as to obstruct the state judiciary, in enforcing the negative prohibitions laid on the states, Congress could punish the combination in aid of enforcing the prohibitions, and Edmunds interrupted to observe that this provision was written into the bill. Trumbull then added that he was in favor of going as far as possible in putting down Klan outrages, but that Congress had no authority under the Fourteenth Amendment to punish private citizens for committing crimes against other private citizens.[163]

Trumbull then asserted that the original House bill was an attempt to punish individuals for crimes committee against other individuals, but "there was objection to it on the part of some of the most thoughtful minds in the House of Representatives." He observed that it was altered to its final form, to punish unequality of legislation, and deprivation of constitutional rights. This he supported. But he opposed Senate amendments which would punish individuals for offenses against other individuals, and added that Congress could not constitutionally create a private criminal code.[164] Turning to the amendment proposed by Edmunds, he declared that while the United States could punish a conspiracy "for the purpose of denying to any citizen of the United States the due and equal protection of the laws," as was done in the House bill, by punishing conspiracies to present state authorities from affording equal protection, the federal government had no power to punish conspiracies to obstruct justice in state court, even if it was with intent to deny the constitutional right of equal

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[160] *Ibid.*

[161] *Id.* at 567–8.

[162] *Id.* at app. 210–6 (Sen. John W. Johnston, Va.); *id.* at 571–4 (Sen. John P. Stockton, N.J.).

[163] *Id.* at 577–8. He said:

"Show me that it is necessary to exercise any power belonging to the Government of the United States in order to maintain its authority and I am ready to put it forth. But, sir, I am not willing to undertake to enter the States for the purpose of punishing individual offenses against their authority committed by one citizen against another. We, in my judgment, have no constitutional authority to do that." *Id.* at 578.

[164] *Id.* at 579.

protection. Edmunds replied that his proposal was simply a specification of one aspect of the House provision to make it clearer.[165]

Next, a Delaware Democrat asserted that Klan crimes in the South were being exaggerated to help Republicans carry the 1872 elections, and added that Congress had no power to enforce the Equal Protection Clause except against discriminatory state laws.[166] Senate Pool of North Carolina, in rebuttal, reviewed the evidence of Klan-inspired violence in his state, and noted that not only had no klansman been indicted for it, but that a Democratic legislature had impeached the Republican governor for attempting to suppress these disorders with military force.[167] Pool, who had authored the sixth section of the Enforcement Act of 1870,[168] pointed out:

"When any State denies the protection of the laws to persons within its jurisdiction, it is competent for the Government of the United States to intervene and to afford to its citizens that protection. In the first place, it is the duty of the States to afford the protection of the laws to the citizens of the United States within their borders, and the United States Government can properly intervene only when that protection is refused."[169]

Pool added that states had the primary duty of protecting constitutional rights, reserving "the exercise of the national authority for those cases in which a State shall fail in such protection."[170] He analyzed the three prohibitions in the first section of the Fourteenth Amendment, observing that the Privileges and Immunities Clause was a limitation against positive action only, and did not refer at all to failure to act. In his view the Due Process Clause was also a limitation only on positive judicial action. But the Equal Protection Clause was addressed to the executive branch of state governments and in his mind covered a failure to execute the laws protecting citizens.[171]

The next day Thurman, one of the ablest Democratic lawyers, addressed the Senate in opposition to the bill. He admitted that the first section, which gave persons deprived of constitutional rights under color of state law an original action in federal court,[172] was constitutional, but opposed transferring such cases as impolitic. He pointed out that federal courts were few and far between, expensive to get to, and would probably differ among themselves because the language used was vague. He also objected that under the section suits would be permitted against state officials, including legislators and judges.[173]

Thurman next attacked the portion of the House bill dealing with private conspiracies to deny equal protection of the laws as vague. He said that federal district attorneys, grand juries, and district judges would find it incomprehensible. He added that insofar as it referred to state law it was beyond Congress' power to enact since the Fourteenth Amendment "gives us no authority at all to punish crimes against a State. If two or more individuals shall combine to prevent another individual from enjoying the equal protection of the laws, that is their individual act, that is no denial by the State of the equal protection of the laws."[174]

Thurman asserted that the portion of the second section punishing conspiracies to prevent state authorities from granting equal protection was in excess of

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[165] *Id.* at 580.

[166] *Id.* at 599–604 (Sen. Eli Saulsbury, Del.). See also *id.* at app. 239–247 (Sen. Thomas F. Bayard, D.-Del.).

[167] *Id.* at 605–9.

[168] 16 Stat. 140 (1870).

[169] 42 (1) Globe 604 (1871).

[170] *Id.* at 607.

[171] *Id.* at 608. He pointed out:

"The protection of the laws can hardly be denied except by failure to execute them. While the laws are executed their protection is necessarily afforded. . . . The right to personal liberty or personal security can be protected only by the execution of the laws upon those who violate such rights. A failure to punish the offender is not only to deny to the person injured the protection of the laws, but to deprive him, in effect, of the rights themselves.

". . . the right to the protection of the laws . . . is the most valuable of all rights, without which all others are worthless and all rights and all liberty but an empty name. To deny this greatest of all rights is expressly prohibited to the States as a breach of that primary duty imposed upon them by the national Constitution. Where any State, by commission or omission, denies this right to the protection of the laws, Congress may, by appropriate legislation, enforce and maintain it. But Congress must deal with individuals, not States. It must punish the offender against the rights of the citizen; for in no other way can protection of the laws be secured and its denial prevented."

[172] This is now 42 U.S.C. Sec. 1983.

[173] 42 (1) Globe app. 216–7 (1871). See also *id.* at app. 220, where he inquired why federal judges would be more efficient at punishing crime than Republican state judges.

[174] *Id.* at app. 218.

Congress' constitutional power because the amendment was a limitation on states alone, and did not allow Congress to punish offenses against state law. He made the same observation about conspiracies to obstruct justice of the state courts.[175] He said that the Equal Protection Clause was similar to the negative limitations in Article One, Section Ten, which were to be enforced by a declaration by the federal judiciary that the state law in violation thereof was void.[176]

Senator Garrett Davis, a Kentucky Democrat, endorsed Thurman's argument, and attacked the bill as unconstitutional, despotic, and politically motivated. He said that Congress could only enforce the first section of the Fourteenth Amendment by passing laws in validating unconstitutional state statutes.[177]

Senator Arthur I. Boreman, a West Virginia Republican, once again recapitulated the evidence of Klan-sponsored crimes.[178] He asserted that since the states were not protecting the constitutional rights of citizens, under the doctrine of *Prigg* v. *Pennsylvania*[179] Congress had a right to do so.[180] A Florida Republican urged the bill to stop the assassination of prominent Republicans in his state,[181] and a Nevada Republican read evidence of political crimes in North Carolina.[182] In rebuttal, Blair brought up the many murders in Nevada, but the senators from that state drew a distinction on the grounds that they were not politically moivated.[183]

Senator George Vickers, a Maryland Democratic lawyer, said that the bill usurped state powers to punish crime. He added that it was the exclusive right and duty of a state to protect its citizens, and that it would be absurd to assume that a state was in complicity with criminals to defeat its own laws. He declared that the first section of the Fourteenth Amendment only referred to state legislation. Vickers concluded by reading testimony that the South was quiet and orderly.[184]

Blair followed with a speech reiterating the argument that the Fourteenth Amendment only invalidated discriminatory state laws. He quoted from the 1866 debates to demonstrate this point, and adverted to the rejection of the first Bingham draft, previously discussed in the House by Farnsworth and Garfield. Turning to the fifth section, Blair reasoned:

"It cannot be supposed the enforcement section could apply to this [Equal Protection] clause without assuming that the State authorities were to be subjected to Congress. It is an injunction upon the States expressly, and its observance is required of the State authorities as officers of the State government; and if the fifth section applies to it, Congress would have the power to compel the State officials to do equal justice, as prescribed by Congress, and to punish them for failing to do so. . . . But it is not pretended that this power was given. . . . to require anything whatever of the State officials . . . it is well known, has been decided to be unconstitutional in the case of *Prigg* v. *Pennsylvania*." [185]

Blair then dealt with Boreman's argument that although Congress could not control state officials, under the doctrine of *Prigg* v. *Pennsylvania* if a state neglected to protect citizens Congress could do this itself through its own officers. Blair said that because of the difference in phraseology between the Fugitive Slave Clause and the Fourteenth Amendment, that case would not apply, probably the only completely sound portion of his argument.[186]

The following morning Senator Carl Schurz, the prominent liberal Republican from Missouri, said that he credited the reports of Klan political crimes, and

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[175] *Id.* at app. 218–9.
[176] *Id.* at app. 221.
[177] *Id.* at 645–9.
[178] *Id.* at app. 224–7. See also *id.* at 650 (Sen. Charles Sumner, R-Mass.).
[179] 41 U.S. (16 Pet.) 539 (1842).
[180] 42(1) Globe app. 229 (1871).
[181] *Id.* at 653–5 (Sen. Thomas W. Osborn). See also *id.* at 655–6 (Sen. Frederick A. Sawyer, R.-N.C.); *id.* at 666 (Sen. George E. Spencer, R.-Ala.).
[182] *Id.* at 656 (Sen. James W. Nye).
[183] *Id.* at 657–660.
[184] *Id.* at 660–3.
[185] *Id.* at app. 231.
[186] *Ibid.* Blair said:
"The construction put on the second clause at the second section of the fourth article, in reference to fugitive slaves, is relied on to sustain this view. But there is no analogy whatever between that clause and that under consideration. That clause enjoined no duty whatever upon State officials, and the Supreme Court held, in Prigg vs. Pennsylvania, 16 Peters, 539, that the legislation required by it was required exclusively of Congress. Here the duty enjoined by the clause in question is exclusively upon the State and the State officials, and it cannot be supposed either that these officials were subordinated to Congress or that these duties might be devolved upon United States officials without violating the fundamental principles on which our system of government proceeds."

attributed them to southern anti-reconstruction sentiment, which made state officials ignore them. He added that he opposed the bill both because he deemed parts of it unconstitutional and dangerous to liberty, and because he thought that more laws would not cure the problem. He counseled a conciliatory policy towards the South.[187]

Edmunds made the closing speech for the bill. He commenced by urging that the federal government owed a duty to protect people in the South to "the uttermost bound.' I mean of course of its constitutional power. . . ." [188] He cited *Cohens v. Virginia* [189] and *Prigg v. Pennsylvania* [190] for the proposition that the federal government could enforce the Constitution directly on individuals even when it was dealing with a negative limitation on state power. As an example, he gave a state which in violation of the Constitution entered into a treaty with a foreign government. In such a case, the only way the federal government could enforce the negative prohibition was by having the federal courts issue process against state officers acting under the invalid treaty, in his view.[191] Edmunds also said that if one man reenslaved another under authority of a state law which violated the Thirteenth Amendment, Congress would not have to make war on the state, but could punish the man under its authority to enforce the amendment.[192]

Edmunds continued by pointing out that the Privileges and Immunities Clause not only forbids the making of an unconstitutional law, but also its enforcement, and that since only the executive and judiciary can enforce laws, the provision must be addressed to them as well as the legislature. He likewise reasoned that the other clauses of the first section of the Fourteenth Amendment applied to all departments of government. Turning to the Equal Protection Clause, he observed that "protection of law" could only be afforded by punishing criminals who violate the law. The word "deny" he construed as being "negative in form, [but] it is affirmative in its nature and character." Edmunds asserted that it was a requirement that states afford such protection, and when they failed to do so, as he deemed that they were doing, Congress could intervene to afford the protection.[193] He concluded by observing that crimes in the South were not like ordinary crimes, born of malice or greed, but were part of a systematic plan to kill or drive out white Republicans, and drive Negro Republicans from the polls.[194] Then, after the committee amendments were agreed to,[195] the bill was passed, with the large majority of Republicans voting for it, the —— Democratic minority voting against it, and a handful of Republicans, including Trumbull, also voting against it.[196]

4. THE SHERMAN AMENDMENT

A. Senate Debate

At the very close of the debate, right before the voting, Senator John Sherman, the pragmatic Ohio Republican lawyer, introduced an amendment which he said was "copied from the law of England that has been in force six hundred years," and was still in force.[197] The amendment provided that if any person was killed

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[187] *Id.* at 686–690.
[188] *Id.* at 691.
[189] 19 U.S. (6 Wheat.) 264 (1821).
[190] 41 U.S. (16 Pet.) 539 (1842).
[191] 42 (1) Globe 692 (1871). Edmunds said: "Whenever the Constitution imposes a duty or a prohibition, and it becomes necessary to make it effectual, the Government always has, and it always must, short of warfare, go directly to the thing itself, take hold of the citizen." He added: ". . . this Constitution has always been a Constitution of the people and has in a thousand ways provided for the protection of the people, . . . prohibiting action to States, and so it has, . . . been applied to the people directly to effect its purposes and to defend its powers, and wherever and whenever that occasion has arisen it has always been done precisely upon the principles that this bill contains, that of dealing with the people, that of enacting laws, and never that of either advice or protest, warfare or proclamation, dealing with the States." *Id.* at 693–4. See also *id.* at 695.
[192] *Id.* at 696.
[193] *Id.* at 696–7. Edmunds said: "When criminals go unpunished by the score, by the hundred, and by the thousand, when justice sits silent in her temple in the States, or is driven from it altogether. . . the Government of the whole people, through their laws and tribunals, takes in its hand this ancient monument and guarantee of justice now found in its Constitution and applies it as it always has been applied." *Id.* at 697.
[194] *Id.* at 702.
[195] *Id.* at 702–5.
[196] *Id.* at 709.
[197] *Id.* at 705.

or injured, or any property was damaged, by a riot designed to deprive anyone of his constitutional rights, or deter him from exercising such rights, the person damnified, or his legal representative if dead, could recover compensation in federal court against the county, city, or parish in which the riot occurred, and levy execution on the property of the local government, and that government could in turn recover what they paid against the rioters.[198] The amendment was agreed to by a vote of 39 Republicans to 25 Democrats and Republicans. Among the eleven Republicans voting nay were Senators Frelinghuysen, Morrill of Maine, and Trumbull.[199]

When the Senate bill reached the House, Shellabarger asked it to non-concur in the Sherman amendment, and to concur in all of the other Senate amendments except one.[200] By virtually a party-line vote, the House concurred in the amendment making obstruction of justice in state courts with intent to deny equal protection a federal offense.[201] Most of the other Senate amendments were likewise agreed to, but the Sherman amendment was voted down by the lopsided margin of 45 to 132.[202]

The conference committee to which the Sherman amendment was sent reported it back with a somewhat altered remedy, which provided that the ordinary remedies against municipalities must be used. It also required that the party injured first attempt to collect from the rioters, and only if they could not be found, or damages could not be collected from them, the municipality would pay as a guarantor.[203] Edmunds explained the legal basis of this section as follows:

"It is said that the United States cannot proceed against a municipality, either a county, town, or city, because they are the creation of State law; and therefore we cannot act upon them in their organized capacity at all. I will merely say in reply to that, what seems to me to be a perfectly conclusive answer, aside from the answers that would exist at common law, that the Constitution declares that it shall be the duty of the State to give to everybody the equal and complete protection of its laws; and where, therefore, there is a State organism, as a county, which is intrusted with the local administration of justice, which is intrusted with the local preservation of peace, as every city, county, and parish in the country is in our autonomy . . . then this clause in the Constitution which speaks of the protection which the States must afford to their inhabitants equally under the law, to preserve them against riots and tumults, does speak, . . . to the municipal authorities existing under the State law directly; and when, therefore, they fail to perform the duty of protection, which the theory of this law implies that they are bound to perform, against tumult and riot, then the Constitution has declared that Congress, by appropriate legislation, may apply to them the duty of making reimbursement."[204]

Edmunds reasoned that if a local government refused protection they ought to pay the damages occasioned by their unconstitutional denial. He added that where the municipality had a duty to suppress the riot and did not do so, it ought to compensate the victim for its denial of protection out of its treasury, or raise taxes for this purpose. Senator Roscoe Conkling, a New York Republican lawyer, interrupted to inquire whether Edmunds meant that Congress could, under the Fourteenth Amendment, deal with counties and cities directly, obligating them to afford equal protection and enforce the amendment, and could thus "short cut" dealing with states, and Edmunds replied affirmatively.[205]

Trumbull then opposed the Sherman amendment, first on the ground that one of the clauses referred to Fifteenth Amendment rights in an ambiguous fashion, and generally, because the federal government had no constitutional authority to impose liability on local units of government.[206] Sherman defended it on the ground that it was the only way to interest local inhabitants in preserving law and order. Adverting to the fact that grand jurors would not indict nor would petit jurors convict for political crimes in the South, he cited medieval and more modern English statutes, and English and New York cases, to show that impos-

[198] *Id.* at 704.
[199] *Id.* at 705.
[200] *Id.* at 723.
[201] *Id.* at 724.
[202] *Id.* at 724–5.
[203] *Id.* at 751, 755–6.
[204] *Id.* at 756.
[205] *Id.* at 757.
[206] *Id.* at 758–9.

ing damages on the municipality is an incentive to law enforcement. He added that the section was constitutional because the federal government had "the same power of legislation to punish riots, where those riots seek to deprive a man of a right conferred by the Constitution of the United States, that any state can have." Sherman said that Congress had express power to pass appropriate legislation to do this, and since a state could make a county liable in damages to secure law enforcement, Congress could also do so. He concluded that hardly one riot in a hundred would come within the section, but "if the riot is aimed at . . . the power of the United States to protect its citizens," Congress could interfere.[207] Sherman concluded that mulcting the property owners of the South for Klan-inspired violence would induce them to enforce the laws.[208]

Several Democrats attacked the Sherman provision as imposing liability on municipalities without fault, and as risking the bankruptcy and consequent stoppage of local government.[209] Thurman added that the action of a municipality or county was not state action, and there would be more constitutional justification in requiring the state treasury to pay damages than in imposing liability on local government.[210]

Morton's reply was to sneer at Democratic constitutional qualms on the grounds that the Democrats had always attacked every reconstruction measure as unconstitutional.[211] Frelinghuysen said that he was against the Sherman amendment for the reasons given by Thurman, but that he would vote for the bill anway.[212] Frelinghuysen noted that the Judiciary Committee had been equally divided on the amendment. He added that the Fourteenth Amendment did not give Congress the power to tax or lay obligations on municipalities, which remained exclusively under state control. He declared:

"But I doubt the constitutionality of the amendment. This General Government, as I understand it, deals with States and with citizens. It does not know such things as towns, parishes, and counties. They are the integral parts of States; they are entirely under the government of the States as political corporations, and the Constitution of the United States recognizes no relation between the Federal Government and these subordinate political corporations."[213]

Senator Garrett Davis, a Kentucky Democrat, also asserted that the federal government had no power to make it a federal crime to conspire to violate state laws.[214] After another peroration against the unconstitutional military despotism which Davis said the bill would create, the Senate approved the conference report by a vote of 32 to 16. Only a handful of Republicans opposed it, including Senator William Sprague, a Rhode Island Republican who had voted for the Fourteenth Amendment. Trumbell was also paired against it.[215]

B. House Objections

Shellabarger opened discussion in the House by reporting the insistence of the Senate on the Sherman Amendment.[216] He cited the case of *Darlington* v. *New York*,[217] decided by the New York Court of Appeals, for the legality of imposing liabilities on cities in cases of riot. He noted that the New York statute was similar in principle to the Sherman Amendment, so that the only question was whether Congress could directly impose such liability. Shellabarger

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[207] *Id.* at 760. He added that Congress could suppress a mob which was rioting to prevent a person from exercising a constitutional right. *Id.* at 761.

[208] *Ibid.*

[209] *Id.* at 762–5, 770–2, 776 (Sen. Stevenson, Casserly, Davis, Thurman, and Bayard).

[210] *Id.* at 772.

[211] *Id.* at 773–4.

[212] *Id.* at 776–7.

[213] *Id.* at 777. He added:

"We deal with States; we deal with the citizens; but I do not see in that [Fourteenth] amendment anything which authorizes the Congress of the United States to regulate the police regulations of the cities and counties of New York and New Jersey. We must remember that we are legislating for this whole nation, that we are legislating for all time, and we must touch with care the framework of our Government."

[214] *Ibid.*

[215] *Id.* at 779.

[216] *Id.* at 751, where he informed the House:

"The Senate I need not say was exceedingly earnest and positive in insisting there should be something of the character retained in the bill, and it was impracticable to procure the yielding of the Senate from that in some shape."

[217] 31 N.Y. 164 (1865).

pointed out that a government which owes a duty "to protect a given privilege of a citizen against a mob's invasion of such privilege . . . [may] assess the damages of such invasion upon a prescribed subdivision of that government which owes such duty to protect." He also noted that since the New York Court of Appeals had decided that the state statute did not violate the Due Process Clause of the state constitution, a similar federal law would not violate the Fifth Amendment.[218]

Shellabarger reasoned that Congress had the power to pass the Sherman amendment, first, because it was designed to protect federal constitutional rights which Congress had the power to protect, and secondly, because it was an "appropriate" way of enforceing the peace, as the English experience showed. He added that since Congress could compel citizens to respect federal rights, it could coerce counties to protect them or suffer liability for omitting to do so.[219]

Kerr replied that Congress had no constitutional power to punish counties for the acts of mobs. He pointed out that state laws making municipalities liable were based on the police power of the state which could require local units of government to keep the peace. He said that Congress lacked power to create new torts enforceable against municipalities in federal court, that this was an invasion of state power, and that local government might be stopped by having its property sold to satisfy judgments.[220] Willard likewise declared:

". . . we have not by the Constitution imposed, any duty upon a county, city, or parish, or any other subdivision of a State, to enforce the laws, to provide protection for the people, to give them equal rights, privileges and immunities. The Constitution has declared that to be the duty of the State. The Constitution, in effect, says that no State shall deny to its citizens the equal protection of the laws, and I understand that that declaration, that prohibition, applies only to the States, so far as political or municipal action is concerned. . . . The city and the county have no power except the power that is given them by the State. They cannot keep violence away from me; they cannot protect me in my rights, except as the State has clothed them with the power to do so; and for the enforcement of the laws of the State they get no aid, no authority, no power whatever from the United States." [221]

Willard reasoned that since counties and cities had no law enforcement powers except such as the state should care to delegate to them, it was unfair to make them liable for not affording protection when the state may not have given them the power to protect anybody. He added that Congress could not impose the duty of protection on them, and that if any government should be required to compensate victims of mobs, it should be the states upon which the Fourteenth Amendment operates.[222]

Representative Benjamin F. Butler of Massachusetts advocated passage of the Sherman amendment as an inducement to law enforcement. He said that the Klan could not operate in the South unless the leading men winked at it, and if they had to pay for its depredations they would prevent them.[223] Poland replied that the Sherman amendment was useless. He pointed out that to prove the intent of the mob to violate the constitutional rights of the victim it would be necessary to find out who they were, and this was impossible in the case of klansmen. However, his basic objection was that the section was unconstitutional because cities were the agencies of states to enforce state laws and the federal government could not deal with them.[224] Representative Austin Blair, a Michigan Republican, reiterated that the federal government had no constitu-

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[218] 42(1) Globe 751 (1871).
[219] *Id.* at 751–2.
[220] *Id.* at 788–9.
[221] *Id.* at 791. He added: "In this case the United States Government does not give the counties any power to enforce the laws. . . ." *Id.* at 792.
[222] *Id.* at 791.
[223] *Id.* at 792. See also *id.* at 794 (Rep. William D. Kelley, R.-Pa.).
[224] *Id.* at 793, where he declared:
"As I understand the theory of our Constitution, the national Government deals either with States or with individual persons. So far as we are a national Government in the strict sense we deal with persons, with every man who is an inhabitant of the United States, as if there were no States, towns, or counties; as if the whole country were in one general mass. . . . ./With these local subdivisions we have nothing to do. We can impose no duty upon them; we can impose no liability upon them in any manner whatever."

tional power to impose duties on counties or cities, and that this was exclusively a state power.[225]

Bingham then warmly attacked the Sherman amendment, saying that all of the bill met his approved except that. He noted that at least 70 of the 132 votes cast against it were cast by Republicans, as against 35 votes for it. He urged:

"I hope that the vote of every Republican will be cast against it. It is useless and worse than useless to vote down this important measure with any doubtful voice. Let the House record its vote emphatically for the rights of all the people of every State and all the States in the Union." [226]

Bingham declared that *Darlington* v. *New York*, relied upon by Shellabarger to sustain the Sherman amendment, condemned it, because the decision showed that only states could impose duties and liabities on counties or cities. In his view, the federal government could impose no obligation on units local government, nor could it make them compensate victims. To do so, he concluded, would bankrupt the local governments and deprive them of the means of affording protection.[227]

Farnsworth also attacked the Sherman amendment as unconstitutional. He adverted to Supreme Court decisions holding that Congress could not impose any duty on state officers, and added that it could impose no duty on sheriffs or other county officers. He concluded that since Congress could not impose a duty on counties or cities, it could not impose a liability for non-performance of the duty.[228] Representative H. Boardman Smith, a freshman Republican from New York, replied that Congress could adopt any means it deemed appropriate to suppress the Klan crimes, and that it had been repeatedly held that such state statutes were not the taking of property without due process.[229] The House, however, once again rejected the conference report by 74 yeas to 106 nays.[230]

(The Substitute)

A second conference was held, and in lieu of the Sherman amendment which the House twice decisively rejected, the conference committee recommended a section which provided that if any person knew about the conspiracy published in the second section, and having power to prevent it failed or refused to do so, he would be liable in damages to the victim of the conspiracy. Poland declared:

"I did understand from the action and vote of the House that the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of State law. . . . At the same time we said . . . there was a disposition on the part of the House, . . . to reach everybody who was connected, either directly or indirectly, positively or negatively, with the commission of any of these offenses, and wrongs, and we would go as far as they chose to go in inflicting any punishment or imposing any liability upon any man who shall fail to do his duty in relation to the suppression of those wrongs." [231]

Poland explained that Congress was in effect creating a statutory tort. Shellabarger added that in some ways this was more efficacious than the original Sherman amendment, since Klan activities were secret and not riotous. However, he asserted that many people in the locality knew about them, and they failed to come forward and give information; they were liable in damages.[232]

Willard asked if a unionist who received a Klan warning and gave notice to the local sheriff or his neighbors, asking them to protect him, could hold them liable for failing to protect him. Shellabarger said that not only would they be liable but everybody else who knew about Klan activities and failed to notify the officials would incur liability. Bingham added that they ought to be liable.[233]

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[225] *Id.* at 795. Burchard, in accord, observed: "These provisions attempt to impose obligations upon a county for the protection of life and person which are not imposed by the laws of the State, and that it is beyond the power of the General Government to require their performance." *Ibid.*

[226] *Id.* at 798.

[227] *Ibid.* He said: "A county being the creature of the State and an integral part of it, can in no case be made responsible for mob violence save by force of the positive law of the State creating it."

[228] *Id.* at 798–9.

[229] *Id.* at 799. See also *id.* at 800 (Rep. Perry of Ohio).

[230] *Id.* at 800–1.

[231] *Id.* at 804.

[232] *Ibid.*

[233] *Id.* at 805.

Butler spoke in favor of the law. He said that the substitute for the Sherman amendment extended federal power further than ever before, but he added that the substitute was as a practical matter valueless because nobody would ever find the defendants.[234] Garfield approved of the substitute for the Sherman amendment.[235] The House then passed the bill by a party-line vote of 93 to 74.[236]

Edmunds reported the substitute for the Sherman amendment to the Senate, telling that body that the House would not agree to the original proposal because it believed that the federal government lacked constitutional power to deal with counties and towns directly. He added that the substitute dealt with citizens directly, making them liable for failing to report or prevent Klan activities. Edmunds explained:

"Every citizen in the vicinity where any such outrages are as mentioned in the second section of this bill . . . are likely to be perpetrated, he having knowledge of any such intention or organization, is made a peace officer, and it is made his bounden duty as a citizen as a citizen of the United States to render positive and affirmative assistance in protecting the life and property of his fellow-citizens in that neighborhood against unlawful aggression; and if, having this knowledge and having power to assist by any reasonable means in preventing it or putting it down or resisting it, he fails to do so, he makes himself an accessory, or rather a principal in the outrage itself. . . ." [237]

Sherman lamented the inadequacy of the bill. He observed that it was of no sure value in the face of organized perjury to let a victim sue in federal court than to permit him to sue in state court, since he would face the same hostile jurors. He therefore deplored the loss of his amendment, since he asserted that if the rich men who applaud Klan activities knew that their taxes would rise on account of it, they would put a stop to such activities. He added that it would be easy to sue the county, but impossible to find the klansmen, and useless to sue them if poor.[238] Thurman agreed that the substitute was valueless. He said that it would be constitutional to punish a citizen for not preventing an offense against the laws of the Untied States. However, since the substitute related in part to a portion of the second section punishing a man *for* offenses against state law, in Thurman's view that part was in excess of Congress' power.[239] The Senate then passed the bill by a party-line vote of 36 to 13.[240]

4. SUMMARY AND CONCLUSIONS

The foregoing analysis represents the gist of debates on the Ku Klux Klan and Congress' power to suppress it under the Fourteenth Amendment lasting for weeks and consuming a large portion of the sitting of the first session of the Forty-Second Congress, and running hundreds of pages in the Congressional Globe. A synthesis of these debates show a high degree of agreement among the dominant Republicans on the essential facts, and some very sharply defined legal positions under the Fourteenth Amendment.

The Republicans asserted that the Ku Klan Klan was a multi-state conspiracy, in the South of a military nature, consisting of tens of thousands of men, organized to assist the Democratic Party in taking control of state and local governments

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[234] *Id.* at 806–7, where Butler declared:

". . . it goes further in the direction of interfering with the individual rights of citizens by law of Congress than ever I attempted to do or desired to do, and makes a precedent for us in the future. I attempted heretofore to report a bill which would allow men who did the act of depriving a citizen of his right to be punished in courts of the United States. I thought the constitutional power was with us to do that.

"Now, my friends, who have constitutional scruples about doing that, have reported an amendment to give a remedy by taking the property of a citizen of the United States because he knows somebody who has committed an offense, or is about to commit an offense, or happens to know about an offense about to be committed, and has not prevented it. For gentlemen who have constitutional scruples, this is going further than anything I have done or know. I have known men in my time who mistook dyspepsia for conscience. [Laughter.] I have known men who mistook their doubts and qualms for constitutional law, who are quite willing to go very far, if they do not happen to go under the lead they do not like, and if you give them their own head will go further than the farthest."

[235] *Id.* at 807–8.

[236] *Id.* at 808.

[237] *Id.* at 820. See also *id.* at 821, 824–5.

[238] *Id.* at 820–2.

[239] *Id.* at 822.

[240] *Id.* at 831.

from the southern Republicans. Its mode of operation was to murder or otherwise commit acts of violence against Republicans to drive them out of the state or induce them not to vote. It neutralized hostile local law enforcement authorities, such as sheriffs and courts, by murdering them, threatening them with violence, breaking open jails and rescuing prisoners, packing grand and petit juries with co-conspirators, or getting klansmen to perjure themselves for defendants in courts. Where the local law enforcement agencies were Democrats, klansmen were alleged to conspire with them or otherwise induce them not to protect Republicans. As a result, the state law enforcement agencies were unable or unwilling to afford the same or equal protection provided for by the laws to Republicans in cases of political crime as they did to Democrats or in other cases. The Democrats almost uniformly tried to discredit evidence of Klan activity, or excuse it on the ground of maladministration of the state reconstruction governments in the South, but the Republicans were convinced that the local and state authorities were culpably and over a long period of time and a wide area denying to Republicans the equal protection of the laws in cases of political crime.

It is clear that the Republicans were intent on going to the absolute limit of their constitutional power under the fifth section of the Fourteenth Amendment to suppress the Klan, but not one inch beyond, especially in the House of Representatives. Since, as noted at the beginning of the article, a considerable number of the members of the Thirty-Ninth Congress who proposed the Fourteenth Amendment were still in Congress, the debates throw a strong light on the limits of Congress' power under this section. Indeed, Garfield and Burchard specifically adverted to the value of this contemporaneous construction in their speeches, so Congress was conscious of the fact that the bill would define the limits of Congress' power.

Four clearly defined positions emerged in the debates, viz:

1. Congress has the power to punish ordinary crimes by one individual against another, or by conspiracies, regardless of what the state does, if the crime is motivated by a design to deprive the victim of his Fourteenth Amendment or other constitutional rights. Every Republican who addressed himself to this point denied that Congress had such constitutional power under the Fourteenth Amendment except Representative Shanks of Indiana, whose plea to retain the first draft of Shellabarger's bill unaltered as an affirmation of such power was ignored without even a vote. Since Shanks was not in the Thirty-Ninth Congress, his rejected view is of value only to show what power was not in the Fourteenth Amendment.

2. If a state denies by affirmative act or omission the equal protection of the laws, whether the denial or failure to afford protection is due to the action or inaction of the legislature, executive, or courts, and thus fails to protect persons in their constitutional rights, Congress may substitute directly federal protection for the state protection withheld, and if the withholding of state protection is due to a failure to prosecute criminals, Congress may use the federal courts as agencies for the affording of protection by prosecuting the criminals in federal court for violating the constitutional rights of the victims who are unprotected by the state law or law enforcement agencies. This was the original theory of Shellabarger's bill, and it was concurred in by a number of Republican representatives who did not vote on the Fourteenth Amendment, such as Hoar, Blair of Michigan, Howley, Butler of Massachusetts, Coburn, and Wilson of Indiana. Shellabarger and Mercur, who voted for the amendment, also agreed with this view. A number of senators who did not vote on the amendment, including Boreman, Frelinghuysen, Morton, Pool and Pratt, also supported this view. The revised House bill, however, abandoned it in favor of the third position, noted below.

3. The Equal Protection Clause, although negative in form, imposes an affirmative duty on all state agencies, whether legislative, executive, or judicial, to protect all persons in their life, liberty, and property equally, and if a state officer refuses or neglects to afford such protection, Congress may punish him for violating his federal constitutional duties. Congress may also punish a private person or conspiracy when engaged in preventing a state officer from performing his federal constitutional duty of affording equal protection, either by violence or threats thereof against the state officer, or by inducing him in some other way not to afford equal protection, such as through a conspiracy with him. Such punishment would proceed on the same basis as punishing a combination to deter a federal revenue collector from collecting revenue by violence or by

bribery or conspiracy, the former of which the second section of the bill also covered. The constitutional theory was that Congress could punish individuals who thwarted officials from performing a federally-imposed duty. But this draft, although punishing individuals who directed their combinations against officials, did not assume the power to punish violence directed against other individuals, even if motivated by an intent to deprive the victim of his constitutional rights, as Cook's explanation shows. This theory, which was ultimately embodied in the bill, was supported by Bingham, who drafted the first section of the Fourteenth Amendment, and Garfield, Cook, and Poland in the House, all of whom had voted for the amendment, as well as Willard and Burchard. Senator Trumbull, Republican Chairman of the Senate Judiciary Committee, also supported it.

4. Congress may act only against discriminatory state legislation, and only against officers or others acting under color of such legislation. This was the Democratic theory, supported by Representative Kerr and Senators Blair, Davis, Thurman, and Vickers, among others. Farnsworth, at least initially, also supported this position, but the Congress rejected it.

The debate on the Sherman amendment highlights the tenacity with which Bingham and other House members adhered to their constitutional theory that Congress could not impose a duty of protection on municipalities, but could penalize anyone in any way connected with inducing a state officer to deny equal protection. If a man even knew of a conspiracy to induce or compel a state officer to deny such protection he was compelled to act to prevent consumation of the conspiracy. Thus, the federal government, in Bingham's views, was entitled to compel citizens not only to refrain from preventing a state officer from executing his federal duties, but to assist him in doing so. But it would not touch private violence.

In *United States* v. *Harris*,[241] Mr. Justice Woods, a Republican appointee, in holding a section of the revised statutes which was derived from the portion of the second section of the 1871 act herein discussed to be unconstitutional, said:

> Section 5519 of the Revised Statutes is not limited to take effect only in case the State shall abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty, or property without due process of law, or deny to any person the equal protection of the laws. It applies, no matter how well the State may have performed its duty. Under it private persons are liable to punishment for conspiring to deprive any one of the equal protection of the laws enacted by the State.
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> As, therefore, the section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the State or their administration by her officers, we are clear in the opinion that it is not warranted by any clause in the Fourteenth Amendment to the Constitution."[242]

As all the other justices except Mr. Justice Harlan, who did not reach this issue concurred, and all were appointed by Republican presidents, including two Grant appointees, it is clear that the United States Supreme Court had not imbided the Democratic theory of the Fourteenth Amendment. Indeed, the foregoing nationale is precisely the grounds on which Garfield had criticized Shellabarger's first draft, and is the very nationale adopted by him, Bingham, Cook, Poland, and other Republicans in supporting the revised draft of the 1871 law which ultimately became Section 5519 of the Revised Statutes. Since the Supreme Court's nationale was similar to that of these Republican Congressmen only one explanation for the result in *United States* v. *Harris* is tenable. The anti-klan statute was not a congressional excursion into unconstitutional territory, but was merely the victim of poor legislative drafting.[243]

While all these congressmen rejected the Shanks theory that whether the state was denying protection was irrelevant, and took the position that Congress could only act to correct state denial of protection, the draft of the law failed to fill out this prerequisite. In addition, although the theory ultimately

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[241] 106 U.S. 629 (1882).

[242] *Id.* at 639-640.

[243] This was not the only piece of reconstruction legislation to fall victim to defective draftsmanship. Compare Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 Col. L. Rev. 873, 918 (1966), with Civil Rights Cases, 109 U.S. (1883).

adopted was that the violence would have to direct its force against a public official to deter him or prevent him from affording protection, the statutory language did not make this clear, but instead prescribed conspiracies to deny protection generally. This Thurman's astute criticism of the vagueness of the language proved correct.

In *United States* v. *Price*,[244] the United States District Court for the Southern District of Mississippi had before it an indictment under 18 U.S.C. §§ 241 and 242, which alleged that three local law enforcement officials conspired with 15 private persons to take the lives of three "civil rights" workers without due process of law, by murdering them. The district court held that the officials could be tried for the substantive offense of denying due process, but the private individuals could only be tried for the offense of conspiring with the officials. The United States Supreme Court reversed this holding, and declared that the private individuals could be tried for the substantive offense as well since they were acting under "color of law." It was not alleged that the laws of Mississippi were themselves discriminatory against the victims; the court rather declared that acting in concert with state officials in denying due process was enough.

It seems clear that from a historical point of view the district court was absolutely correct as to the outermost limits of the Fourteenth Amendment. The government officials who violated their oaths to support the Constitution by taking life without due process of law could be punished by Congress for the substantive offense of breaking their oaths. But the private individuals, in the view of Garfield, Bingham, Poland, Cook, and others of the period could only be punished for inducing the officials to break their oaths, and not for the substantive offense of taking life without due process, even though they were in league with the derelict officials. This is precisely what the conspiracy count covered. By holding that the federal government may, through its own agencies, punish private individuals directly for violating the constitutional rights of other private individuals, when state officials have, through a conspiracy or otherwse, denied to the victims the equal protection of the laws, is simply resurrecting the constitutional theory of the first Shellabarger draft of the 1871 anti-Klan bill, and applying *Prigg* v. *Pennsylvania*[245] to the Fourteenth Amendment. Indeed, the lengthly quotation from one of Senator Pool's speeches in the appendix underscores the use of this erroneous theory of the fifth section of the amendment.

Nor is it accurate to justify this result in the *Price* case on the ground that the private persons were acting under color of law. They were not enforcing any law of Mississippi, nor were they government officials clothed by law with legal authority. Their conspiracy with government officials simply invokes the Cook-Garfield theory that they can be punished by the federal government for inducing the officials to violate the official oaths of office. Indeed, this was precisely the grounds for punishing the klansmen set forth at the time. But it obliterates the distinction between private and official action to say that a private person is punishable as an official if he acts with an official.

In *United States v. Guest*,[246] Mr. Justice Stewart held that private individuals would be punishable for the substantive offense of depriving Negroes of their constitutional rights if they were acting in league with state officials, citing the *Price* case. This was again the application of the theory of the first Shellabarger draft and *Prigg* v. *Pennsylvania* in substance, although not in terms. But one opinion of Justices Clark, Black and Fortas, and another of Justices Brennan, Douglas, and the Chief Justice, held that the federal government, under the fifth section of the Fourteenth Amendment, could punish private conspiracies or private violence designed to interfere with the exercise of rights under the first section of the amendment, regardless of what state officials may or may not do. This is the precise theory which in 1871 was disavowed by every Republican who voted for the Fourteenth Amendment and addressed himself to the point, and by every other Republican with the possible exception of Representative Shanks, as being clearly in excess of Congress' power under the amendment. It is nothing more or less than the creation by Congress of a general criminal code, provided only that an intent is present to deprive a man of his Fourteenth Amendment rights. And since that amendment protects every man from having his life, liberty, or property taken without due process, Congress may punish under this theory every premeditated murder, robbery, rape, arson, and other crime against life, liberty, or property, provided only that it is intentional. The result

[244] 86 Sup. Ct. 1152 (1966).
[245] 41 U.S. (16 Pet.) 539 (1842).
[246] 86 Sup. Ct. 1170 (1966).

of the *Guest* case is to resurrect the rejected first draft of the Bingham amendment from its grave and enshrine it in all of its glory into the Fourteenth Amendment.[247] As Senator Stewart of Nevada observed in 1866, this would eliminate the need for any state governments.[248]

The result is that although the *Price* and *Guest* cases purported to be decided on history, the United States Supreme Court has turned history inside out. The *Price* case is only a little askew, but the *Guest* case is so wide of the mark that it would be necessary to burn all of the Congressional Globes in the nation to support it.[249]

Fourteenth Amendment Limitations on Banning Racial and Religious Discriminations: the Original Understanding

(By Alfred Avins)

1. CURRENT SIGNIFICANCE

There is at large in the United States today a singular notion. The idea has gained ground that the Fourteenth Amendment is a special foe of racial discrimination, that it forbids racial discrimination where it permits other types of discrimination. This notion has penetrated into some very high places.[1] Its most common habitat is to be found in the proliferating "civil rights" acts of both the federal and state governments, which usually confine their ambit to a stock formula of race, creed, color, and national origin, with occasional references thrown in to age or sex, more for comic relief, it is believed, than anything else.[2] The first section of the Fourteenth Amendment mentions neither race nor religion. It guarantees the privileges and immunities of national citizenship to all citizens, and equal protection to all persons. Statutes singling out racial and religious discrimination for special condemnation, except in respect to voting, cannot justify themselves on the letter of the Fourteenth Amendment. Discrimination may be based on political grounds, on unpopularity of viewpoint, on occupation, on financial status, on looks, and on many other factors. The letter of the Fourteenth Amendment does not condemn one form of discrimination any more than any other. There is nothing about reasonableness of classification in its text. If one form of discrimination is a denial of privileges or equal protection all forms must be a similar denial. The terms of the amendment require that all discrimination be banned, or none. To protect one group and not another is not equal protection, but its converse.

It has been suggested that racial discrimination forms a special class to be particularly condemned.[3] Since nothing in the text of the amendment supports this theory, if it has any validity it must be found in the historical origins of the amendment. This study will examine those origins to test the validity of the foregoing theory.

2. THE HOAR INCIDENT

If a single incident can be found which impelled the North to conclude that the constitutional rights of American citizens were not safe in the protection of southern officials, and that federal intervention was needed before the Civil War,

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[247] See Tansill, Avins, Crutchfield & Colegrove, *The Fourteenth Amendment and Real Property Rights in Open Occupancy vs. Forced Housing Under the Fourteenth Amendment*, 68, 76–80 (Avins ed. 1968).

[248] 42(1) Globe app. 115 (1871), where Farnsworth quotes Stewart as saying: "There is another proposition of the committee of fifteen which, if passed, will . . . obviate the necessity of any more State Legislatures or conventions." See also *id.* at 231, where Senator Blair observed that "Mr. Stewart, incidentally, in the Senate. . . . characterized it as an abolishment of State governments. . . ."

[249] In oral argument before the United States Supreme Court in *Katzenbach* v. *Morgan*, No. 847, Oct. Term, 1965, decided June 13, 1966, this author said: "I will say that I think it would be necessary for the Department of Justice to burn the Congressional Globe debates if they were to convince anybody that the original understanding was in accordance with this statute." Record of Argument, p. 49–50. The same remark is applicable to the *Guest* case.

[1] See *Harper* v. *Virginia State Board of Elections*, 86 S. Ct., 1079, 1089, n. 8 (1966). (Harlan J., dissenting).

[2] See Civil Rights Act of 1964, 78 Stat. 241; Avins, *Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Antidiscrimination Legislation*, 49 Cornell L. Q. 226 (1964) and the statutes cited therein.

[3] See *McLaughlin* v. *Florida*, 379 U.S. 184 (1964); Tussman & Ten Broek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341 (1949); Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Col. L. Rev. 131 (1950).

it was the Hoar incident. Indeed, the need to enforce the privileges and immunities of citizens, and the requirement of equal protection, stemmed from this incident.

The background may be briefly stated. South Carolina, along with Louisiana, had a statute which provided that any free Negro found on a vessel which came into a port in the state would be arrested and jailed until the vessel was ready to sail, and the ship captain would have to pay the expenses of detention, in default of which the colored seaman would be sold into slavery and the ship captain fined and imprisoned. The purpose of the statute was to keep free Negroes out of the state, since it was believed that they would stir up slave revolts. This statute was highly detrimental to Massachusetts shipowners, who employed a number of free Negroes, chiefly as cooks and stewards in coastwise trade. It was also believed that the statute was violative of Article Four, Section Two, the clause of the Constitution giving citizens of each state the privileges and immunities of citizens in the several states, since Massachusetts Negroes were deemed to have state citizenship.[4]

In November, 1844, former Representative Samuel Hoar, a leading lawyer in Massachusetts, was sent by that state's officials to South Carolina to test the constitutionality of the law imprisoning Negro sailors in federal court. His visit aroused great excitement, and he was threatened with personal injury.[5] The state authorities refused or expressed the inability to protect him against mob violence, and on December 5, 1844, the South Carolina legislature passed a resolution expelling him from the city of Charleston. He was thus forced to leave without bringing his suit.[6]

The Hoar incident was a constant subject of reproach by northern members of Congress against the South before the Civil War.[7] For example, Representative Edward Dickinson, a Massachusetts Whig, complained that Hoar "was informed by the authorities of Charleston that he could not be protected, and was advised by them to leave, because they could not answer for his safety if he remained."[8]

All during the Reconstruction period, too, reference was made to the Hoar incident.[9] Representative John A. Bingham, the Ohio Republican lawyer who drafted the first section of the Fourteenth Amendment,[10] except for the declaration of citizenship, gave as the reason for introducing his amendment that the old constitutional provision "was utterly disregarded in the past by South Carolina when she drove with indignity and contempt and scorn from her limits the honored representatives of Massachusetts, who went thither upon the peaceful mission of asserting in the tribunals of South Carolina the rights of American citizens."[11] Likewise, Senator John Sherman, an Ohio Republican lawyer, declared:

"By this clause of the Constitution, one which has always been a part of our fundamental law, it is provided that—

" 'The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.'

"This clause gives to the citizen of Massachusetts, whatever may be his color, the right of a citizen of South Carolina, to come and go precisely like any other citizen. There never was any doubt about the construction of this clause of the Constitution. * * * but the trouble was in enforcing this constitutional provision. In the celebrated case of Mr. Hoar, who went to South Carolina, he was driven out, although he went there to exercise a plain constitutional right and although he was a white man of undisputed character. This constitutional provision was in effect a dead letter to him. The reason was that there was no provision in the Constitution, by which Congress could enforce this right."[12]

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[4] An extensive discussion of the background will be found in Cong. Globe, 31st Cong. 1st Sess. app. 1654–64, 1674–78 (1850). (Hereafter, Congressional Globes or Records will be cited by Congress, session, page and year, as follows: 31(1) Globe app. 1654–64, 1674–78 (1850).) See also id at 2066.

[5] See 34 (1) Globe 1598 (1856).

[6] 18 Encyclopaedia Britannica 542 (11th ed. 1910); Biographical Directory of the American Congress, 1774–1927, p. 1103 (1928).

[7] See 33 (1) Globe 1154–55, 1556, app. 575, app. 1012–13 (1854).

[8] 33 (1) Globe 1155 (1854).

[9] 38 (1) Globe 2984 (1864) (Rep. Kelley); 38 (2) Globe 193 (1865) (Rep. Kasson); 39 (1) Globe 474–5 (1866) (Sen. Trumbull); 39 (1) Globe 1263 (1866) (Rep. Bromall); 40 (3) Globe 1001 (1869), Sen. Edmunds); 42 (1) Globe 500 (1871) (Sen. Frelinghuysen).

[10] 41 (1) Globe app. 256 (1871).

[11] 39 (1) Globe 158 (1866).

[12] Id. at 41.

Hoar, as noted above, was a respected white lawyer. He was discriminated against and denied equal protection, not because of his race, but because he wanted to try an unpopular lawsuit. Protection of people in his category was the very purpose of the Fourteenth Amendment. It is plain that confining this amendment to racial discrimination would frustrate an important reason for the amendment's very existence.

8. PROTECTION OF WHITE TRAVELERS IN THE SOUTH

Protection of northern white travelers in the South was another prime purpose of the Fourteenth Amendment. The dominant Republican majority in Congress considered freedom of speech an essential right,[13] and were sharply critical of southern states for menacing anyone traveling therein with outspoken anti-slavery views.[14] Representative Green C. Smith, a Kentucky Unionist, observed: observed:

"The very fact that men from the North could not go to the South and speak their real sentiments induced the people of the North to become bitter toward the institution. Now, . . . my judgment is that the principle of the Constitution will not become fully established until the man from Massachusetts can speak out his true opinions in the State of South Carolina, and the man of Mississippi shall be heard without interruption in Pennsylvania." [15]

For example, Representative Ignatious Donnelly, a Minnesota Republican, urged Bingham's amendment because otherwise the "old reign of terror [shall] revive in the South, when no northern man's life was worth an hour's purchase." [16] Representative Hiram Price, an Iowa Republican, declared that a northerner visiting the South who expressed anti-slavery opinions was expelled by violence. He said that the amendment meant that "if a citizen of Iowa or a citizen of Pennsylvania has any business, or if curiosity has induced him to visit the State of South Carolina or Georgia, he shall have the same protection of the laws there that the would have had had he lived there for ten years." [17] Representative Ralph P. Buckland, an Ohio Republican lawyer, demanded that citizens of his state traveling in the South be protected in their rights. He added that northerners will never again submit to the indignities and outrages which were perpetrated upon northern people at the South previous to the war." [18] The widely circulated Schurz Report declared that if federal troops were withdrawn from the South the lives of northerners there would not be safe.[19] The Report of the Joint Committee on Reconstruction, which recommended the Fourteenth Amendment, gave this as one of the reasons for the amendment.[20] It was also mentioned during the debates of ratification.[21]

The need to protect northern travelers was also mentioned during Reconstruction.[22] Senator Orris S. Ferry, a Connecticut Republican lawyer, complained that while he was able to campaign in his own state for the Republican ticket in 1856, "I could not have gone to one of these ten States and asked the people to vote for that candidate without endangering my own life." [23] Senator John Conness, a California Republican, complained that a northerner who emigrated to the South risked his life.[24] A Pennsylvania Republican adverted to the fact that northern investors, businessmen, and officeholders were being driven out of the South by violence.[25] A New York Republican said that citizens of his

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[13] 35 (2) Globe 985 (1859) (Rep. Bingham); 38 (1) Globe 2990 (1864) (Rep. Ingersoll); 39 (1) Globe 2765 (1866) (Sen. Howard); 41 (2) Globe 3671 (1870) (amendment); 42 (1) Globe app. 310 (1871) (Rep. Maynard); *id.* at app. 85 (Rep. Bingham); *id* at 382 (Rep. Hawley); *id.* at 414 (Rep. Roberts); *id.* at 486 (Rep. Cook).

[14] 38 (1) Globe 1202 (1864) (Sen. Wilson); 38 (2) Globe 138 (1865) (Rep. Ashley); *id.* at 193 (Rep. Kasson); 39 (1) Globe 157 (1866) (Rep. Bingham); 40 (2) Globe 926 (1868) (Sen. Ferry); 42 (1) Globe 335 (1881) (Rep. Hoar); *id.* at 500 (Sen. Frelinghuysen); *id.* at 570 (Sen. Trumbull).

[15] 38 (2) Globe 237 (1865).

[16] 39 (1) Globe 586 (1866).

[17] *Id.* at 1066. See also *id.* at 2082 (Rep. Perham).

[18] *Id.* at 1627. See also *id.* at app. 293–4 (Rep. Shellabarger).

[19] S. Ex. Doc. No. 2, 39th Cong., 1st Sess. 7–8 (1865).

[20] S. Rep. No. 112, 39th Cong., 1st Sess. 11–12 (1866).

[21] Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 Stan. L. Rev. 5, 75, 96 (1949).

[22] 40 (2) Globe 514 (1868) (Rep. Bingham), 725 (Sen. Morton).

[23] *Id.* at 926.

[24] *Id.* at 2903.

[25] 42 (1) Globe 839 (1871) (Rep. William D. Kelley). See also *id.* at app. 310 (Rep. Maynard).

state being driven out of the South had the right to protection, it being a privilege of national citizenship.[26] Senator Oliver P. Morton, an Indiana Republican, denounced the South for driving out northern emigrants.[27] Senator Frederick T. Frelinghuysen, a New Jersey Republican and a former attorney-general of that state, declared that a northerner has the right to come to the South in spite of all state laws to the contrary, and could demand "protection of the laws" in doing so.[28] The Ku Klux Klan Act of 1871,[29] which was designed to enforce the Equal Protection Clause, was specifically directed, in part, towards protecting northerners in the South.[30]

The travelers going from northern states to the South were just as much of the Caucasian race as the southerners against whom they requested protection. No element of racial discrimination was involved. Discrimination was based on state origin and differences of opinion on sundry social and political problems. Here again, confining the Fourteenth Amendment to racial discrimination would remove from its ambit another important type of discrimination which the framers clearly intended to prevent states from making.

4. PROTECTION OF WHITE LOYALISTS

The problem of protecting white anti-slavery southerners against discrimination because of their opinions occupied the attention of the Republicans even before the Civil War. During the 1860 Republican National Convention, a special resolution moved by former Representative Joshua R. Giddings of Ohio and adopted therein stated:

"Resolved, That we deeply sympathize with those men who have been driven, some from their native States and others from the States of their adoption, and are now exiled from their homes on account of their opinions; and we hold the Democratic Party responsible for the gross violation of the clause of the Constitution which declares that citizens of each State shall be entitled to all privileges and immunities of the citizens of the several States." [31]

Representative John A. Kasson, an Iowa Republican lawyer, also declared:

"Let me say here that it is necessary to carry into effect one clause of the Constitution of the United States which has been disobeyed in nearly every slave State of the Union for some twenty-five or thirty years past. I refer to that clause of the Constitution which declares in section of the fourth article that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. You cannot go into a State of the North in which you do not find refugees from southern States who have been driven from the States in the South where they had a right to live as citizens, because of the tyranny which this institution exercised over public feeling and public opinion, and even over the laws of those States.

"In my own State there are numbers of men who have been driven from their farms, not for any offense against any of the laws which usually constitute crime, but because in opinion they did not agree with those who adhere to the institution of slavery." [32]

At the close of the war, protection of the minority of white loyalists in the South loomed as a large problem in the eyes of the dominant Republicans. The report of Major General Carl Schurz pointed out that known loyalists in the South lead a "precarious" existence, and that the withdrawal of federal troops would lead to their expulsion. Schurz recounted instances of the murder of white unionists in the South, and of their arrest by local officials for activities in aid of the union cause.[33] Representative William D. Kelly, a Pennsylvania Republican, declared that to surrender the "truly loyal white men of the insurrectionary districts" without protection to "the unbridled lust and power of the conquered traitors of the South" in order to obtain peace would be a purchase "by such heartless meanness and so gigantic a barter of principle [as] would be unparalleled in baseness in the history of mankind." [34]

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[26] *Id.* at 413–4 (Rep. Ellis H. Roberts).
[27] *Id.* at 253. See also *id.* at 567 (Sen. Edmunds).
[28] *Id.* at 500. See also *id.* app. 227–8 (Sen. Boreman). Cf. 42 (2) Globe, 486 (1872) (Sen. Frelinghuysen).
[29] 17 Stat. 13, Ch. 22.
[30] 42 (1) Globe 567 (1871) (Sen. Edmunds).
[31] 1 Curtis, *The Republican Party* 357, 361 (1904).
[32] 38 (2) Globe 198 (1865).
[33] S. Ex. Doc. No. 2, 39th Cong., 1st Sess. 9 (26) (1865).
[34] 38 (2) Globe 289 (1865).

When the Thirty-Ninth Congress commenced the work of reconstruction with the Freedmen's Bureau Bill,[35] it was careful to give as much protection to loyal white southerners, known as "refugees," as it was to the newly liberated Negroes.[36] The House was told that they were to be treated "exactly the same," and that they had "all the rights under this bill that the freedmen have."[37] Likewise, when Senator Garrett Davis, a Kentucky Democrat, complained that the Civil Rights Bill was partial to Negroes, Senator Lyman Trumbull, an Illinois Republican and a former state supreme court justice, who was in charge of the bill as Chairman of the Judiciary Committee, replied that "this bill applies to white men as well as black men," and that its "only object . . . is to secure equal rights to all the citizens of the country, a bill that protects a white man just as much as a black man."[38] Trumbull also observed that not only did the Freedmen's Bureau Bill provide for white refugees, but that "we have been feeding more white persons than colored persons in some localities. . . ."[39]

The Fourteenth Amendment was likewise designed to protect southern white loyalists. The following exchange between Representative Robert S. Hale, a Republican former judge from New York, and Bingham, shows this clearly:

"Mr. HALE. It is claimed that this constitutional amendment is aimed simply and purely toward the protection of 'American citizens of African descent' in the states lately in rebellion. I understand that to be the whole intended practical effect of the amendment."

"Mr. BINGHAM. It is due to the committee that I should say that it is proposed as well to protect the thousands and tens of thousands and hundreds of thousands of loyal white citizens of the United States whose property, by State legislation, has been wrested from them under confiscation, and protect them also against banishment."[40]

Shortly thereafter, in respect to South Carolina, Bingham urged the amendment "to protect the few loyal white men there against State statutes of confiscation and statutes of banishment." He observed that as the Constitution stood the federal government was powerless, once the southern states were restored, "to protect the loyal white minority." He added:

"Restore those States with a majority of rebels to political power, and they will cast their ballots to exclude from the protection of the laws every man who bore arms in defense of he Government. The loyal minority of white citizens and the disfranchised colored citizens will be utterly powerless. There is no efficient remedy for it without an amendment to your Constitution."[41] Congressman Giles W. Hotchkiss, a New York Republican lawyer, in urging that the intial draft of the Fourteenth Amendment's first section be redrafted, stated that he wanted to protect white persons as well as blacks.[42]

Representative John M. Broomall, a Radical Republican from Pennsylvania, also advocated protecting loyalists in mountain areas without "distinction of caste or color" who had been banished or imprisoned for standing against secession. Broomall adverted to the fact that the property of white southern loyalists had been seized and confiscated in state courts, and they "are denied remedy in the courts of the reconstructed South. . . ." Representative Thomas

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[35] A discussion of the debates in the first session of the Thirty-Ninth Congress which led to the Fourteenth Amendment is contained in Tansill, Avins, Crutchfield & Colegrove, *The Fourteenth Amendment and Real Property Rights in Open Occupancy vs. Forced Housing Under the Fourteenth Amendment* 68 (Avins ed. 1963).

[36] The following colloquy occurred between Representatives Green C. Smith, a Kentucky Unionist, and Thomas D. Eliot, a Massachusetts Republican, who was in charge of the Freedman's Bureau Bill:

"Mr. SMITH. Then the word 'refugee' applies only to whites. I would inquire . . . if, under this law and under the operations of the Freedmen's Bureau, all white men who were not rebels and who were as poor as the negroes are entitled to the same privileges and the same protection that negroes are?

"Mr. ELIOT. The object of this bill is to place the refugees—that is to say the loyal white men who have fled from their homes because of the rebellion—upon the same footing with the freedmen as to the care and protection of the Government.

"Mr. ELIOT. I will say . . . that there is no distinction made in this bill between the rights of freedmen and of refugees under it. They are treated alike from the first to the last. . . ." 39 (1) Globe 516 (1866).

[37] *Ibid.* (Rep. Eliot). See also *id.* at 632 (Rep. Moulton); 651 (Rep. Grinnell); 1262 (Rep. Broomall); 1292 (Rep. Bingham).

[38] *Id.* at 599. See also *id.* at 1757.

[39] *Id.* at 746. See also *id.* at 943.

[40] *Id.* at 1065.

[41] *Id.* at 1094. See also Bingham's reference to statutes of banishment and confiscation at pp. 1091 and 1093.

[42] *Id.* at 1095.

T. Davis, a New York Republican, agreed with this object.[43] Representative Samuel W. Moulton of Illinois warned that Union soldiers were being prosecuted by rebels in the Kentucky courts, and that if the rebels regained power in the South they would persecute white unionists as well as freedmen in the South, confiscate their property, pass laws discriminating against them, and drive them out of the state or kill them. He added that such a process was already beginning.[44]

A Pennsylvania Republican complained that Alabama had passed criminal laws severely punishing both white and black workers.[45] Representative Buckland of Ohio declared "that the Government was bound to protect the rights of the loyal white people and the loyal colored people of the South . . . ."[46] Another Ohio Republican read letters and articles to the House describing how white loyalists in the South were being insulted and driven out.[47]

Representative Sidney Perham, a Maine Republican, declared that the southern "policy is to render it so uncomfortable and hazardous for loyal men to live among them as to compel them to leave." He, too, recounted how the Kentucky courts were prosecuting Union soldiers and imprisoning them for acts done pursuant to military orders. He cited the Schurz report for the proposition that "if the military forces should be removed, it would be impossible for Union men, black or white, to remain there."[48] Representative Ephraim R. Eckley, an Ohio Republican, added:

"The whole North is full of loyal refugees who do not dare return to their former homes. . . . Reject the amendment . . . and you must widen the asylum in the North for those southern people who have sympathy with the Government."[49]

Finally, the Joint Committee on Reconstruction, which reported out the Fourteenth Amendment, gave as a reason for it:

". . . without the protection of United States troops, Union men, whether of northern or southern origin, would be obliged to abandon their homes . . . the general feeling and disposition among all classes are yet totally averse to the toleration of any class of people friendly to the Union, be they white or black; . . . Southern men who adhered to the Union are bitterly hated and relentlessly persecuted. . . . All such demonstrations show a state of feeling against which it is unmistakably necessary to guard."[50]

Even after proposing the Fourteenth Amendment, Congress continued its criticism of southern states for "denying protection to the people who were true and loyal during the war. . . ."[51] Representative Kasson of Iowa said that loyal men were being driven out of the South by violence, and that southern states should not be admitted to representation until "first they . . . take care that all free men, white or black, who adhere to the Government of the United States shall be protected as fully as one of their own class of citizens."[52] Senator Morton of Indiana declared that southern loyalists were murdered with impunity because the state governments "failed to extend protection to the loyal men, either white or black," and as a result the white majority was able to persecute "the loyal men, both white and black, in their midst. . . ."[53] Senator Timothy O. Howe, a Wisconsin Republican and a former state supreme court justice who had voted for the Fourteenth Amendment, declared that it was adopted because the Joint Committee on Reconstruction, after taking testimony,

"finally came to the conclusion that it would not be safe to commit these two populations, the loyal white men and the freedmen of those communities to the keeping of those governments unless some further restrictions were placed upon

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[43] *Id.* at 1265.
[44] *Id.* at 1618.
[45] *Id.* at 1621 (Rep. Leonard Myers).
[46] *Id.* at 1627.
[47] *Id.* at 1835 (Rep. William Lawrence).
[48] *Id.* at 2082–3. Representative Thaddeus Stevens of Pennsylvania, leader of the House Radical Republicans, thought that the Fourteenth Amendment does "not sufficiently protect the loyal men of the rebel States from the vindictive persecutions of their victorious rebel neighbors." *Id.* at 2460.
[49] *Id.* at 2536. See also *id.* at 2537 (Rep. Beaman), 2539 (Rep. Farnsworth).
[50] S. Rep. No. 112, 39th Cong. 1st Sess. 11–12 (1866). For discussion of this point during the debates on ratification, see Fairman, *op. cit. supra*, n. 21 at 90.
[51] 39 (2) Globe 128 (1866) (Sen. Sherman).
[52] *Id.* at 346. See also discussion of hostility to loyal whites and their protection in H.R. Rep. No. 21, 40th Cong., 2nd Sess. 2 (1868); H.R. Rep. No. 30, 40th Cong., 2nd Sess. 5, 26 (1868).
[53] 40 (2) Globe 725 (1868).

the authority of the State governments than were placed by the Constitution as it then stood." [54]

Senator William M. Stewart, a Nevada Republican lawyer, ascribed the Radical plan of reconstruction to the "denial of the rights of the black man and of the white Union man of the South" by the Johnson governments.[55] An Oregon Republican declared that if the southern rebels had been left to themselves "they would have imposed upon the loyal white people of the South political burdens and disabilities for the purpose of gratifying their revengeful feelings. . . ." [56]

It is obvious that the southern white unionists or loyalists were not being discriminated against based on race, color, or previous conditions of servitude. Discrimination against them was based on adherence to the national government, or political viewpoint. If the first section had been confined to racial discrimination, one of the major objects of congressional solicitude in submitting the Fourteenth Amendment would have been left out. It is therefore clear once again that if racial discrimination were deemed to have a special condemnation, under the Fourteenth Amendment, an important group, of equal concern with Negroes to the framers could not benefit from it. This is strong evidence that no such primacy was given to racial discrimination.

5. PROTECTION OF SOUTHERN REPUBLICANS

One of the three major statutes passed during the Reconstruction Period to enforce the Fourteenth Amendment, and especially the Equal Protection Clause, was the Ku Klux Klan Act of 1871.[57] This statute was designed, not to bar racial discrimination, but to protect southern Republicans against politically inspired violence.[58] White Republicans were as much covered as were black Republicans. Thus, Representative Horace Maynard, a Tennessee Republican, gave as the reason for the bill that "this Congress will be recreant to its duty if it stops short of making it just as safe anywhere in the country to vote the Republican ticket as it is to vote the Democratic ticket." [59] Senator Morton of Indiana declared:

"the white people in many parts of the South who are Republicans, who are the friends of the Government, have no security for life or property in the State courts, and that the colored people, . . . because they, too, are Republicans, have no protection for life and property. I plead for the security and protection of these people, not because they are Republicans, but because they are human beings; because they are men and women entitled to the protection of the laws; and I call upon all men, without regard to party, . . . to give to the citizens of the United States, whatever may be their political views, the equal protection of the laws."

"We are not at liberty to doubt that the purpose is by these innumerable and nameless crimes to drive those who are supporting the Republican party to abandon their political faith or flee from the State. A single murder of a leading Republican will terrify a whole neighborhood or county." [60]

Senator Daniel D. Pratt, an Indiana Republican lawyer, made a lengthy argument to demonstrate that the Equal Protection Clause gave as much protection to white persons discriminated against on account of their politics as it did to Negroes discriminated against because of race. He observed that southern courts were virtually closed "when a man of known Union sentiments, white or black,

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[54] *Id.* at 883. See also *id.* at app. 113 (Sen. Sumner and Morrill of Maine). Representative Burton C. Cook, an Illinois Republican lawyer, likewise asserted: "It is also manifest the white Union men of the southern States who risked so much and suffered so much for their devotion to the country would be left in the power of their enemies, receiving no measure of protection . . ." *Id.* at 2402.

[55] *Id.* at 2898.

[56] 40 (3) Globe 900 (1869) (Sen. George H. Williams).

[57] 17 Stat. 13, Ch. 22.

[58] 42 (1) Globe app. 412–4 (1871) (Rep. Ellis H. Roberts, N.Y.).

[59] *Id.* at app. 310.

[60] *Id.* at app. 251–2. See also *id.* at 702, where Senator George F. Edmunds, a Vermont Republican, observed:

"The disorders in the South are not like the disorders in many other States, where there always are disorders, the results of private malice. The slaying of men there, as a rule . . . is but one step in the progress of a systematic plan and an ulterior purpose, and that is not to leave in any of those States a brave white man who dares to be a Republican or a colored man who dares to be a voter. The one is to be expelled or slain and the other is to be reduced to what they consider to be his normal condition."

Senator Allen G. Thurman, an Ohio Democrat, *id.* at app. 219.

invokes their aid."[61] He added that the first section of the Fourteenth Amendment, "by way of limitation upon the power of the States, applies equally to both races . . . whether Caucasian, African, or Asiatic in origin." He observed:

"If protection is guaranteed to the African, it is also to the Chinaman if naturalized; and what warrant have we to claim that the whites alone are excluded?"[62]

Senator George F. Edmunds, a Vermont Republican lawyer in charge of the bill for the Judiciary Committee, observed that a refusal of a state to protect a man because he was a Democrat, a Catholic, a Methodist, or a native of Vermont, would constitute a denial of equal protection of the laws within the meaning of the Fourteenth Amendment.[63] Edmunds remarked:

"But when you . . . come to the next [fourteenth] article of the Constitution, which secures the rights of white men as much as of colored men, you touch a tender spot in the party of our friends on the other side. If you wish to employ the powers of the Constitution to preserve the lives and liberties of white people against attacks by white people . . . contrived in order to drive them from the States in which they have been born or have chosen to settle, contrived in order to deprive them of the liberty of having a political opinion . . . then the whole strength of the Democratic party and all its allies is arrayed against . . . such an act."[64]

Senator Lyman Trumbull, an Illinois Republican and chairman of the Senate Judiciary Committee, observed in criticizing one of the drafts of the bill:

"Now, there is nothing in the [Fourteenth Amendment of the] Constitution of the United States in regard to 'race, color, or previous condition of servitude' that I am aware of. The Constitution of the United States guarantees to all citizens the equal right of protection wherever they are, and guarantees the equal protection of the laws to all persons, whether they are citizens or not. . . . Now, if you can punish persons for doing an injury to a man because he is white, or because he is black, or because he is yellow, why can you not punish him for an injury done to a man because he is regarded as a mean man, because the community do not like him, because he is an unpopular man?"[65]

Representative Charles W. Willard, a Vermont Republican lawyer, likewise declared, in criticizing another section as it was originally drafted:

"But no man is guaranteed by the Constitution, on account of his race, color, or previous condition of servitude, the enjoyment of any more rights than every citizen has by that instrument the guaranty of. The Constitution holds over no man any additional shield on account of his birth-place, or parentage, or previous condition. . . . That instrument gives him as a citizen no rights which it does not give to me or any other man. It gives him as a citizen no rights which are not given to white and black alike. Alike they are entitled to the equal protection of the laws, . . . The Constitution now calls them all citizens, and gives to all the protection which it gives to any citizen; and it is the most patent inequality and injustice to give Irishmen or Chinamen or colored men a remedy against a county, and in the United States courts, when a white native citizen can only have his remedy against individuals and in the State courts.

"It is true that a person may suffer this damage by reason of his previous condition of servitude. . . . but every offense has something peculiar in its character, and which constitutes the motive for its commission against that particular individual. But the life of a colored person, the house of a colored person are no more under the peculiar protection of the United States than the life and property of citizens of different complexions; and where the guarantee is the same it is clear that the remedy must be the same. When we have just got rid . . . by the amendment to the Constitution, of the inequality, . . . let us

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[61] *Id.* at 505.
[62] *Id.* at 506.
[63] *Id.* at 567.
[64] *Id.* at 696. See also the somewhat humorous remarks of Senator Allen G. Thurman, an Ohio Democrat, *id.* at app. 219.
[65] *Id.* at 758. Trumbull also observed:
". . . if you can punish an offense committed against a man because he is white or because he is black, . . . if you can punish a mob for getting up a riot and driving a man off on that account, I want to know if you cannot punish a mob for injuring a person for any cause that may be conceived of, because they want a man's property, because they want him out of the community, because they are 'Regulators,' as they had in Nevada some time ago . . ." *Id.* at 759.

not now begin to go over to the other side and give greater rights and more effectual remedies to one man than to another, to one class of men than to another, to one race of men than to another. Of course, I deny that we have any constitutional power to do this; but I . . . confine my remarks mainly to a consideration of the injustice of the legislation. . . . I believe a black man is just as good as a white man . . . and while I would give to him the same rights and the same protection which I would give to any one, I would not give him any greater rights or any higher remedies than are allowed to other citizens . . . we must [not] make him an exceptional and favored class in the administration of our laws." [66]

It is quite clear that southern white Republicans, at least, were not being discriminated against on account of race or color, and if the Equal Protection Clause were limited, in whole or in part, to preventing such discrimination, there would have been no legal basis for protecting them under that clause. But such was not the understanding of the framers of the Fourteenth Amendment. They were loud in their assertions that discrimination based on race or color was not entitled to be more guarded against than political discrimination or any other form of discrimination. In their eyes, everyone was entitled to the same protection, whether the discrimination was based on race, color, religion, birthplace, politics, personal traits, or any other ground.

6. PROTECTION OF ALIENS AND CHINESE

Discrimination by law against Chinese on the West Coast, which was deemed in legal theory to be based on nativity rather than race,[67] was extensive during the Reconstruction Period.[68] The California courts would not permit them to be witnesses,[69] as a result of which they received no protection from legal authorities against robbery or other crimes committed on them by white persons.[70]

Discrimination against aliens or travelers in respect to natural or "civil" rights was contrary to Bingham's ideals as they were set forth in some of his earliest speeches. In 1859, even before the Civil War, he declared "that natural or inherent rights" were guaranteed by the Fifth Amendment's use of "the broad and comprehensive word 'person,' as contra-distinguished from the limited term citizen," so that the "natural rights to all persons, whether citizens or strangers, may not be infringed. . . ." [71] In introducing his first draft of what was later to become the Equal Protection Clause, Bingham declared that "the divinest feature of your Constitution is the recognition of the absolute equality before the law of all persons, whether citizens or strangers. . . ." [72] Indeed Bingham was sharp in his criticism of the Civil Rights Act of 1866 [73] for protecting only citizens and not all persons in their civil rights.[74] It can hardly be doubted that the differences

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[66] *Id.* at 791.

[67] 41 (2) Globe 4275 (1870) (Rep. Sargent), 4278 (Rep. Fitch).

[68] See 39 (1) Globe 628 (1866) (Rep. Marshall); *id.* at 1056 (Rep. Higby); 40 (3) Globe 1033–4 (1869) (Sen. Morton); 41(2) Globe 3807–8 (1870) (Sen. Stewart); 42 (2) Globe 898 (1872) (Sen. Corbett); 901 (Sen. Trumbull), 912 (Sen. Stevenson), 985 (Sen. Sumner); 43 (2) Globe 1794 (1875) (Sen. Thurman).

[69] 41(3) Globe 1253 (1871) (Sen. Morton). See *People* v. *Washington*, 36 Cal. 658 (1869); *Speer* v. *See Yup Co.*, 13 Cal. 73 (1859); *People* v. *Hall*, 4 Cal. 399 (1854).

[70] 39 (1) Globe 2802 (1866) (Sen. Conness).

[71] 35(2) Globe 983 (1859). See also 42(1) Globe app. 314 (1871), where Representative Horatio C. Burchard, an Illinois Republican lawyer, referred to "those inalienable rights that belong to every human being everywhere, and in the enjoyment of which the stranger as well as the citizen is protected by every free Government."

[72] 39(1) Globe 158 (1866). See also *id.* at 1094.

[73] 14 Stat. 27 (1866).

[74] 39(1) Globe 1292 (1866). Bingham declared:

". . . are we not committing the terrible enormity of distinguishing here in the laws in respect to life, liberty, and property between the citizen and stranger within your gates? Do we not thereby declare the States may discriminate in the administration of justice for the protection of life against the stranger irrespective of race or color?

"Sir, that is forbidden by the Constitution of your country. The great men who made that instrument, . . . inserted . . . the more comprehensive words, 'no person;' thereby obeying that higher law given by a voice out of heaven: 'Ye shall have the same law for the stranger as for one of your own country' . . .

"This bill, sir . . . departs from that great law. The alien is not a citizen. You propose to enact this law, you say, in the interests of the freedmen. But do you propose to allow these discriminations to be made in States against the alien and stranger? Can such legislation be sustained by reason or conscience? . . . Is it not as unjust as the unjust State legislation you seek to remedy? Your Constitution says 'no person,' not 'no citizen,' 'shall be deprived of life, liberty, or property,' without due process of law."

between the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment, in protecting "persons," and the Privileges and Immunities Clause, in protecting only "citizens," stem from this theory.

The very first statute passed by Congress to enforce the Fourteenth Amendment [75] contained a provision extending the Civil Rights Act of 1866 to aliens, "so that all persons who are in the United States shall have the equal protection of our laws." [76] Although the bill covered all foreigners, including travelers, [77] it was called the "Chinese bill," [78] because it was primarily designed for "the protection of the Chinese." [79] Senator Stewart of Nevada, declared:

"Now while I am opposed to Asiatics being brought here, and will join in any reasonable legislation to prevent anybody from bringing them, yet we have got a treaty that allows them to come to this country. . . . While they are here I say it is our duty to protect them. I have incorporated that provisions in this bill on the advice of the Judiciary Committee. . . . It is as solemn a duty as can be devolved upon this Congress to see that those people are protected, to see that they have the equal protection of the laws, nothwithstanding, that they are aliens. They, or any other aliens, who may come here are entitled to that protection. If the State courts do not give them the equal protection of the law. . . . their ordinary civil rights, . . . we will protect Chinese aliens or any other aliens whom we allow to come here, and . . . let them be protected by all the laws and the same laws that other men are. . . . The fourtheenth amendment to the Constitution says that no State shall deny to any person the equal protection of the laws." [80]

Bingham approved the Senate bill. He declared that Congress could enforce the Equal Protection Clause in favor of emigrants.[81] Indeed, even the California representatives of both parties advocated protecting the Chinese in their civil rights. Representative James J. Johnson, a California Democrat, remarked that the Equal Protection Clause "puts the Chinaman on an equality with every other unnaturalized foreigner in the land," [82] and added that "Chinamen will always receive all the protection that just laws may give." [83] Representative Aaron A. Sargent, a California Republican, said that "the Chinaman and anyone else, no matter what his color, is entitled to the equal protection of our laws in life, liberty, and security; but I never have believed that we should go beyond that and make them all citizens." [84] The right of aliens to be protected in their civil rights under the Equal Protection Clause was conceded by other members of Congress as well.[85]

If the Equal Protection Clause were confined to protection against racial discrimination, in whole or in part, it could not protect travelers and aliens discriminated against because of alienage. Once again, such a construction is manifestly inconsistent with the original purposes of the Fourteenth Amendment.

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[75] Enforcement Act of 1870, ch. 114, 16 Stat. 140.

[76] 41 (2) Globe 1536 (1870) (Sen. Stewart).

[77] *Ibid.*

[78] *Id.* at 3702 (Sen. Thurman). See also *id.* at 3703 (Vice President).

[79] *Id.* at 3807 (Sen. Stewart). See also *id.* at 3570, where Senator Sherman referred to the fact "that we must protect the Chinese against the local law of California. . . ."

[80] *Id.* at 3658. After deploring the fact that the Chinese in California were being robbed and murdered with impunity, Stewart added: "Dare he say to the good people of California that while the Chinese are here under our laws, and while we have a Constitution which says that no State shall deny to any person within its jurisdiction the equal protection of the laws, Congress ought not to pass a law to give them protection?" *Id.* at 3808.

[81] *Id.* at 3871. This included discrimination among European immigrants.

[82] *Id.* at 3879.

[83] *Id.* at 3880.

[84] *Id.* at 4275. Representative Thomas Fitch, a Nevada Republican, likewise noted "that I voted for the bill enforcing the fifteenth amendment, the sixteenth section of which protects this people in all their civil rights." *Id.* at 4278. Cf. 42 (1) Globe 506 (Sen. Pratt).

[85] 42 (2) Globe 901 (1872) (Sen. Trumbull), 43 (2) Record 1863 (1875) (Sen. Carpenter). Cf. *id.* at 1870 (Sen. Edmunds). Senator Thurman observed:

"As I said before, the clause of the amendment which he reads has no relation to citizenship. It covers every human being within the jurisdiction of a State. It was intended to shield the foreigner, to shield the wayfarer, to shield the Indian, the Chinaman, every human being within the jurisdiction of a State from any deprivation of an equal protection of the laws; and the very fact that it embraces aliens, the very fact that it embraces the traveler passing through, shows that it has no relation whatsoever to qualifications for political office. . . ." 43(2) Record 1794 (1875). See also *id* at 1795.

7. THE CIVIL RIGHTS ACT OF 1875

The one statute passed during the Reconstruction Period which specifically forbids racial discrimination is the Civil Rights Act of 1875.[86] But even this law does not permit an inference that racial discrimination was especially obnoxious to the Fourteenth Amendment, even assuming the validity of the law.[87] Although this point is not shown on the face of the law, the purpose of the statute was to guard against state statutes or common-law rules which gave everyone the benefit of the facilities therein named but discriminated only against Negroes. Thus, the law seemed that all discrimination except racial discrimination was forbidden, and merely eliminated this exception.[88] Indeed, the debates show that Congress did not intend to give any special privilege to Negroes, thus "falling into the absurdity of discriminating against whites . . ."[89]

The Democrats harped on the theme that the remedies given by Congress were specially designed for the benefit of Negroes.[90] For example, Representative Aylett H. Buckner, a Missouri Democrat, declared:

"Nor can I understand why there should be such discrimination in his favor as between him and the white citizen . . . If a white citizen is excluded from a public inn or a place of public amusement he must sue in the State courts, and content himself with the actual damages sustained; but if it be a colored man who has a similar cause of action, the unfortunate innkeeper, showman, or teacher of a public school is subjected to a penalty of from one hundred to five thousand dollars, . . ."[91]

Moreover, the Democrats also noted that the Fourteenth Amendment does not protect against racial discrimination alone. Senator William T. Hamilton, a Maryland Democratic lawyer, said:

"I ask you and each Senator present to read again the fourteenth amendment. It has not a reference to race; it has not a reference to color; it applies to all the people alike as citizens or persons only, and not in any other respect."[92]

Senator Allen G. Thurman, an Ohio Democrat and a former chief justice of the state supreme court, likewise observed: "There is not one word in this first section of the fourteenth amendment that has any relation to race, color, or previous condition of servitude . . ."[93] Senator Thomas F. Bayard, a Delaware Democratic lawyer, remarked:

". . . the fourteenth amendment is addressed entirely to States and never to people, and there seems to me to have been a very strange confusion in the minds of those who draughted this bill, under the fourteenth amendment, in referring to 'nativity, race, color, or persuasion, religious or political,' when the fourteenth amendment contains no such language, and no reference to such subjects is to be found in any part of it. The fifteenth amendment relates only to the right to vote, and forbids any State to abridge that right by reason of 'race, color, or previous condition,' but the fourteenth amendment has no reference whatever to such subjects. There is not a word of sex or of race, of age or of color, of nativity or of religion—not a word in any way, express or implied, in the language of the amendment under which this statute is supposed to find its warrant."[94]

Bayard suggested that a poor man was as much entitled to equal protection of the laws as a rich man, and that discrimination by an owner of a place of pub-

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[86] 18 Stat. 335 (1875).

[87] The first section was held unconstitutional in the *Civil Rights Cases*, 109 U.S. 3 (1883).

[88] Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 Col. L. Rev. — (1966).

[89] 42 (2) Globe 435 (1872) (Sen. Frelinghuysen). Senator James K. Kelly, an Oregon Democrat, observed:

"If the United States can, under the fourteenth amendment, punish white people for infringing the rights of colored people, why can they not punish white people for infringing the rights of white people? Certainly, they have a right to protect all classes, and if the right belongs exclusively to the United States to protect colored people, it belongs in an equal degree to the United States to protect the white people also." *Id.* at 895. See also Kelly's remarks at 43 (1) Record 4163 (1874).

[90] For example Representative Henry D. McHenry, of Kentucky declared: "It has never occurred that such extraordinary remedies have been given by Congress for the protection of any white man in his rights. To be a negro is to belong to the favored class." 42 (2) Globe app. 218 (1872).

[91] 43 (1) Record 429 (1874).

[92] *Id.* at app. 362. See also 43(2) Record 1794 (1875) (Sen. Hamilton). And note *id.* at app. 114: "'Color' is not in the fourteenth amendment; 'race' is not in the fourteenth amendment."

[93] *Id.* at 1795.

[94] *Id.* at app. 104.

lic accommodation based on poverty or inability to pay the requisite charge was as much condemned under the Fourteenth Amendment as was racial discrimination. He therefore concluded:

"I do not know but that an amendment should be offered to this bill, providing not only that this equal enjoyment of hotels should be guaranteed by the United States, but that money should be appropriated to pay for the accommodation, the ticket of the railway, or for entrance to the theater from the Treasury of the United States, ... for impecuniosity is as much a condition under the fourteenth amendment as race or color, and entitled to the same protection." [95]

Thurman later added: "No man has been able to point out one word in the Constitution which says you shall make no discrimination on account of race but you may discriminate on any other account you see fit." [96]

The dominant Republicans strenuously denied any discrimination in favor of Negroes. Senator Frelinghuysen of New Jersey, reporting the bill for the Judiciary Committee, said that it "properly secures equal rights to the white as well as to the colored race." [97] Senator Pratt of Indiana noted that "this measure is not confined to colored citizens; it embraces all, of whatever color." [98] And the following exchange between Thurman and Senator George S. Boutwell, a Massachusetts Republican who, as a Representative had been a member of the Joint Committee on Reconstruction of the Thirty-Ninth Congress, which reported out the Fourteenth Amendment, clearly illustrates this point:

Mr. THURMAN. . . . the first section of the fourteenth amendment, on which he relies of course to sustain the bill, has no reference whatsoever to 'race, color, or previous condition of servitude.' No such words are in the section. No allusion is made to that distinction. . . . there is not one word in the first section of the fourteenth amendment that relates to race, color, or previous condition of servitude.

"Mr. BOUTWELL. That is all very true. The fourth section of this bill provides for equality in certain particulars where the equality of citizens is assailed, and not elsewhere. It is assailed or threatened in many of the States of the Union, upon the ground that certain persons are of a particular race or of a particular color or have been subject in times past to the condition of slaves. . . .

". . . Therefore, while we cannot go into the States and say what the rights of citizens of the State in the State shall be, whenever there is a law in a State or a provision of its constitution which secures to citizens generally their rights and discriminates against other citizens, . . . in our power under the fourteenth amendment to protect them as citizens of the the United States, we pass the boundaries of the several States by authority of the Constitution and secure . . . their rights under the laws of the States as citizens of the State. . . .

". . . all that is claimed under the fourth section of this bill is that you shall not, . . . say that a man shall not sit upon a jury because he is a black man or because he is of the German race or because he has been held in slavery, and I might say for other reasons. If for other reasons discriminations were made by the law of any of these States, we might under the fourteenth amendment protect men from such discriminations." [99]

It is interesting to note that Representative Richard H. Cain, a South Carolina Negro Republican, said that he was not asking for special privileges but merely no discrimination in the laws, and that when the laws made no distinction, "if the Negro is not qualified to hoe his row in this contest of life, then let him go down," [100]

It is clear from the foregoing evidence that Congress, in passing the first section of the 1875 statute, was simply eliminating a discrimination in respect to businesses in which all other discriminations were forbidden by common law. This statute, therefore, lends no support to the notion that racial discrimination is more interdicted under the Equal Protection Clause than any other form of discrimination. The debates show that members of both parties did not believe that racial discrimination was specially banned. Since it was singled out only because other discriminations were already forbidden, this lends no support to

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[95] *Id.* at app. 105.
[96] *Id.* at 1866.
[97] 43 (1) Record 3451 (1874).
[98] *Id.* at 4082 Senator Edmunds said that discrimination based on religion or nativity violated the Fourteenth Amendment equally with that of race. 43 (2) Record 1866, 1870 (1875).
[99] *Id.* at 1792–3. Cf. *id.* at app. 113 (Sen. Hamilton).
[100] *Id.* at 957. See also *id.* at 982.

the notion that racial discrimination may be banned when other discriminations are allowed.

8. THE FIFTEENTH AMENDMENT

The only enactment during the Reconstruction Period which singled out race, color, and previous condition of servitude for special interdiction was the Fifteenth Amendment. The striking difference in phraseology between the Fourteenth Amendment and the Fifteenth Amendment is in itself a good indication that the former does not limit itself to the three discriminations set forth in the latter. However, it is of interest to review the attitudes of the dominant Republicans towards this limitation as a reflection of their attitudes generally.

The Fifteenth Amendment was a political compromise, hammered out under great time pressure after attempts were repeatedly made to give every adult male an equal vote, or to ban the major causes of discrimination against white persons, nativity, religion, education, and property. Many of the dominant party members were very unhappy with the result, and were vocal in the belief that this compromise did not assure equal political rights.[101] It was feared that white persons might disenfranchise other whites for political or other reasons.[102]

Senator Edmunds, for example, objected to any constitutional amendment giving only Negroes the right to vote because it did not "stand on any principle," and because "there is nothing republican in that." [103] He did not want to "undertake to take one particular class of people in this country who happen to have been born in one zone of the earth rather than another, and say that they, and they alone, shall be entitled to the political privileges. . . ." Edmunds added:

"I say it undertakes to dispose of him in the fundamental law, when you leave the native of every other country under the sun, the descendant of every other race under the sun, entirely to the mercy of the States. . . . I say, and I shall be excused for the expression, that it is little less than an outrage upon the patriotism and good sense of a country like this, made up of the descendants of all nations, to impose upon them an amendment of that kind." [104]

Senator John Sherman of Ohio attacked the amendment for protecting only against racial discrimination when many whites were disenfranchised for other reasons. He said that the amendment banning only racial discrimination rested "on so narrow a ground that we are constantly apologizing for its weakness." [105]

Senator Howe remarked that discriminations among white people should be eliminated along with discriminations against Negroes.[106] Senator Joseph S. Fowler, a Tennessee Republican lawyer, exclaimed:

". . . the propositions before us ignore the rights of all the white men of the country who are now divested of this great right. When this measure is adopted they will remain divested of the right. . . . I contend that any amendment of the Constitution that does ignore the rights of the white men who are disfranchised throughout the United States is an amendment unworthy of the age and it is an amendment unworthy of a white citizen of the United States or of any citizen of the United States. Carry the proposition to the colored men in the southern country and they will vote to-day to give this right to the disfranchised whites. They would spit upon such a proposition as this—a proposition in which their own rights are attempted to be secured, while it tramples down the rights of their own white fellow-citizens. . . . There is not a decent black man in all the southern States who would not scorn such a proposition as this; and yet we are told . . . that nobody's rights are to be guarded except those who are marked by race, color, or previous condition of servitude. . . . For all other reasons a State may divest a man of his right to vote. . . ." [107]

Senator Wilson of Massachusetts lamented the loss of his substitute banning discrimination based on factors other than race, or color. He wanted to protect people against discrimination based on other grounds. He declared:

"If the black man in this country is made equal with the white man—and I hope he soon will be—I mean, * * * to make every white man equal to every

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[101] Avins, *The Fifteenth Amendment and Literacy Tests: The Original Intent*, 18 Stan. L. Rev. 808 (1966).
[102] 40 (3) Globe 900 (1869) (Sen. Williams).
[103] *Id.* at 1008.
[104] *Id.* at 1009. Cf. *id.* at 1011 (Sen. Doolittle).
[105] *Id.* at 1039.
[106] *Id.* at 1040.
[107] *Id.* at 1808. See also Fowler's remarks at 1807–8.

other white man. I believe in equality among citizens—equality in the broadest and most comprehensive democratic sense. No man should have rights depending on the accidents of life."[108]

Senator Willard Warner, an Alabama Republican, attacked the Fifteenth Amendment as "a narrow and illogical one, and one that is unworthy of the grand opportunity that is presented to us."[109] Finally, Bingham himself viewed the Fifteenth Amendment as the very antithesis of the Fourteenth Amendment, rather than as a logical extension. He considered that by banning only racial discrimination the amendment gave special privileges to Negroes. He declared:

"Why, equality of the law is the very rock of American institutions, and the reason why I desire to amend this proposition of the Senate is that as it stands it sweeps away that rock of defense by providing only against State usurpation in favor of colored citizens, to the neglect of equal protection of white citizens. While colored citizens are equal in rights with every other class of citizens before the majesty of American law, as that law stands written this day, I am unwilling to set them above every other class of citizens in America by amending the Constitution exclusively in their interest. The import of my amendment is to protect all classes alike * * *."[110]

Of course, the Democrats were equally in favor of protecting the right of white persons to vote, so there was no difference between the parties in this regard.[111]

Thus, the equalitarian Republicans were unhappy with limitations on the Fifteenth Amendment. Bingham was himself keenly disappointed. This amendment, therefore, casts no reflected light on the Fourteenth Amendment.

9. CONCLUSION

Where is the authority for the proposition that the Fourteenth Amendment interdicts racial discrimination to any greater extent than any other discrimination? It is true that there is some *obiter dicta* by Mr. Justice Miller in the *Slaughter-House Cases*[112] which points in this direction, but the five-to-four decision, insofar as it rests on any such notion, is opposed to the whole legislative history of the Reconstruction Period. Moreover, this point was specifically rebutted by Senator Howe of Wisconsin,[113] a Radical Republican and a former state supreme court justice who had taken part in the debates on, and voted for, the Fourteenth Amendment, and who declined the position of Chief Justice of the United States right after that case was decided.[114] Such *dicta* is therefore hardly authoritative.

Bingham had the broadest view of the scope of the protection given by the Fourteenth Amendment. He wanted it to be "the keystone of American liberty."[115] What kind of a keystone of liberty would it be that was more solicitous of one racial group than another, or protected against one kind of discrimination more than another? The Republicans themselves supplied the answer during the debates on the Fifteenth Amendment. That prohibited only racial discrimination, just as "civil rights" bills do today. Bingham thought that discrimination "sweeps away" equality and "sets [Negroes] above" everyone else, upon a pedestal. Edmunds thought it would be "an outrage upon the patriotism and good sense" of the country which was made up of many groups, while Fowler said that every "decent black man" would "spit upon" such a proposition.

Discrimination in education, housing, and employment may be based on innumerable arbitrary reasons aside from race, color, creed or national origin. People are refused jobs because their political opinions are unpalatable. They are refused housing because their personality is deemed disagreeable. A host of other causes readily come to mind. To refuse to protect them against all arbitrary discrimination, and to protect them only because of racial or religious

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[108] *Id.* at 1620. See also Wilson's observations at 1307.
[109] *Id.* at 1641.
[110] *Id.* at 1427. Of course, Bingham was always sensitive to charges that he was less interested in protecting the rights of white persons than Negroes, and always refuted them. See e.g. 41(2) Globe 3874 (1870) (Rep. Beck), app. 400 (Rep. Cox), 3883 (Rep. Bingham).
[111] See *id.* at 3565 (Sen. Thurman), 3567 (Sen. Stockton), 3569 (Sen. Sherman, Trumbull). See also 40(2) Globe app. 350 (1868) (Sen. Yates).
[112] 83 U.S. (16 Wall.) 36, 71–72 (1873).
[113] 43(1) Record 4148 (1874).
[114] Graham, *The Waite Court and the Fourteenth Amendment*, 17 Vand. L. Rev. 525 (1964).
[115] 42(1) Globe app. 84 (1871).

discrimination, is to deny the same protection to all people who suffer from arbitrary discrimination. Such a partiality is a refusal to protect people equally. Banning racial and religious discrimination alone is therefore a denial of equal protection of the law. It is not only not an enforcement of the Fourteenth Amendment, but rather a violation of it. Such laws which single out this form of discrimination alone to ban are accordingly unconstitutional on this ground, if on none other. [An additional article by Professor Avins appears in the appendix.]

Mr. EVANS. Mr. Chairman, the next witness is Mr. Harry A. Taylor, president of the New Jersey Association of Real Estate Boards, whose appearance was scheduled at the request of Seantor Case.

STATEMENT OF HARRY A. TAYLOR, JR., PRESIDENT, THE NEW JERSEY ASSOCIATION OF REAL ESTATE BOARDS, EAST ORANGE, N.J.; ACCOMPANIED BY ROBERT S. GREENBAUM, COUNSEL OF THE ASSOCIATION, AND ROBERT F. FERGUSON, JR., EXECUTIVE VICE PRESIDENT OF THE ASSOCIATION

Mr. EVANS. Mr. Taylor, would you please identify the people who are with you?

Mr. TAYLOR. Yes, I will, in my opening comments.

The CHAIRMAN. You may proceed.

Mr. TAYLOR. Mr. Chairman, members of the subcommittee, I am Harry A. Taylor, Jr., a realtor of East Orange, N.J., appearing here today as president of the New Jersey Association of Real Estate Boards. Accompanying me is Robert S. Greenbaum, Esq., the association's counsel of Newark, N.J., and Robert F. Ferguson, Jr., the association's executive vice president of Newark, N.J. We wish to testify in opposition to title IV of S. 3296.

I would also like to ask your permission, Mr. Chairman, in the event that there are questions that involve any legal comments that might be made in the statement or statements that might relate to the experiences that go beyond the scope of 1966, that I ask Mr. Greenbaum and Mr. Ferguson to aid me in an answer or to answer directly.

The CHAIRMAN. That will be fine.

Mr. TAYLOR. The New Jersey Association of Real Estate Boards represents 2,800 realtor members and their 12,000 associate members, who are engaged in all facets of the real estate industry. The New Jersey Association of Real Estate Boards is a member of the National Association of Real Estate Boards and we are presently celebrating our 50th year of service to the citizens of the State of New Jersey.

At the outset, I want to state for the record a reaffirmation of the New Jersey Association of Real Estate Boards' dedication to the principles of the Constitution of the United States and our unqualified dedication to the principle that no man should be deprived of the enjoyment of property ownership solely on the grounds of race, color, religion, or national origin.

I have read accounts of the previous testimony and public statements in opposition to this bill. You are, I know, well aware of the basic constitutional arguments in opposition. You must now, in the discharge of your responsibilities, evaluate the basic constitutional issues raised in the hearings on this bill. Our brother realtors from other States of the Union have already advanced the position expressed against the introduction of the element of compulsion by

Government into private dealings, among private persons, concerning their private property.

Our purpose in appearing here today is to invite your attention to the specific vices in title IV of S. 3296 which, if enacted into law, might well become instruments of oppression rather than enlightenment. If you concur that there is a merit in the criticism we will offer on this bill, there can be no excuse for the enactment of title IV on any theory of the ends justifying the means.

We must face the facts that the subject matter of title IV generates highly charged subjective reactions in the community. Administration of the law in this sensitive area of community relationships requires intimate knowledge and understanding of local situations. Historically, Federal bureaucratic control does not lend itself to such treatment. As you know, New Jersey has, over the past several years, enacted a comprehensive series of antidiscrimination laws including broad provisions with respect to housing. We consider our State to be among those in the Union which have been most interested in administration of effective measures against racial bias. New Jersey has comprehensive statutes enforced through the office of the State attorney general. We believe that the Federal legislation under consideration, although perhaps drafted to simplify the machinery of enforcement, will, in fact, complicate these procedures and will create the potential for gross injustice, harassment, and multiplicity of actions. I believe I can most dramatically present our opposition to this bill by directing your attention to the inequities which are readily apparent to anyone interested in a truly objective appraisal of its provisions.

We consider section 406 and its subsections to constitute a real and present danger to traditional concepts of the administration of justice. Section 406 provides for enforcement of title IV by private persons through civil actions in the U.S. district courts, as well as in appropriate State or local courts. This provision is drafted without any regard whatsoever for the parties who are potential defendants in such suits.

There is no more eloquent testimony of the unfairness of this bill than subsections (c) and (d) of section 406, wherein provisions are made for damage to the plaintiff including damages for humiliation, mental pain and suffering, and up to $500 in punitive damages and for allowance of an attorney's fee as part of the costs to a prevailing plaintiff. The bill is devoid of any comparable provision for the benefit of a vindicated defendant. You must recognize, gentlemen, that the actions contemplated under section 406 will without doubt, based upon our experience in New Jersey under existing antidiscrimination laws, be accompanied by wide publicity without any regard to the merits of the complaint. Further, under this section provision is made for the appointment of an attorney for the plaintiff by the court and for commencement of civil actions without the payment of fees, costs, or security.

This open invitation to litigation, disguised as justice, constitutes a flagrant invitation to irresponsible court actions. These provisions must most certainly invite a rash of spite suits claiming astronomical damages on grounds of humiliation, mental pain, and suffering.

It is unthinkable from any standpoint of fairplay, that the Congress of the United States might create such a cause of action without some safeguard and protection for those who will be subject to suit under the provisions of section 406. The usual deterrent to irresponsible litigation, that is some monetary risk to plaintiff, in the form of costs, security, attorney's fees, and a real liability for malicious prosecution will not be present in these instances. It takes little imagination to foresee the use of section 406, not as a remedy but as a weapon, which, in the guise of civil rights legislation and socially desirable ends, actually encourages unwarranted harassment.

In section 407, where the enforcement power is vested in the Attorney General, reasonable safeguards should be incorporated to protect and compensate those who are, in their turn, the subject of humiliation, who suffer mental pain and suffering because of complaints made without probable cause and based upon misinformation.

In New Jersey, the statute includes safeguards to insure against the commencement of frivolous and non-bona-fide actions. An honored and cherished tenet of our system of justice requires that an accuser identify himself, particularize his allegations, and be confronted by the accused so that the latter may have full opportunity, with knowledge of the charges made, to state his defense. The New Jersey attorney general's department charged with enforcement of the laws against discrimination makes investigation of verified complaints filed with the attorney general to determine whether or not there is probable cause to proceed against any person charged with discriminatory practices. In our State law, there is no provision, placing in the hands of the public at large a potentially destructive weapon in the form of availability of civil actions in the nature of tort for such intangibles as mental pain and suffering and humiliation. This weapon, erroneously classified as a "remedy" has no place in legislation which is proposed to introduce and effect "fair" treatment to all citizens through abolition of discriminatory practices related to housing.

Our belief, fortified by experience, is that true progress can be made in an ever-improving climate by genuine cooperation without the ugly threat of privately motivated litigation as a stimulus.

Section 409 is also subject to abuse even though it may be drafted with the good faith intention that sham State legislation shall not constitute a bar to Federal jurisdiction, but may, nevertheless, create greater evils than it can conceivably cure. This will undoubtedly be true in States with existing civil rights legislation as New Jersey, which include some measure of reasonable enforcement procedures. Section 409 will permit duality of action, actually encouraging a multiplicity of suits in the form of concurrent actions in State and Federal courts, with a purpose not to seek justice but to overwhelm, discourage, and demoralize by the sheer weight and expense of litigation. This effect is not the purpose of the function of the U.S. district courts and it certainly would not constitute justice. Would it not be more reasonably appropriate to provide for a choice between Federal jurisdiction and State jurisdiction at the election of the U.S. attorney in the district where State laws exist or perhaps an option to be exercised by the Attorney General in instances where he finds action is warranted but none has been taken under State law.

Section 408 constitutes a potential source of difficulty in its broad provisions authorizing the Secretary of Housing and Urban Development devoid of any standards or any qualifications for aid not only to Federal, State, and local public agencies, organizations, and institutions, but also to private organizations or agencies "formulating or carrying on programs to prevent or eliminate discriminatory housing practices." Under these broad provisions, Federal moneys will be made available to private agencies with less than an objective approach to the problem of discrimination in housing. It is obviously appropriate that the Secretary of Housing and Urban Development be concerned with discrimination in housing and that the power and the facilities of his office be brought to bear against the problem. However, it is equally appropriate that this responsibility be discharged in a manner responsible and sensitive to the grievances and the rights of all citizens.

There is, however, throughout an apparent lack of consideration and an insensitivity to the irreparable damage which will result in the fostering of fraudulent claims, irresponsible litigation, multiplicity of suits and actions which will result from the enforcement provisions.

The National Association of Real Estate Boards has recommended in the past and we commend to you now that there should be an express provision in this legislation against the reprehensible practice of blockbusting. Our association in New Jersey proposed the inclusion of a provision against this insidious practice. Although it was not not enacted into law in New Jersey in 1966, we are hopeful that in the next session of the legislature our recommendation for this legislation will be accepted. We commend to your attention now that any legislation in this field must and should take cognizance that the practice of blockbusting exists and make specific provision against its continuance. Our proposal for inclusion into law is as follows:

It shall be an unlawful discrimination to induce or solicit or attempt to induce or solicit a commercial housing or personal residence listing, sale or transaction by representing that a change has occurred or may occur with respect to the racial, religious, or ethnic composition of the block, neighborhood, or area in which the property is located, or induce or solicit or attempt to induce or solicit such sale or listing by representing that the presence or anticipated presence of persons of any race, color, religion, ancestry or national origin, or ancestry in the area will or may have results such as the following: the lowering of property values; a change in the racial, religious, or ethnic composition of the block, neighborhood, or area in which the property is located; an increase in criminal or antisocial behavior in the area; a decline in the quality of the schools serving the area.

No person shall discourage or attempt to discourage the purchase by a prospective purchaser of a commercial housing or a personal residence by representing that any block, neighborhood, or area has or might undergo a change with respect to the religious, racial, or nationality composition of the block, neighborhood, or area.

We have attempted to be constructive in our statement this morning. We challenge any man of good will to dispute the merit of our objections to S. 3296 under any standard of fairness or equal treatment under law.

The fact that title IV in its present form is receiving serious consideration eloquently demonstrates the truth of the statement that there is no greater force on this earth than a society moved by an awakened social conscience. Here it seems that the great forces afoot to

remedy past injustice coupled with the political pressure such forces generate, may in the haste to remedy the ills of centuries, sweep all aside without regard to the injury inflicted in the process upon our cherished institutions.

This is not only a time for action, a time for progress, but it is a time for men of courage to make certain that in the process of righting past wrongs further wrongs are not begotten.

Mr. EVANS. Thank you, Mr. Taylor. The hearing is recessed until 10:30 tomorrow morning.

(Whereupon, at 3:25 p.m., the hearing was recessed, to reconvene at 10:30 a.m., Wednesday, June 22, 1966.)

(Committee insert follows:)

NEW JERSEY ASSOCIATION OF REAL ESTATE BOARDS,
July 6, 1966.

Senator SAM J. ERVIN, JR.,
Subcommittee on Constitutional Rights of the Senate Judiciary Committee, U.S. Senate, Washington, D.C.

MY DEAR SENATOR ERVIN: On behalf of the New Jersey Association of Real Estate Boards I wish to thank you for the opportunity the Subcommittee afforded us to be heard on June 21, 1966.

At that time, due to the business of the Senate, a portion of our statement was read to the Subcommittee, consisting then of Senator Eastland. The balance of the statement was incorporated in the record by the stenographer pursuant to your order, transmitted in your absence through Subcommittee counsel.

Unfortunately, due to these circumstances, we had no opportunity to amplify our statement with respect to projected impact of Title IV, if enacted as presently proposed.

We hope therefore, that you and the members of your Subcommittee will consider the subject matter of this letter in your deliberations on Title IV of S-3296.

There are four points that we believe should be made to amplify our statement made on June 21st. I will cover them, not necessarily in order of their importance, but as they come to mind.

1. It is our understanding that the Subcommittee has received a paucity of information concerning the nature of multiple listing systems, their operation and the effect we may expect on these vehicles should Title IV become law.

In the New Jersey Association of Real Estate Boards we have thirty-nine Member Boards. Approximately thirty-two multiple listing systems are presently operating in twenty-eight Board Areas.

Any property owner who enlists the aid of the multiple listing system lists his property for sale with the multiple listing system, hereinafter referred to as M. L., through a broker referred to as a "Listing Broker" in such instances, who is a participating member of M. L.

All M. L. have a common goal, i. e., to offer to the public, through Realtor Members of the M. L., the widest exposure to the real estate market. Although all M. L. have this common purpose, their respective constitutions, by-laws, membership requirements and qualifications may differ. A property listing in M. L. is circularized through the central office of the system among all participating members. In New Jersey, the Realtor Members, acting as agent for the seller of the property, considers offers of cooperation with non-realtors from other licensed brokers. The sole criteria of choice in determination of the question to cooperate or not cooperate is the best interests of the property owner, considered, of course, subject to applicable law. Reference to applicable law refers to the duty imposed by the law of Agency and any other applicable statute law including, in New Jersey, the Laws against Discrimination.

It is the avowed purpose of NJAREB to effect among all its constituent member boards reasonable membership requirements so that all licensed brokers who are able to comply with the membership requirements of NJAREB will have the opportunity, if they choose, to become members and to participate in the multiple listing systems.

Section 403(e) of Title IV, obviously directed solely at licensed brokers, and particularly Realtors, since only Realtors are involved in multiple listing services, as we understand them, plants and nurtures the seed of destruction of the

multiple listing systems. This, in itself, is not a desirable goal. In fact, it is universally recognized in the real estate industry and New Jersey Courts have already declared accordingly, that the multiple listing services provide a valuable function in the marketing of real estate.

Subsection (e) of Section 403 provides nothing in addition to Section 403 and subsections (a), (b) and (c). The only purpose of subsection (e), it would seem, is to invite suits under the private enforcement section (Section 406) against real estate brokers who are Realtors by—

(*a*) Other licensed Real Estate Brokers (non-Realtors); and

(*b*) Customers of non-Realtors who, under the circumstances we provide in New Jersey should not be permitted the choice of private enforcement under Section 406, unless and until it has clearly been shown that the non-Realtor, through whom such potential plaintiff is dealing, has sought membership in a Board of Realtors and has been denied membership in a Board of Realtors through arbitrary and unlawful determination.

Although it may be unnecessary to amplify the immediately preceding statement, we conclude as we do because we have effected a situation in New Jersey where there are no unreasonable membership requirements for membership in all of the constitutent member Boards of the New Jersey Association of Real Estate Boards. It therefore follows that any licensed Broker who has the desire and who is possessed of these reasonable qualifications, may become a member of a Board of Realtors and thus have access to the multiple listing system in New Jersey. The appropriate remedy to gain access to the multiple listing services is not to destroy the multiple listing systems but it is to encourage the growth of the multiple listing systems and encourage qualified licensed Brokers to seek membership in the member Boards operating the M.L.

2. It ought to be emphasized that under the terms of Title IV it is possible for a person to proceed under the New Jersey fair housing law, have the case dismissed for lack of grounds and then file a suit under Title IV for damages, humiliation, mental pain and suffering as well as punitive damages. We have felt this is a very dangerous part of the bill and should be very carefully considered.

3. You will note on page 4 of my testimony, line 23 where I state "It takes little imagination to foresee the use of Section 406, not as a remedy but as a weapon, which, in the guise of civil rights legislation and socially desirable ends actually encourages unwarranted harassment."

This is not just an idle statement because our organization has had the experience of 33 charges being made against it, all have been examined and 32 dismissed, the one remaining charge that is pending also appears to be without grounds. In spite of the fact that our organization will be proven innocent of the charges made there is a tremendous amount of newspaper publicity and I was even forced to appear on television to defend our organization when I felt that my refusal to appear would perhaps infer automatic guilt. This is the kind of harrassment that we can get from this type of legislation. We ask you to give serious consideration to it.

4. In the State of New Jersey we have three exemptions; one for the rental of a room or rooms in a single family dwelling, one for the other half of a two family dwelling, owner occupied and the other for all religious and charitable institutions. With these exemptions this would give the privilege to a Catholic family for instance in South Orange, New Jersey to lease a room or rooms and advertise as such to Catholic students attending Seton Hall University. We have this exemption in our law but it does not appear in the Federal law.

However, to my way of thinking there is a much more serious consequence as it relates to religious and charitable institutions such as Catholic Charities or the Daughters of Israel Nursing Home in West Orange or many charitable institutions sponsored and housing and retirement projects that are now being projected. Many of these are denominational in nature and therefore the privilege of discrimination for their own sect should be made available. I can visualize that this would completely break down many of these projects if the exemption was not a part of Title IV.

Again, thank you for the courtesy afforded the New Jersey Association of Real Estate Boards to appear before your committee on June 21. I hope that our comments made at that time and the additions made in this letter are helpful in having your committee arrive at a fair and equitable solution to this very perplexing problem.

Respectfully,

HARRY A. TAYLOR, Jr., *President.*

CIVIL RIGHTS

WEDNESDAY, JUNE 22, 1966

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:40 a.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin, Jr., presiding.

Present: Senators Ervin, Fong, and Javits.

Also present: George Autry, chief counsel and staff director; Houston Groomes, Lawrence M. Baskir and Lewis W. Evans, counsel; and Rufus Edmisten, research assistant.

Senator ERVIN. The subcommittee will come to order.

Counsel will call the first witness.

Mr. AUTRY. Mr. Chairman, the first witness is the Honorable Strom Thurmond, Senator from the State of South Carolina.

Senator ERVIN. Senator, we are delighted to welcome you to this subcommittee. We appreciate your making an appearance here to give us the benefit of your thinking on this proposed legislation.

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. I wish to thank the able chairman of this subcommittee for allowing me to appear at this time.

Mr. Chairman and members of the subcommittee, I appreciate the opportunity to appear before you and express my views on the legislation pending before the subcommittee. I note that there are seven separate bills which are the subject of this hearing, as well as an amendment to the administration's bill, which amendment has been offered by the distinguished chairman of this subcommittee. As important and all-encompassing as these proposals are, in the interest of time and out of consideration for the members of the subcommittee, I intend to limit my remarks to the principal bill: S. 3296, the administration's so-called "Civil Rights Act of 1966."

At the outset, may I say that I have always considered the phrase "civil rights," as used in this context, to be misleading. "Blacks Law Dictionary" gives several meanings for the phrase beginning with the following:

> Civil Rights are such as belong to every citizen of the state or country, or in a wider sense, to all its inhabitants, and are not connected with the organization or administration of government.

This, I submit, is an accurate statement of the meaning of the phrase and in its simplicity reveals the futility attendant upon legislation designed to extend or protect "civil rights" on the national level.

S. 3296 contains six titles, five of which are substantive in nature, four of which either attempt to establish new constitutional rights where none were heretofore known to exist, or to authorize National Government intervention into areas not delegated to that Government in the Constitution. The Constitution, while being the basic charter of the Central Government in our country, created no rights on the part of the people which did not exist before it was written and put into effect. It was soon thereafter amended to insure that certain rights which resided in the people would not be infringed by the Central Government. Being ever mindful of the fact that people tend to have short memories, the ninth and tenth of these amendments were designed to restate the basic philosophy of the Constitution: that is, that the Government created by that charter was one of specific and limited authority and that the States and the people thereof remained supreme in all matters not delegated to the Central Government. It is with this concept in mind hat I question the use of the phrase "civil rights" as used in this context, because the most the Central Government can do, consonant with the Constitution, is to protect constitutional rights which are specifically safeguarded by that document or any of the amendments thereto.

TITLE I—FEDERAL COURT JURY PROVISIONS

Title I of S. 3296 deals with the manner of selecting jurors in Federal district courts. This title involves no constitutional question as to the power of Congress to legislate in this field. Congress was specifically delegated the authority to create tribunals inferior to the Supreme Court as from time to time might be needed. The method of selecting jurors is but one of the necessary concomitants to the creation of a trial court; therefore, establishing by legislation a uniform system of selecting the jurors is clearly within the power of Congress.

The wisdom of the method selected is another question entirely, but I prefer to leave that decision in the hands of the members of this subcommittee, in the sure knowledge that all the provisions of this title will receive the utmost scrutiny.

There is one discrepancy in the language used in this title, however, which is worthy of note. In section 1861, the declaration of policy, it is stated that "all qualified persons shall have the opportunity to serve" on the same juries. I assume that the former, section 1861, is the correct statement for the simple reason that the annals of Anglo-Saxon jurisprudence record no "right" for any individual or any group of individuals as a class to serve on juries. Service on a jury is an obligation of citizenship for all who are qualified under an objective criteria. No single individual or class of persons may assert a right to serve, however, even though they may have a right not to be unconstitutionally deprived of the opportunity or the obligation to serve. This error runs throughout this title and the following title II.

TITLE II—STATE COURT JURY PROVISIONS

Title II of S. 3296 gives rise to a most fundamental question of congressional power under the Constitution and the 14th amendment and of the division of powers between the States on the one hand and the Central Government on the other. By this provision, it is proposed to prohibit, in the selection of all State court jurors, discrimination based on "race, color, religion, sex, national origin, or economic status." Although the bill does not so state, presumably this provision relies solely upon the 14th amendment as its constitutional basis.

It is instructive to look at the language of the 14th amendment and compare it with the language of the bill. The applicable language of the 14th amendment reads as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The operable language of the bill is as follows:

> No person or class of persons shall be denied the right to serve on grand and petit juries in the State court on account of race, color, religion, sex, national origin, or economic status.

The language contained in this provision goes far beyond the authority granted to Congress in the amendment. The language of the amendment is couched in the negative and the doctrine that the amendment is self-executing is too well-settled to require the citation of authority. Nevertheless, a quotation from the civil rights cases, 109 U.S. 3 (1883), is directly to the point and should shed light on the matter.

> Until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity;
>
> * * * The legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizens, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking.

Congress has long since enacted legislation enforcing, in the only appropriate manner possible, the mandate of the 14th amendment preventing racial discrimination in jury selection procedures. I refer, of course, to section 254 of title 18 of the United States Code which reads as follows:

> No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.00.

Mr. Chairman, this law is appropriate in the sense that it contains a prohibition against the specific object of the amendment and is hardly

more than a restatement of one of its basic purposes. The law is criminal in nature and sets out the punishment for any violation of the law, and therefore of the amendment upon which it is based. This law is not general legislation in the way that title II of S. 3296 is; it does not purport to create rights in the way that title II of S. 3296 does; and it does not tamper with the States' jury selection process in he way that title II of S. 3296 would.

It would be appropriate to consider what provisions relating to the qualifications of jurors were on the books of the separate States at the time of the ratification of the U.S. Constitution. Of the Thirteen Original States, 10 of them required prospective jurors to be "freeholders." The word "freeholder" is generally used to designate the owner of a free simple interest in land.

The only States of the Original Thirteen which did not require jurors to be freeholders were Georgia, Pennsylvania, and South Carolina. The State of South Carolina is truly representative of the basic law in this country in that the qualification of jurors falls under the control of the State legislature. At the time of the formation of the Union, jurors in South Carolina were chosen from lists drawn up by the general assembly of the State. The law relating to jury selection provided that—

> The persons whose names are mentioned and contained in the lists or schedules hereunder annexed, and all persons who hereafter shall be named and appointed to serve as jurymen by the General Assembly * * * shall be deemed and taken to be qualified to serve and act as jurymen on all trials and inquests whatsoever * * *.

Under the law at the present time in the State of South Carolina, juries within the individual counties of the State are chosen from a master list drawn up by the jury commissioners in December of each year. The jury commissioners of each county consist of the county auditor, the county treasurer, and the clerk of the Court of Common Pleas. Title 38, section 52 of the Code of Laws of the State of South Carolina requires the jury commissioners to prepare their master lists from among the qualified electors and include—

> Such male electors of their county, qualified under the provisions of the Constitution, between the ages of 21 and 65 years and of good moral character as they may deem otherwise well qualified to serve as jurors, being persons of sound judgment and free from all legal exceptions. Such lists shall include not less than two from every three electors * * *.

From this master list, there is chosen not less than 10 nor more than 20 days prior to a session of common pleas or general sessions court, a jury venire consisting, in most cases, of 40 individuals. They jury venire is chosen by a child under 10 years of age or a blind person, by drawing at random the 40 names out of the jury box. I believe that this system is representative of the method used today in most States for selecting jurors and it is as practicable and as fair as any method could be.

The State of South Carolina places no restriction upon jury service based on the person's race, color, religion, national origin, or economic status. However, at the present time, women do not serve on juries in South Carolina. I limit that statement to "at the present time," because at the latest session of the State legislature, a proposed State

constitutional amendment was authorized to be submitted to the electorate in the general election this November on this question. If the amendment is approved, women will soon thereafter be allowed to serve on juries in South Carolina.

Incidentaly, Mr. Chairman, I might say that when I was Governor of South Carolina, I recommended that women be allowed to serve on juries.

Nevertheless, it is inconceivable to me that Congress can now presume to require all States to allow women to serve on juries under the pretext of the 14th amendment when it was previously admitted that a separate and distinct amendment to the Constitution was necessary to enfranchise women. If the 14th amendment does indeed give Congress the authority to legislate the eligibility for women to serve on juries, it seems apparent that it would have also given Congress the authority to legislate the eligibility for women to vote without the necessity for further amending the Constitution. No such authority was presumed by Congress at the time of the approval of the 19th amendment.

The administration of the courts and the application of State law in State courts, under our Federal system, is reserved entirely to the States. Those safeguards which Congress has in prior years deemed necessary are both written into the Constitution and have been enacted into law. Title II of S. 3296 would give the Attorney General of the United States oversight of the processes of jury selection of all State courts down to and including police courts and the numerous magistrates' courts. This proposal is violative of the spirit and of the terms of the Constitution because it infringes upon, in a very substantial manner, the rights and prerogatives of the States. The selection of jurors is an integral part of the administration of justice, and the administration of justice should not and, constitutionally, cannot be centralized under the authority of an Attorney General or of any other official of the National Government.

Senator ERVIN. Senator, I have some questions on this. Would you rather that I ask them now or wait until you have completed your statement?

Senator THURMOND. Either way the chairman desires.

Senator ERVIN. Title II undertakes, among other things, to let Congress prescribe a rule of procedure for State courts, does it not?

Senator THURMOND. That is correct.

Senator ERVIN. Do you know of any other proposal from the time George Washington took his first oath of office as President of the United States down to the present moment, where Congress has ever been asked to prescribe a rule of procedure for State courts?

Senator THURMOND. I know of no such law or no such rule. In fact, I do not recall any ever having been advocated even, before this.

Senator ERVIN. Now, when you say that you cannot do so and so, that is tantamount to saying you must do so and so, is it not?

Senator THURMOND. I think the effect would be the same.

Senator ERVIN. And is not the effect of this declaration that Congress is going to undertake to determine the composition of State juries; is that not the purpose and effect of title II?

Senator THURMOND. Mr. Chairman, I do not think that there is any question that that is the effect.

Senator ERVIN. Under this rule of procedure any person can raise the question whether the jury is constituted according to this so-called declaration of rights, can he not?

Senator THURMOND. Yes, I believe that would be the case.

Senator ERVIN. The way this is phrased, if a millionarie has a civil case or if he is accused in a criminal case, he can raise the point that there has not been a proper placing in the jury wheel or jury box of the names of paupers and hoboes, under the provision that you cannot consider the economic status of people?

Senator THURMOND. If this bill passed, I do not see any reason why he could not raise those points.

Senator ERVIN. At the present time, the court has gone as far as to say that a man of one race can raise the point that members of his race had been systematically excluded from juries, has it not?

Senator THURMOND. That is correct.

Senator ERVIN. Does this not go a bow shot beyond that and provide that a man who is a litigant in a civil case, or an accused in a criminal case, can raise the point that women had been excluded from jury service?

Senator THURMOND. I think that is correct.

Senator ERVIN. And also, he can raise the point that people of a certain religion, to which he does not belong, have been excluded from the jury wheel or jury box?

Senator THURMOND. I think a man charged with a crime can raise all kinds of points, even though there may be no merit in some of the points. But it certainly opens up the matter to such an extent that a criminal can raise points that could very seriously affect the administration of justice throughout the whole Nation.

Senator ERVIN. As a matter of fact title II provides a rule of procedure, which says that regardless of whether the attorney for a litigant or an accused has any basis whatever for his claim, he can raise the point that the names of persons in the jury wheel or jury box do not conform to this declaration about the persons who have a right to serve on juries, can he not?

Senator THURMOND. That is correct.

Senator ERVIN. I will ask you, from your long experience as a trial lawyer and a trial judge, if you know any other situation where the law gives a man a right to raise a point and have it passed on without showing he has any basis for raising the point?

Senator THURMOND. I know of no precedent of that kind. In fact, I do not think anyone in the past connected with the administration of justice has even had the audacity to raise such a point.

Senator ERVIN. And does not this bill provide that when the lawyer raises this point, without having any foundation for raising it, that the court cannot proceed to try the case, but must then call upon the jury officials in the jurisdiction to file a written statement under oath explaining exactly how they went about selecting the names of persons put in the jury box or the jury wheel?

Senator THURMOND. Unless the judge does follow that procedure, then very probably, if this law is passed, an appellate court would reverse the verdict, because the point had been raised and had not been

settled. This puts the burden of proof, really, on the jury commissioners and you would practically have to go through a trial of that, which in effect is a pretrial of the main trial, before you could determine the matter.

Senator ERVIN. In other words, title II says you cannot proceed with the trial of the case, where the lawyer raises this point regardless of whether he has any merit for raising it, until the jury commissioners file these affidavits.

Senator THURMOND. I think that is correct, because once a man accused of a crime raises the point, he practically holds the jury commissioners guilty until they have proven themselves innocent.

Senator ERVIN. I will ask you if under this bill, after the attorney raises the point, regardless of whether or not he has a basis for it, and the jury officials file an affidavit showing that there was no violation of this provision, then the attorney who has raised the point can cross-examine them and anybody else who has any relevant facts connected with the matter.

Senator THURMOND. I think the attorney for a defendant in such a case would probably claim such a right, and very probably, under this bill, if it passes, he would have such a right.

Senator ERVIN. Do you not agree with me that under the phraseology of the bill, he has an absolute right to do that, regardless of whether he has shown any foundation whatever for his claim?

Senator THURMOND. That is my opinion, if the bill passes.

Senator ERVIN. And then to pass on that question of whether the names of the persons in the jury wheel correspond to this declaration of the bill, you can go into the question of everybody's race, everybody's sex, everybody's economic status, everybody's national origin, and everybody's religion who is of the age to serve as jurors in those jurisdictions.

Senator THURMOND. I think the chairman is eminently correct.

Senator ERVIN. And to go into this, you would have to show the names of everybody in the jury box to see whether people have been excluded, and also the names of everybody whose name is not in the jury box.

Senator THURMOND. Well, that is the only way the determination can be reached, if that point is raised.

Senator ERVIN. And there is an absolute right to do this under this bill, regardless of whether there is any showing of anything wrong. Just to make the thing concrete, in my county, which is Burke County, in North Carolina, we probably have 23,000 or 24,000 people 21 years of age and up. Before there could be a trial of the case a lawyer could inquire into the race, the sex, the religion, the national origin, and the economic status of every one of those 23,000 or 24,000 persons as a matter of right under this bill, could he not?

Senator THURMOND. I do not know of any reason why he could not, and if such a procedure is followed, it is very easy for anyone to visualize the long, tedious, drawn-out, extended procedure that would result in the trial of a case if a lawyer saw fit to raise those points, and, of course, many of them would.

Senator ERVIN. A lawyer as a matter of absolute right could inquire into all of these matters concerning everybody whose name appears

in the jury box, and everybody in the jurisdiction whose name does not appear in the jury box. He could for all practical purposes prevent a case from ever coming to trial if the bill is enacted into law and upheld by the courts.

Senator THURMOND. Well, I could visualize where that could happen.

Senator ERVIN. And how will society be protected against criminals in the meantime, while these inquiries are being made?

Senator THURMOND. Well, there is no question that society would suffer and the criminals would rejoice.

Senator ERVIN. Now do you not agree with me that under the present practices in the States, if you wanted to raise any question about the composition of the jury, you would have to show some basis for the claim that the jury is improperly constituted?

Senator THURMOND. The chairman is correct.

Senator ERVIN. And this bill turns the whole process around and allows an inquiry into that matter without any basis being shown to sustain that contention, is that not so?

Senator THURMOND. I think that is correct. I think it practically would allow a pretrial which, in itself, might take much, much longer, even, than the trial on the merits of the case.

Senator ERVIN. And do you not agree with me, apart from the question of the constitutional power of the Congress to prescribe rules of procedure for State courts, that title II is a wholly unrealistic proposed piece of legislation that does not take into account any of the practicalities of the administration of justice?

Senator THURMOND. I think it is unrealistic and I think it is impractical. I think it is unwise. I think it is purely visionary.

Senator ERVIN. Thank you.

Senator THURMOND. This may cause a lot of complications even in the magistrate's courts, where people go out and pick up jurors from the streets, as they do now. This could cause tremendous delays, not only in the trial courts, the high courts like the circuit courts, the superior courts, as they call them in different States, but in the lower courts.

Senator ERVIN. You referred to the fact that under the law of the Original Colonies, the jurors were ordinarily required to be freeholders. In North Carolina, the law is that the regular jurors are drawn from the jury box, but the court very often summons special venires, which are not drawn from the jury box, and also summons, in both civil and criminal cases, tales jurors, who are drawn from the bystanders. Under North Carolina law, a juror whose name is not drawn from the box as a regular juror, but who is summoned in a special venire, or as a tales juror, has to be a freeholder. Title II would nullify that North Carolina law, would it not?

Senator THURMOND. It would invalidate it. The effect of it would be if this law passes to invalidate the North Carolina law.

Senator ERVIN. And the South Carolina law, which makes women ineligible for jury service——

Senator THURMOND. It would nullify the laws of all the States in conflict with this law, because as the chairman, of course, and everyone knows, a Federal statute would not only strike down the State statute, but even presumes to strike down the State constitution.

Senator ERVIN. And on the theory of the equal protection of the laws clause on which title II is based, I will ask if you try teenagers, if Congress would not have the power to say teenagers could sit on juries, or at least have their names in jury boxes for trials of teenagers?

Senator THURMOND. Well, this law is so broad until it seems it is just really impossible to predict just how far it does go.

Senator ERVIN. Well, if Congress has the power to prescribe rules of procedure for State courts, it has the power to prescribe how bills of indictment should be drawn in State courts and how pleadings should be filed. It can regulate the entire matter of procedure and evidence in State courts; can it not?

Senator THURMOND. Well, if this law passes, Mr. Chairman, it seems to me that the State courts have virtually been taken over by the Federal Government and that every aspect of the jury trial will be controlled by the Attorney General of the United States.

As I stated earlier in my statement, section 1861 held that all qualified persons shall have the opportunity to serve on juries. In section 1862, it states that no person or class of persons shall be denied the right to serve on juries.

Why, you can just visualize the technicalities that an able criminal trial lawyer could raise if this bill passes with the various ramifications that this bill imples.

Senator ERVIN. I will ask you a question I have not been able to get anybody to answer thus far, and that is, what do these words "national origin" used in title II mean?

Senator THURMOND. Well, that is a rather difficult question to answer. When you say national origin, I do not know how far back you are going. We have people who have come from foreign countries who were born over there and we have others who have been here one generation, some two generations, some three. It is just a question of construing national origin. And I imagine the Attorney General would make that construction, as he would make all other interpretations under this bill if it passes.

Continuing, Mr. Chairman, we are now down to title III, suits by the Attorney General in school or other public facility cases.

Title III of S. 3296 would empower the Attorney General of the United States to bring a civil action or other proceeding for preventive relief to compel—and I want to emphasize that—to compel the integration of any public school, public college, or any other public facility owned or operated by a State or any subdivision thereof. Also, the Attorney General would be empowered to bring similar suit against any person, whether acting under color of law or otherwise, who interferes with or threatens to interfere with any other person attending any public school, public college, or other public facility.

If any question arises there as to who is going to determine whether they are interfering, is the Justice Department going to make that determination? Is the Attorney General himself going to make that determination himself?

The Attorney General would have power to bring suits in these two circumstances without so much as a complaint upon which to base his action.

In other words, even though nobody complains, the Attorney General on his own initiative can institute action of this kind. Nobody complains, but yet the powerful Central Government here in Washington can bring a suit if they wish to do so to harass somebody on the pretense that someone is being denied his rights.

The only criteria established in this bill to guide the Attorney General in the institution of such suits is the wholly inadequate "whenever he has reasonable grounds to believe."

The initial question must be: What would the Attorney General consider reasonable grounds for proceeding against an official of the State of any private individual in this instance? Title IV of Public Law 88–352, the Civil Rights Act of 1964, authorizes the Attorney General to bring suits in school integration cases only after having received a complaint in writing signed by a parent or a group of parents alleging discrimination on the part of a school board. Even then, the Attorney General must have reason to believe that the complaint is meritorious and must certify that the individual is unable to initiate and maintain appropriate legal proceedings for relief on his own behalf. Then the Attorney General may institute such a suit. Now it is proposed to give the Attorney General free reign when deciding where and for what reasons he shall institute suits in cases of this type. This title contains no objective criteria by which the Attorney General will be guided in his institution of legal proceedings against either State officials or private individuals.

Completely aside from the constitutional issue involved, this is an unnecessary and unwarranted authorization for any one individual to wield arbitrary power over decisions of school boards or private individuals. "Reasonable grounds" to an Attorney General may be no more than a figment of his imagination, especially if he is a politically inclined Attorney General. If there is no complaint upon which he may base a decision to institute legal proceedings, the only alternative I see is a numerical or statistical balance of students based on the racial makeup of the community. If the racial balance of the students in any school district is not to the liking of the Attorney General, then this is reasonable grounds for him to institute suit against the local school board, if he sees fit. Such a grant of authority to any officer of any government should not go unchallenged.

Paragraph (b) of section 301, which authorizes the Attorney General to bring suit against individuals for their individual action raises an entirely different and a much more important constitutional question because it deals with individual action rather than action by the State or under color of law. This is the point which is raised so vividly by titles IV and V of S. 3296, and I will discuss this point in connection with those two titles.

Senator ERVIN. Senator, since you have reached the end of your discussion of title III, I will ask you if the decision of the Supreme Court in *Brown* v. *Board of Education* merely holds that no State can bar a child from a particular school on the basis of his race, and it does not hold that the 14th amendment requires integration of the races in public schools?

Senator THURMOND. The chairman has stated exactly what that decision holds. I might say that neither that decision nor any other

decision of the Supreme Court has been handed down that allows the Attorney General or any official to go as far as is contemplated here. No decision and no statute today on the lawbooks of this Nation requires integration, forced integration, compulsory integration. All that the decisions hold, all that the statutes hold today, is that there shall be no discrimination.

Now, in my State, for instance, the children are allowed to choose the school which they desire to attend and there is no discrimination, they can go to any school they want to. But if you pass this statute here, as proposed by the Attorney General, then the Federal Government can require forced integration. In other words, the Attorney General will decide which students can go to which schools. The authority of the school selection is taken out of the hands of the school board, is taken out of the hands of the parents, is taken out of the hands of the student. They will not even have the right to say which school they want to go to. If this bill passes, there will be no discretion left with them back there. If the Attorney General sees fit to exercise his power under this bill and decides that there must be integration to a certain extent or a certain degree or a certain percentage, certain students have to go there to accomplish that.

Senator ERVIN. I will ask you if the *Brown* case did not involve one case from Clarendon County, S.C., another case from Topeka, Kans., and another case from Delaware. And I will ask you if, when that Clarendon County case was remanded after the decision in the *Brown* cases, if Chief Judge John J. Parker did not write a per curiam decision, in which he expressly stated that the decision in the *Brown* case did not require integration, but on the contrary, merely prohibited discrimination, and that if the schools of a school district were open to all children, regardless of their race, and the children elected to attend separate schools, there was nothing in the Constitution to prevent them from so doing, any more than there was to prevent them from attending separate churches.

Senator THURMOND. Chief Judge John J. Parker did write such a decision. He wrote the decision clarifying and interpreting that Supreme Court decision of the United States and made it very clear that the Supreme Court decision of the United States did not require integration. It merely prohibited segregation.

Senator ERVIN. And I will ask you if, when *Brown* v. *The Board of Education of Topeka*, was remanded to the Federal three-judge district court sitting in the State of Kansas, that three-judge court did not also hand down a decision to the effect that the *Brown* case did not require integration of schools, but merely prohibited discrimination against individuals?

Senator THURMOND. That is exactly what the decision held, and as I stated a few moments ago, there has been no decision of our Supreme Court, the Supreme Court of the United States, holding that there had to be forced or compulsory integration. All of the decisions have merely held that there cannot be segregation.

Senator ERVIN. And I will ask you, since those cases were handed down, if there has not been a decision, of the Federal district court sitting in the State of Delaware, exactly to the same effect?

Senator THURMOND. The decision in Delaware was of a similar nature.

Senator ERVIN. And I will ask you if in the case of *Beall* v. *Gary School District of Indiana*, there was not a district court decision to exactly the same effect?

Senator THURMOND. The holding of that decision was the same.

Senator ERVIN. And I will ask you if that decision was not carried by appeal to the U.S. court of appeals for the circuit having jurisdiction in Indiana and if that circuit court did not affirm that decision.

Senator THURMOND. They affirmed that decision.

Senator ERVIN. And after that, did not the Supreme Court of the United States refuse to grant certiorari to review the decision of the U.S. court of appeals?

Senator THURMOND. That is correct, which in effect affirmed their previous decision that there should not be segregation. It did not hold that there must be compulsory integration.

Senator ERVIN. I would like to ask you if it is not a fundamental principle of our law that a constitutional right is a right which belongs to an individual and it is to be exercised or waived according to the volition of the individual.

Senator THURMOND. That is a well settled principle of law.

Senator ERVIN. I will ask you if title III of this bill does not in effect and purpose rob individuals, parents, schoolchildren, and school districts, of the right to exercise their own constitutional right or to waive their constitutional right. It confers upon one public official, the temporary occupant of the office of the Attorney General of the United States, sitting up here on the banks of the Potomac River, the power to determine whether these people shall have the power to exercise or to refrain from exercising their constitutinoal rights? In other words, it gives him the power to make the decision for them, regardless of their personal wishes?

Senator THURMOND. Mr. Chairman, I think the effect of this bill would be to preempt the rights of the school boards, the parents, and the children, in these matters, and transfer that power to the Attorney General of the United States.

Senator ERVIN. How can you reconcile such proposed legislation with the proud boast of America that we are a free country, when such legislation provides that people would not have the freedom to determine for themselves whether they shall exercise or refrain from exercising their constitutional rights, but that on the contrary, a Federal official who is not elected by anybody, and responsible to nobody except the President, shall have that sole authority for the people throughout the United States?

Senator THURMOND. Well, the preamble to the Constitution provides, I think, the main purpose in establishing our constitutional form of government, to preserve liberty to the people, to preserve freedom to the people, and when we pursue a course like this, if Congress should pass this bill, it seems to me that they are going back on the very intent of our forefathers who wrote the Constitution: to preserve the liberty and freedom to the people. In fact, the whole Constitution of the United States was written on the theory to protect the individual from government, because the greatest tyrant in history has been governmen.

Senator ERVIN. Thank you very much.

Senator THURMOND. Now we come to Title IV: The Housing Provisions.

Title IV of S. 3296 purports to protect the right of every person to be free from discrimination on account of race, color, religion, or national origin in the purchase, rental, lease, financing, use, and occupancy of housing in the United States. Although the bill itself is silent as to the constitutional basis for this provision, the testimony of witnesses on behalf of the administration, including primarily the Attorney General, has sought to constitutionally justify this provision under the 14th amendment to the Constitution and the commerce clause.

The first concept to be kept in mind throughout any discussion of this title is that the subject sought to be regulated and the matter upon which it is proposed to legislate in this title is the private dealings between individuals. This title does not even purport to have application to any State involvement or involvement by any official person, or body, of the State. The right to hold and enjoy property is a personal right which attaches to each and every individual in this country under the laws and traditions established by the laws. Property itself has no rights. There is no contest here between what could be termed "property rights" on the one hand versus "personal rights" on the other. We are dealing only with personal rights and, in this specific case, with the personal right to hold, use, and enjoy property.

In the case of the *U.S.* v. *Dickinson*, 331 U.S. 745 (1947), the Supreme Court held that property is "taken" within the meaning of the Constitution—

> when inroads are made upon the owners' use of it to an extent that, as between private parties, a servitude has been acquired either by an agreement or in course of time.

The rights which a person has in the use and enjoyment of his property include a free and unfettered decision as to whom he will rent, if he decides to rent, and to whom he will sell, should he decide to sell. This is purely a personal decision on his part and, as we shall see, there is no legally enforceable way his neighbors or any other individuals can influence his decision in any unconstitutional manner.

The most celebrated case in this field, and certainly the landmark case, is *Shelley* v. *Kramer*, 334 U.S. 1 (1948). In this case, the judicial power of the State was called into play to enforce restrictive covenants between private adjoining landowners which discriminated against prospective purchasers on account of their race. The Supreme Court of the United States held that restrictive covenants, although they were purely private agreements, could not be enforced in the courts since an attempt to do so would involve State action. Speaking for the Court, Chief Justice Vinson said:

> These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such restrictions as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of the Government to deny to petitioners, on the grounds of race or color the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.

The Attorney General has relied very heavily upon this case to substantiate his claim of constitutionality of this provision of S. 3296.

This case should give him no solace, for it is clear from even a casual reading of it that the object of the 14th amendment is State action, and what is sought to be controlled by this legislation is purely private action.

The Supreme Court has consistently held, beginning with the *Civil Rights Cases* in 1883, and down to the present time, that the 14th amendment is directed only toward State action and does not apply to acts of individuals in their individual capacity. In 1883 in the *Civil Rights Cases*, the Supreme Court said—

> that Congress' power under section 5 (of the Fourteenth Amendment) is confined to the adoption of "appropriate legislation for correcting the effects of * * * prohibited State law and State acts, and thus to render them effectually null, void, and innocuous.

In 1948, in *Shelley* v. *Kramer*, the Court said that—

> the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such as may fairly be said to be that of the State. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

As recently as March 28, 1966, the Supreme Court, in *U.S.* v. *Guest*, said:

> It is a commonplace that rights under the equal protection clause itself arise only where there has been involvement of the State or of one acting under the color of its authority. The equal protection clause does not * * * add anything to the rights which one citizen has under the Constitution against another "*U.S.* v. *Cruikshank*, 92 U.S. 542, 554–555.

As Mr. Justice Douglas more recently put it: "The 14th amendment protects the individual against State action, not against wrongs done by individuals." (Citations omitted.) This has been the view of the Court from the beginning. "It remains the Court's view today."

There are various citations on this point that are unnecessary to give here.

Since it is obvious that title IV of this bill is aimed at only private action and does not purport to be concerned with State action, it is not appropriate legislation or constitutional legislation under the 14th amendment.

The Attorney General cites also the commerce clause of the Constitution as constitutional authority for this proposal. The commerce clause of the Constitution reads as follows:

> The Congress shall have power * * * to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

That is the full commerce clause.

Admittedly, the commerce clause has been cited as authority for far-reaching legislative enactments in recent years. If it does indeed authorize Congress to regulate private action dealing with the sale or rental of real property situated wholly within the borders of one State, then there is no field of endeavor which Congress cannot control under the authority granted in this clause. There is no question in my mind but that such an elastic view exceeds the power intended to be granted Congress by the framers of the Constitution. Had they intended otherwise, the framers of the Constitution certainly would not have gone to the time and trouble of delineating certain specific grants of power to Congress. This would have been completely unnecessary, because such

an all-encompassing interpretation of the commerce clause would have obviated the necessity for any other grants of power. I cannot ascribe to the framers of the Constitution a willful intent to make a futile gesture to limit Congress power by specifically authorizing fields of legislation while granting such pervasive power in one single clause.

I am frank to admit that I do not know how the Supreme Court, as it is today composed, would rule on this issue. I do know, however, that it is the duty and the obligation of each Member of Congress, according to the oath he took upon assuming his duties in Congress, to weigh each piece of legislation presented to him on the scales of the Constitution. If he finds a lack of authority under the Constitution, he must vote against that proposal.

Under no theory of either the commerce clause or the 14th amendment do I find constitutional authority to deprive any individual of his basic, inherent right to hold, use, and enjoy private property.

Senator ERVIN. Senator, does not the pertinent part of the 14th amendment merely prohibit three certain types of action by States; namely, actions by States which deprive persons of the privileges and immunities of Federal citizenship, actions by States which deprive persons of due process of law, and actions by States which deprive persons of equal protection of the law?

Senator THURMOND. There is no question in my mind that that is the meaning and intent of the 14th amendment, and the decisions of the courts have uniformly held that down through the years.

Senator ERVIN. Does not the fifth section of the 14th amendment merely authorize Congress to enact legislation which is appropriate to enforce the provisions of the 14th amendment?

Senator THURMOND. That is correct.

Senator ERVIN. And those provisions relate solely to State action and not to the action of individuals?

Senator THURMOND. That is exactly correct.

Senator ERVIN. And I will ask you if the legislative history of the 14th amendment does not show that it was carefully drawn for the purpose of restricting its application to State action and to exclude individual action?

Senator THURMOND. I do not think there is any question but that the interpretation placed upon it by the able and distinguished chairman of this subcommittee is absolutely correct.

Senator ERVIN. Now, you stated a moment ago, did you not, that every decision interpreting the 14th amendment, from the time of its ratification, down to the present moment, has held that these provisions of the 14th amendment are merely prohibitions upon State actions and do not reach the actions of individuals, no matter how wrongful those actions of the individuals are, unless State action is involved also?

Senator THURMOND. I do not see how any other interpretation could be reached, and the decisions of the Court affirm that position.

Senator ERVIN. Could you tell me how any man can take the words of the 14th amendment, just from the standpoint of the plain meaning of the English language, and attribute to them any meaning other than that they affect State action as contradistinguished from individual action?

Senator THURMOND. I do not see how they could do so, especially anyone who has studied law or been admitted to a bar.

Senator ERVIN. Do you not agree with me that you would have to distort and pervert the plain meaning of the 14th amendment and the uniform interpretation placed upon the 14th amendment to reach the conclusion that you can reach the action of private individuals under it?

Senator THURMOND. I think you would have to completely destroy the purpose those who wrote the 14th amendment had in mind when it was written.

Senator ERVIN. The alleged discrimination in the sale or rental of houses is purely individual action, is it not?

Senator THURMOND. Exactly.

Senator ERVIN. I will ask you if, under the decision in *Shelley* v. *Cramer*, any man of any race can purchase a dwelling house or rent a dwelling house in any place anywhere in the United States, if he can find a person who is willing to sell or to rent to him?

Senator THURMOND. Exactly, and no State action prohibits that. That is entirely up to the individual who owns the property. Now, to show you how asinine this is, suppose a young married man would be called in the service. Suppose his wife would decide that she would like to stay with her parents while her husband is away during the war in Vietnam, say. They decide to rent the home for the 2 years he is away. Under this proposed bill, the wife would not have the right to choose the person to whom she would want to lease her home during those 2 years. She would be forced to lease it maybe to people she would prefer not to lease it to.

Well, certainly a person who owns a piece of property, where it is their property, their private individual property, their home, their castle, where they live when the husband is not at war, should have the right to look around and select some person who would protect the house, who would not abuse the house, who would protect the furniture, who would maybe look after the lawn being mowed and look after the shrubbery being fertilized and cultivated and would protect the premises in general, and to think that she would have to rent it to someone she does not want to is unheard of and unthinkable, and in my language, it is purely un-American. This deprives people of their freedom and it is very difficult to conceive of many instances that go further than this in depriving people of their freedom in this country.

Senator ERVIN. I will ask you if section 403 of this bill does not make it unlawful for an owner or manager to refuse to rent a dwelling to any person because of religion?

Senator THURMOND. That is what the bill provides.

Senator ERVIN. Now, in the State of North Carolina, members of the Methodist Church have raised contributions and have erected a home in which they rent apartments to elderly members of the Methodist Church, and particularly to retired ministers of the Methodist Church. And the Presbyterians in North Carolina have raised contributions and erected a home for like purpose for elderly Presbyterians and retired Presbyterian ministers and their families. And the Jewish people of North Carolina now are in the process of erecting a similar home for elderly members of the Jewish religion. I will ask you if, under this bill, a person of any other religion or a person of no religion of the requisite age could not compel the Presbyterians

to rent him an apartment in the Presbyterian home, or the Methodists to rent him an apartment in the Methodist home or the Jewish people to rent him an apartment in the Jewish home?

Senator THURMOND. If this proposed bill passes, I do not see how the Methodists could refuse renting or leasing their property to an atheist, an agnostic, a Buddhist, or any other person who came along and wanted to rent it.

Senator ERVIN. Do you not believe that this section is not only against commonsense, but it is a denial of the right to freedom of religion guaranteed in the first amendment, and the right to freedom of association, which is also guaranteed in the first amendment?

Senator THURMOND. I do not think there is any question about it. I think it is a direct violation.

Senator ERVIN. You have mentioned the fact that the Attorney General says this can be justified under the commerce clause. Is not a dwelling real estate in law, and is it not something that is fixed and immobile? Is that not the characterization of real estate as distinguished from personal property?

Senator THURMOND. I have always considered it so, and I think the public generally has.

Senator ERVIN. Have you ever seen any real estate moving in interstate and foreign commerce?

Senator THURMOND. No, I have never been in an earthquake in which real property was moved from one State to another.

Senator ERVIN. Outside of the fact that on occasion, you may have seen a little dust fall across the State line in a storm, you have never seen real estate of any character moving in commerce, have you?

Senator THURMOND. That is correct.

Senator ERVIN. Can you reconcile the theory that the commerce clause would justify such legislation with the plain words of the English language in which it is expressed?

Senator THURMOND. It is unthinkable to me. The only way in which real estate can move from one State to another is for them to change the State line.

Senator ERVIN. Do you agree with me that the commerce clause is subject to limitations of the Constitution such as those relating to depriving persons of property without due process of law and such as those relating to condemnation of private property for public use?

Senator THURMOND. I thoroughly agree with the chairman. I think there is no question about this proposal here being unconstitutional, from any number of angles that might be considered.

Senator ERVIN. I will ask you, despite the fact that there is a recognized principle that allows the State to regulate the use of property for police purposes, has it not been held by the decisions that the due process clause of the 5th amendment and the due process clause of the 14th amendment protect the owner in the use of his property and that under these decisions, the property does not consist solely of the tangible property, but consists also of the attributes of property such as the right to use it as one pleases and the right to sell it to whom one pleases and the right to rent it to whom one pleases?

Senator THURMOND. That is correct, and I think that is well illustrated in condemnation cases, where there is a separation, for instance.

If a State condemns a portion of a man's property, he can get damages not only for the part taken, but damages to the rest of the property because of the partial taking.

Senator ERVIN. Now, do you not agree with me that under the decisions, when the attempt is made by law to curtail one of the attributes of property, such as the right to sell the property or the right to lease the property, that the courts hold it is a deprivation of due process of law?

Senator THURMOND. I do not think there is any question about it.

Senator ERVIN. I will ask you another thing with reference to the provision of the fifth amendment which says that no private property shall be taken for public use except upon the payment of just compensation. Is it not a fundamental principle of interpretation of all writings, regardless of whether they be constitutions or statutes or private contracts, that the expression of one thing is the exclusion of another?

Senator THURMOND. That is right.

Senator ERVIN. And do you not agree with me that when the fifth amendment says no private property shall be taken for public use except upon the payment of just compensation, that expression excludes any idea that the Constitution authorizes the taking of private property for private use under any circumstances?

Senator THURMOND. In my opinion, it certainly does.

Senator ERVIN. I have observed in the North, the South, the East, and the West that where people select associates for themselves and for their children of immature years, they virtually always select members of their own race or their own religion. Has that not been your observation?

Senator THURMOND. I think that is true, and I think it is natural that generally people would prefer to be with people of their own religion or their own race. That does not mean discrimination when I say that. I do not believe in discrimination. But I do bitterly oppose actions that destroy the freedom of the people, the right of the individual to make his choice.

Senator ERVIN. Do you not think that a very strong case can be made for the proposition that men segregate themselves in society on the basis of race, on the basis of the natural law that like seeks like rather than dissimilar?

Senator THURMOND. Well, I think so.

Senator ERVIN. Do you not think that this is the explanation as to why, in so many of the Northern States we have de facto segregation in residential communities?

Senator THURMOND. Well, there is no question about it. There is much more integration in the South in living, housing, and so forth, than there is in the North. If you go to New York City, you will find most of the Negroes living in Harlem. If you go to Detroit, you will find most of the Negroes there living in a certain section. If you go to Chicago, you will find most of them there, I believe, to the East Side. I presume they are happy to be among people of their own race.

Senator ERVIN. Since every person is free to purchase a home in any community where he can find a willing seller, do you not infer that these residential patterns have been established by the will of the people?

Senator THURMOND. I think it is the desire of the people to have it that way. Otherwise, it would be different, because if anybody wants to sell or anybody wants to buy, if both parties are willing, then it is purely a private agreement, it is private property. It is an understanding between two individuals.

Senator ERVIN. And do you not believe that this has been the result of the working of the free enterprise system and the result of the working of freedom on the part of people to select places where they wish to live?

Senator THURMOND. I think so. I think such a policy is followed by the people because that is what they prefer.

Senator ERVIN. And do you not agree with me that this is a decision which ought to be made by the people as individuals in exercising freedom rather than by compulsion by the power of Federal laws?

Senator THURMOND. I think to compel them to do otherwise is depriving the people of their freedom.

Senator ERVIN. Now, one provision I wish to call your attention to is subsection (c) of section 406:

> The court may grant such relief as it deems appropriate, including a permanent or temporary injunction, restraining order, or other order, and may award damages to the plaintiff, including damages for humiliation and mental pain and suffering, and up to $500 punitive damages.

I will ask you if, under this provision, damages for humiliation and mental pain and suffering cannot be unlimited?

Senator THURMOND. Well, it limits general punitive damages to $500, but it leaves unlimited damages for humiliation and mental pain and suffering.

Senator ERVIN. I will ask you if this is not an unusual provision in that it says the court may grant such relief as it deems appropriate. I will ask you if, under that, the court cannot grant any kind of relief the court sees fit, with no limitation whatever.

Senator THURMOND. That appears to be the case as the bill is now worded.

Senator ERVIN. Does that not permit tyranny upon the bench?

Senator THURMOND. Well, I think if this bill passes, there is going to be tyranny. And I think it would allow a judge to engage in tyrannical acts, if it passes.

Senator ERVIN. Do you not agree with me that one of the reasons we attempted to establish a free republic over here was because we did not like tyranny upon the throne?

Senator THURMOND. That is the reason our forefathers came to this country originally. They came here seeking freedom and that is the reason they seceded from Great Britain, because Great Britain was practicing tyranny on them and depriving them of that freedom.

Senator ERVIN. Do you see much choice between tyranny on the throne or tyranny on the bench.

Senator THURMOND. I do not think it makes much difference if tyranny comes from one source or another. If people are deprived of

their freedom, or tyranny's is practiced against the people and their rights, it is tyranny, regardless of whether it is their own government or from whatever source it comes.

Senator ERVIN. Do you not agree with me that any fair system of jurisprudence would give the same rights to litigants on both sides of the case and thereby accomplish impartial justice?

Senator THURMOND. Well, I was always brought up to respect the courts and to look at a judge in a robe in the view that here is an impartial person and to walk into court and feel that here is an impartial tribune. The only purpose in the person going into court is to get justice. If they do not get justice in the court, we might as well tear down the courthouse and abolish all court officials.

Senator ERVIN. Do you not agree with me that the court should be as much concerned with doing justice to the defendant as to the plaintiff?

Senator THURMOND. That has always been my opinion. I was circuit judge about 8 years. About half of that, I was in World War II, but I think our people generally in South Carolina felt that when they went into a court, they received justice.

Senator ERVIN. I invite your attention to subsection (b) of section 406, on page 28, which provides that—

upon application by the plaintiff, and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint at attorney for the plaintiff and may authorize the commencement of a civil action without the payment of fees, costs, or security.

You note there is an absence of any provision for the court to appoint an attorney for the defendant.

Senator THURMOND. This, in effect, would provide that the Government would furnish a lawyer for the plaintiff.

Senator ERVIN. But not for the defendant?

Senator THURMOND. But not for the defendant, which to my way of thinking is discrimination in itself.

Senator ERVIN. If a widow rented a room in her dwelling house for the purpose of keeping soul and body together and somebody she did not want to rent to demanded that she rent to them, the Federal court could furnish the attorney for the would-be renter but not for the widow?

Senator THURMOND. That is correct.

Senator ERVIN. I would like you to note another legal monstrosity in this bill.

Subsection (d) of section 406, page 29:

The court may allow a prevailing plaintiff a reasonable attorney's fee as part of the costs.

Do you think it is fair to allow the prevailing plaintiff to recover an attorney fee and not allow the prevailing defendant to recover an attorney fee?

Senator THURMOND. Well, Mr. Chairman, it appears that the whole bill is written in a manner that, initially, prohibits objective and impartial treatment to all involved. This, I think, is another instance of allowing the plaintiff a reasonable attorney's fee and not allowing the defendant a reasonable attorney's fee.

Senator ERVIN. In a sense, it creates a legal difficulty against the defendant and not against the plaintiff.

Senator THURMOND. It appears that is the way the bill is written.

Senator ERVIN. In so doing, it favors one side and discriminates against another. Do you not think that that makes a mockery of justice?

Senator THURMOND. There is no question about it. When there is no objectivity in the courtroom, then there is no justice.

Senator ERVIN. Is it not a general principle of law that each party ordinarily pays his own counsel?

Senator THURMOND. That is correct.

Senator ERVIN. Is it not also a general policy of law that the Government does not favor stirring up litigation and they do not have laws in the States for that purpose?

Senator THURMOND. That is true. That has been the custom through the history of this country.

Senator ERVIN. Do you not think it is bad public policy to stir up litigation by inducing or offering inducement to lawyers to bring suits?

Senator THURMOND. I think it is a heinous procedure.

Senator ERVIN. Do you not think they should look to their own clients for fees rather than to others' clients?

Senator THURMOND. I do.

I now proceed with Title V: Criminal Law Provisions for Private Interference of Private Action.

Title V of S. 3296 would make it a Federal crime for any private individual to injure, intimidate, or interfere with, or attempt to do any of the foregoing, to any person because of his race, color, religion, or national origin while he is engaged in certain specified activities. The activity specified is that activity which is usually associated with asserting constitutional or "civil" rights.

This provision represents a radical new departure in Federal criminal law. It establishes a Federal protectorate based on a combination of events which include both who the person is and what he is engaged in doing.

Once again, there is no recitation in the act of the constitutional authority for this radical proposal, but the testimony so far given to this subcommittee reveals that it is somehow supposed to be grounded in the 14th amendment. In my discussion of the immediately preceding section of S. 3296, I covered, quite conclusively, I believe, the concept that the 14th amendment is directed toward State action, and State action only. There is no attempt in title V to allege any State involvement or any conspiracy, which is the subject of 18 U.S.C. 241. This provision of the bill is directed toward direct private action.

In his testimony, the Attorney General relied in very large measure upon the recently decided *Guest* case. The decision in this case, which is entitled "*United States, Appellant* v. *Herbert Guest et al.*", was handed down by the Supreme Court on March 28 of this year. In that case, six defendants were indicted under the provisions of 18 U.S.C. 241, as having conspired to injure, oppress, threaten, or intimidate a citizen in the free exercise or enjoyment of a right or privilege secured to him by the Constitution or laws of the United States. The defendants moved to dismiss the indictment and the Federal district court granted the motion and dismissed the indictment as to all six defendants and on all counts.

In brief, the Supreme Court's action was to remand the case to the district court with instructions for them to consider certain paragraphs of the indictment. At the outset of the case, however, the Court noted in very specific and clear language that "we deal here with issues of statutory construction, not with issues of constitutional power." I have already quoted at length from a crucial portion of the Court's decision in the *Guest* case which reinstates and reffirms the basic concept that the 14th amendment prohibits discriminatory action on the part of the States only and not by private individuals.

It is true that there is some indication that some few of the Justices question the breadth of power granted to Congress under section 5 of the 14th amendment. In the concurring opinion of Mr. Justice Clark, in which he was joined by Mr. Justice Black and Mr. Justice Fortas, the following language is found:

> It is, I believe, appropriate and necessary under the circumstances here to say that there now can be no doubt that the specific language of section 5 empowers the Congress to enact laws punishing all conspiracies—with or without State action—that interfere with 14th amendment rights.

Also, the opinion of Mr. Justice Brennan, joined in by the Chief Justice and Mr. Justice Douglas, contains the follow language:

> A majority of the members of the Court express the view today that section 5 empowers Congress to enact laws punishing all conspiracies to interfere with the exercise of 14th amendment rights, whether or not State officers or others acting under the color of State law are implicated in the conspiracy.

The Attorney General seizes upon this language in the concurring opinions to fortify his contention that the Supreme Court would uphold title V against a charge of unconstitutionality. I do not so interpret these opinions. First, in both instances, the word "conspiracies" is used. Title V does not authorize prosecution for conspiracies. It is a straight criminal statute directed toward the criminal act itself.

Second, the Justices hedged their opinions by referring to "14th amendment rights." This necessitates an inquiry as to just what are "14th amendment rights." The 14th amendment begins, in almost every clause, in a way that leaves no doubt that it applies to every clause, "No State shall." Therefore, it is clear that 14th amendment rights are prohibitory upon State action, and State action only. Title V is applicable to private action and contains not even the slightest pretense that State action need be involved.

Under all the precedents of the Supreme Court, title V of S. 3296 is unconstitutional. Even if there were a constitutionally valid argument in its favor, it is subject to the most serious question. Would Congress be wise in creating a special class of protectorate depending solely upon who the person is and what he might be engaged in doing at the time of the alleged crime? I think not. Such a proposal would establish a bad precedent and could very well lead to other proposals of this nature which would create a Federal police state, which none of us wants.

Mr. Chairman, may I make emphatically clear that I have no interest in protecting criminals from prosecution for their crimes. They should be prosecuted to the full extent of the law. I do have an interest, however, and a very deep one, in protecting the Constitution from either well-meaning or willful distortions which will be to the ultimate detriment of the personal and constitutional rights of all the citizens of the United States.

Mr. Chairman, I had thought that, with the passage of the so-called Civil Rights Act of 1964 and the so-called Voting Rights Act of 1965, Congress would be free from the pressures to take further action in this field for some time. Indeed, it was difficult for me to imagine what more could be proposed under this general heading. We now see that the appetite is virtually insatiable.

This proposal, unfortunately, follows the trend of recent years in ignoring the basic yardstick by which Congress is governed—the U.S. Constitution. Not only does this proposal fail to measure up by the yardstick of the Constitution, but it is, in many respects, both arbitrary and capricious and creates the possibility of the use of oppressive and dictatorial means of achieving its objectives.

It is past time for a calm, dispassionate reappraisal of this entire matter, and by no means should Congress be stampeded into approving the pending bill.

Senator ERVIN. You have had a distinguished career upon the bench. Would you not agree that it is very unusual for any court to do anything more than to decide the case that is pending before it at the time, and do you not agree that the *Guest* case could have been decided as it was on the basis of the bill of indictment?

Senator THURMOND. I certainly do.

Senator ERVIN. Which alleged State action.

Senator THURMOND. That is correct. I agree fully with the statement of the distinguished chairman.

Senator ERVIN. Is it in accordance with accepted judicial practice for judges to go beyond the scope of the case before them and announce how they will act in the future?

Senator THURMOND. It has never been customary for judges in this country to follow such procedure.

Senator ERVIN. I believe your statement puts a little different interpretation on the statement of those judges than that of the Attorney General.

Senator THURMOND. I think my statement is entirely in conflict with the position of the Attorney General of the United States.

Senator ERVIN. Senator, on behalf of the subcommittee, I wish to thank you for making a very brilliant presentation of your views on this very momentous legislation.

Senator THURMOND. Thank you, Mr. Chairman, and I wish to thank the subcommittee.

Senator ERVIN. Will the counsel call the next witness?

Mr. AUTRY. Mr. Chairman, the next witness is the honorable John H. Chafee, Governor of the State of Rhode Island.

STATEMENT OF HON. JOHN H. CHAFEE, GOVERNOR OF THE STATE OF RHODE ISLAND; ACCOMPANIED BY DR. BARRY A. MARKS, CHAIRMAN OF THE RHODE ISLAND COMMISSION AGAINST DISCRIMINATION, AND ARTHUR L. HARDGE, EXECUTIVE SECRETARY OF THE RHODE ISLAND COMMISSION AGAINST DISCRIMINATION

Senator ERVIN. On behalf of the subcommittee, I want to thank you for accepting the invitation of this subcommittee, to bring your views to us.

Governor CHAFEE. Thank you very much, Mr. Chairman.

First, Mr. Chairman, I would like to thank you for inviting me to come down and state my views on the proposed Civil Rights Act of 1966. As requested, I shall confine my remarks to title IV, the section dealing with open occupancy housing. I want to make it clear that I do not consider myself an expert in this field. Nevertheless, as the Governor of a predominantly urban State in the Northeast, I was delighted to accept your invitation and to share with you the experience of a State and region which have had experience with the type of legislation which you are presently considering.

Let me make clear at the outset that I am in favor of the bill as a whole, and I am in favor of the portion of it which deals with housing. For reasons which I shall explain, I think the housing provisions are far less creative than I would like them to be. Nevertheless, I favor the bill which is before you.

As some of you probably know, Rhode Island had a unique experience in the passage of its Fair Housing Practices Act. I am proud to say that, as a member of the Rhode Island House of Representatives, I was a sponsor of the first fair housing bill to be proposed in my State back in 1959. The bill immediately became the subject of widespread and intense public debate. It remained so for 6 years, until April 1965, when it finally passed both branches of our general assembly and, as Governor, I had the privilege of signing it into law. I might point out that during each of those 6 years public discussion was focused on a slightly different version of the fair housing idea. When the original bill failed to pass in 1959, for example, the legislature turned its attention in 1960 to a bill which would have excluded from coverage large portions of the housing market. Yet the bill which we finally passed last year was almost identical to the bill which was first introduced 6 years earlier.

Mr. Chairman, I cannot say to you that, after our 6 years of debate, the fair housing bill passed on a wave of favorable public sentiment. Legislation of this type is not popular. I do not apologize for the Rhode Island experience, however. Indeed, I would point out that we passed our bill within a few short months after the California referendum showed just how unpopular open housing legislation is apt to be. We did what we thought had to be done, and I think it fair to claim that, whether popular or unpopular, nowhere in the Nation was there better public understanding of fair housing legislation at the time of its passage than in Rhode Island.

It is partly because of this 6-year history that I am reluctant to discuss the details of the coverage or the specific procedures and remedies provided in the housing section of the legislation before this committee.

I would be glad to answer any questions on that.

Our law in Rhode Island does not now cover the entire housing market. It excludes from coverage rooms in a rooming house, which was one of the questions previously directed to Senator Thurmond, market. It excludes from coverage rooms in a roominghouse, which the owner is also a bona fide resident. Our law does not provide for damages for a complainant. On the other hand, it does provide, as do most State laws, for administration of the act by a commission, which

also administers similar legislation in the fields of public accommodations and employment.

I might add in there that one of the commission's principal jobs is conciliation, investigations, attempts to reach a fair solution without undue publicity of any nature.

My point is that these seem to me to be details. They are important. Someone has to make decisions about them. Yet what seems to me most impotrant is that color, religion, and country of national origin have no proper place in buying, selling, and leasing houses and apartments. Because this is an area in which people are caught up in fear and prejudice, Rhode Island and many other States decided it was necessary to pass legislation to insure that real estate transactions would be based on the qualifications of individuals rather than on their membership in this or that group. I urge the Congress to take the same step which has already been taken by many States, including my own.

I have only one detail on which I would like to comment. Respectfully, I would recommend the addition of language similar to section 706(b) of title VII of the Civil Rights Act of 1964, which would require that complaints be deferred to State commissions in those cases where the applicable provisions of State legislation are substantially similar to the corresponding provisions of the present bill.

But, Mr. Chairman, while I am in favor of this legislation, I must also register my disappointment with it. It is necessary, but it is not enough. Title IV is likely to benefit only those in the nonwhite community who are already relatively able to fend for themselves. It is likely to benefit only those middle-class nonwhites who have already achieved some educational and economic stature, who have incentive, and, perhaps most important, who both understand and trust completely the complicated legal machinery which must be used if fair housing is to work. Let me underscore my point here. I am for this legislation, because I think it is important, for many reasons, to establish the principle of freedom in the housing market. But I am also expressing my disappointment that the bill is not more imaginative than it is, for by itself it is not likely to help us in northern urban areas to cope with those massive problems which today constitute the frontier of the civil rights movement.

Specifically, my largest disappointment with this bill, therefore, is its excessive reliance on the essentially negative role of nondiscrimination law and its failure to recognize the importance of administrative policy and program. Section 408, dealing with the responsibilities of the Secretary of Housing and Urban Development and the various commissions and services in this field, is indeed weak. The point is that antidiscrimination statutes are limited in what they can be expected to accomplish. After their passage, the highly urbanized States in the Northeast are still faced with severe problems.

The unhappy facts are that the overwhelming number of nonwhites in the urban North are living in more and more tightly concentrated areas of our cities; significant proportions of them live in what the Census Bureau calls, officially, deteriorating or dilapidated housing; and, yet, considering the quality of their housing, they pay relatively more in rent than their white counterparts. Their schools

tend to be segregated, employment opportunities are still limited, income are low. We must move beyond the negative principle of nondiscrimination to positive programs and policies designed to bring about real change, and we must do so before rather than after desperate acts of violence force us to do so.

President Johnson said in his address at Howard University in June 1965:

> You do not take a person who for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "You're free to compete with all the others," and still believe that you have been completely fair.

I agree with that statement and I do not believe that this legislation is "completely fair," for it fails at the critical point to instruct Government departments and agencies to take a more complete look at the most desperate problems of our cities and, in cooperation with the States, find beginning ways to meet them.

Let me voice some broad concerns: In recent years, we have embarked on a number of vast Federal programs designed to renew our cities, revitalize education, and wipe out poverty. All of these areas of our common life need full attention. The fact is, however, that these programs have all too often had unhappy consequences.

For example, look at the effects of urban renewal on the nonwhite. According to a report by the Urban League of Rhode Island, two-thirds of the nonwhite families in the city of Providence were forced to move at least once just within the 5-year period between 1955 and 1960. I would like to stress the words "forced to move." These were not voluntary moves. It is abundantly clear that the burden of urban renewal, redevelopment, and highway construction is borne primarily by the poor and especially by the nonwhite poor. These forced moves not only weaken community life and leadership, they also mean, too often, increased segregation, poorer living conditions, and higher rentals. We need far more careful policy and far more creative planning and counsel in this whole field. The burdens of urban change must be more equally carried.

Again, look at the effects of our welfare programs on the nonwhite male. In Providence, one out of three of our nonwhite families has only one parent. Two of five nonwhite children under the age of 18 live with only one parent, usually the mother. Our present work with such families is mainly through the aid to families with dependent children and the aid to dependent children programs. In terms of the status of the nonwhite male and the strength of family life, these programs, even at their best, fail to do what must be done. At their worst, they often hurt rather than help. The McCone report on the Watts riots has this to say about the effect of the ADC program on the man and the family:

> The welfare program that provides for his children is administered so that it injures his position as the head of the household, because aid is supplied with less restraint to a family headed by a woman married or unmarried. Thus, the unemployed male often finds it to his family's advantage to drift away and leave the family to fend for itself. Once he goes, the family unit is broken and seldom restored.

Welfare is a complicated subject with many variations in program from State to State. There is little question, however, that the ceilings on the degree of Federal participation in these programs make

it impossible for States to make a realistic contribution to stabilizing the nonwhite family, and all families who are on aid, I might say.

Third, the vast poverty program has had its adverse effects. By making a sudden call on the social work profession, offering high salaries, and raiding the top leadership of public and private agencies, it has weakened the morale of other social workers and generally weakened the necessary ongoing work of regular State and local welfare services. We need new programs, but we need to be more careful about how we frame them. And we need, specially, concerted action at all levels of government to encourage more and more young people to enter the social work profession and to make it financially feasible, if not downright attractive, for them to take on the less glamorous tasks.

Fourth, the poverty program in our communities has had an almost devastating effect on the leadership in nonwhite neighborhoods and in civil rights groups. I suppose inevitably in a crash program you turn to existing leadership rather than developing new leaders. But, in so doing, some of the most trusted Negro leaders in our communities have become part of what many in the ghetto consider the "untrustworthy establishment" and thus suspect in those very communities with which they are expected to work.

I have no vest-pocket solution to this problem. At this point I can simply record my deep concern about the rate with which leaders of various kinds of private action groups are leaving their posts to become employees of one or another level of government and in too many instances leaving their home communities to go to other cities in the process. I do not think this is a healthy situation in a democracy, and it does seem to me largely the result of the newest Federal programs.

My point thus far is that many Federal programs have actually had adverse effects on the problems with which civil rights legislation must be concerned, and, secondly, that the present bill does not adequately focus attention on the most pressing of those problems.

My second broad concern is a matter of technique. All urban areas share common problems; yet each will have a somewhat different set and some peculiar to itself. Metropolitan Providence is not Metropolitan Chicago. We have certain unique strengths and weaknesses that reflect local conditions and history. My concern therefore is that all Federal legislation in this field should encourage and support local imagination and experimentation. The present legislation does not appear to do this.

It is all too clear that for all of our law, court decisions, and programs, the word is not yet clearly out that the doors of opportunity are really open. This is a subtle but very important point. It is not enough in any area of civil rights—whether you are talking about housing or education or employment or public accommodations—it is not enough simply to establish a policy of nondiscrimination. One must take affirmative steps to insure that those of our citizens who have been discriminated against for years know about the policy of nondiscrimination and believe that the doors are open. It is not enough simply to say, "Now, the doors are open"; one must say it in such a way that it is heard. Moreover, we must also be about the difficult

business of finding the specific openings and the particular people to fill them. We must be willing on the local level actually to recruit individuals, train and place them. Federal policy must permit and even encourage all kinds of experimentation.

To illustrate: In response to the widely advertised services of the Federal Community Relations Service and the Federal Equal Employment Opportunities Commission, our Rhode Island Commission Against Discrimination, which is the agency within our State that handles these matters, has made several efforts to get help to do a very simple, specific task. We asked for professional assistance in an area of South Providence which is heavily nonwhite to help us with a survey of families to find those who might be interested in moving out of this ghetto area. Instead of assistance and support, we met a blank wall—not because of incompetence, but because the agencies seem to be interested only in programs that can be handled uniformly across the country.

On the other hand, the regional office of the Community Relations Service recently sent us a man who spent several days carefully listening to and picking the brains of many of our people. But then, of all things, he was forbidden by Federal policy from sharing the results of his conversations with us. My point is that this bill, like others before it, fails to initiate the kind of Federal, regional, State, and local cooperation which may permit us to get at our most troublesome urban problems.

The civil rights movement in the United States today is many sided and complex. There is always a strong temptation to believe that some problems must be dealt with before others. We are sometimes tempted even to think that, if certain problems are dealt with properly, the others will disappear.

Mr. Chairman, I do not consider myself an expert in this field. Yet my experience tells me that housing, employment, education, voting, welfare, public accommodations, present discrimination and the effects of past discrimination are all bound up together, and we do ourselves no favor unless we quite realistically face up to this situation. This is the reason why I have taken the liberty today to discuss matters which, technically speaking, may be beyond the jurisdiction of this committee. But the chairman was kind enough to invite me to come to Washington to testify and I have spoken to you about the things which are on my mind as the Governor of Rhode Island and as a citizen of the United States.

Most of the legislation presently being considered will have little or no impact on my State. It will probably have little impact on the northeastern region. As a plain citizen, however, the whole bill seems to me clearly necessary, and I would urge its passage as soon as possible.

I must repeat my disappointment in section 408 of title IV. This is the one section which takes cognizance of the most pressing problems in my part of the country, because it is the one section that envisions the need for administrative policy and programs which go beyond the narrow concept of nondiscrimination.

Finally, however, let me repeat once more that, even as it stands, the civil rights bill of 1966 seems to me to be necessary legislation, and I urge its passage.

Thank you.

Senator ERVIN. Governor, I notice that you say you favor open housing, open occupancy.

Governor CHAFEE. Yes, sir.

Senator ERVIN. Because it establishes the principle of freedom in housing. Does it not establish that principle of freedom at the expense of freedoms of the owners?

Governor CHAFEE. I think we are always having to equate these matters in the United States. We have had it in whether a man's restaurant is his kingdom or whether everybody is going to have a chance to come into it.

Senator ERVIN. Is it not an illustration of the old saying that one man's meat is another man's poison?

Governor CHAFEE. I suppose, except if you are on the poison end of things.

Senator ERVIN. Yes.

Governor CHAFEE. If you cannot get a place to live, and there is no question, and I cannot speak for the whole Nation—I am speaking for my State, and I believe what has taken place in my State is probably true throughout the Nation—people were unable to find adequate housing because of their color. That is what it came right down to.

Senator ERVIN. Well, it gives some people the freedom to purchase or rent housing from unwilling owners, does it not?

Governor CHAFEE. That is right, although in many instances we find that the unwilling owners are assisted by this act in that pressure comes from—say you have a plat developer that builds 20 houses on a plat. He himself would be willing to sell to somebody, a house on the plat to a Negro family. But the local, the other, neighbors say, "Oh, you cannot do that." This act permit him to say, "Look, the law requires me to do it." And when the house is sold to the Negro on the plat, life goes on quite evenly.

Senator ERVIN. But I believe we do agree that, as far as a home is concerned, it does deprive the owner of the right that he would otherwise have; that is, the right to sell or to rent freely to persons of his choice?

Governor CHAFEE. I am sorry. You are saying it deprives him of a right?

Senator ERVIN. It does deprive the owner, open occupancy does deprive the owner of the property, of his right to sell or rent freely to persons of his choice.

Governor CHAFEE. I will have to agree that there is. On the other hand, it gives a person on the other end of the scale, or somebody else, the right to acquire housing or to rent housing.

Senator ERVIN. Well, we agree that it does effect curtailment of the right of private property?

Governor CHAFEE. Some part of it, yes.

Senator ERVIN. I would have to infer from the Attorney General's testimony that the primary objective of this bill is to assist nonwhites in obtaining housing. What percentage of the population of Rhode Island is nonwhite?

Governor CHAFEE. In the whole State it is about 6 percent. Lower than that; I would say about 5 percent in the State, about 8 percent within the city of Providence.

Senator ERVIN. Now, Governor, notwithstanding the fact that you have the open occupancy law in Rhode Island, would you say there has been any substantial change in residential segregation in Rhode Island since the law became operative?

Governor CHAFEE. We have had the law now just for a year. I cannot say there has been a substantial change, no. I think in anticipation, we did not think that there would be a substantial change. But the leaders, those who are able to afford such housing, who are cognizant of the right that exists for them under this legislation, are able to move on and get such housing, and this act as an incentive to the others.

Senator ERVIN. Now, you state that you confined your statement largely to title IV, although you stated you were in favor of the other provisions of the bill.

Do you favor the provision of title II, under which Congress would prescribe the rules of procedure to govern State courts in investigations of composition of juries?

Governor CHAFEE. Well, as I said in the statement, I really confined my attention to title IV. This title II, which you have just gone into, and I heard your prior discussion with the Senator, would work no hardship with us in our section of the country.

Senator ERVIN. Now, you state that none of the provisions of the bill would have much impact on Rhode Island?

Governor CHAFEE. That is correct.

Senator ERVIN. I think you are a man who has stood to some considerable degree for local State government and States rights. Do you think it is a good policy for Congress to prescribe rules of procedure for State courts in determining questions of fact?

Governor CHAFEE. I think when we have had problems arise, as it is my understanding in certain sections of the country, which the States have been unwilling or unable to wrestle with, that is the reason that such national legislation has come into being.

On your specific question, as far as this particular provision goes, it does not disturb me, no.

Senator ERVIN. I notice that under the Rhode Island General Laws, section 9-9-11, that with reference to the service of women on juries, it provides that where the jury commissioner certifies that there are sufficient accommodations to take care of women jurors, they shall have women jurors; otherwise, women are excused from service.

Then there is another provision which I would say is somewhat similar to our law in North Carolina: any woman can get herself excused from jury service by notifying the jury commissioner that she does not desire to serve.

Now, do you not think that title II would nullify that law?

Governor CHAFEE. I do not think so. The important thing is that the women are given the opportunity to serve, and if they so excuse themselves, in the subsequent drawings they do not come up with a woman on the jury, that is quite all right. I do not think that this law requires that every jury have one poor person, one rich person, or anything like that. As I get the law, they have to be included within the jury wheel or the jury box.

Senator ERVIN. Yes, but it says it has to be a representative cross section—the Attorney General's testimony was to the effect that it was designed to get a representative cross section of the population.

And certainly if the women were permitted to excuse themselves from service, there would be great danger that you would not get a cross section of the feminine population of a given area.

Governor CHAFEE. I do not think—it does not really present a problem, because we find that the women do not avail themselves of this.

Senator ERVIN. That is what we found in North Carolina.

Governor CHAFEE. They seem to like to serve on juries.

Senator ERVIN. We found that they do not like to serve on juries.

Governor CHAFEE. Oh, I do not know what the difference is between the women in North Carolina and the women in Rhode Island, but we seem to have a very substantial percentage of women on our juries.

Senator ERVIN. Most of ours prefer to stay at home and manage the home and look after children, I might say.

Governor CHAFEE. I am not interpreting that as meaning that the women of Rhode Island want to leave their children in homes.

Senator ERVIN. I am just expressing my opinion that maybe North Carolina—and I am not familiar with the women of Rhode Island, but I would surmise that they are very charming human beings.

Governor CHAFEE. They would have to be extremely charming to compete with the women of North Carolina.

Senator ERVIN. Senator, I have a luncheon engagement. I wonder if you could take over for me?

Senator JAVITS. Certainly.

Senator ERVIN. Governor, I want to thank you on behalf of the subcommittee for your willingness to appear here today and give us the benefit of your views.

Governor CHAFEE. Thank you.

One moment, Senator. Could we submit with the written record a statement by our commission against discrimination?

Senator ERVIN. Yes, sir; we would be glad to have it, and to have it printed in the record.

(The document referred to follows:)

THE STATE OF RHODE ISLAND,
COMMISSION AGAINST DISCRIMINATION,
Providence, June 21, 1966.

Senator SAM J. ERVIN, JR.,
Chairman, Senate Constitutional Rights Subcommittee,
U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: In testimony before your Honorable Committee on June 14, 1966, Dennis M. Lynch, President of the Rhode Island Realtors Association, called the Rhode Island housing law a failure. I concede that the law enacted was much weaker than we desired but this was due largely to strong opposition led by Mr. Lynch and his fellow members of the Rhode Island Board of Realtors. I would be one of the first to agree that the law is weak, and that it should be much stronger. Recommendations have already been made to strengthen it but the Legislature took no action, saying that a little more time should be allowed to test its effectiveness. However, I do strongly disagree with the testimony of Mr. Lynch that the law is a sham or a failure. The fact that a number of Negroes, though small, have been able to buy and rent properties of their choice through the use of the law is the best evidence to prove this particular point.

In further testimony, Mr. Lynch stated that the Rhode Island law has not improved the housing rights of minorities. This statement is in direct contradiction to the opinions of the leaders and members of minority groups. As an example, during the past month a non-white professional couple purchased a home which had been denied to them solely on the basis of color through the

use of the law. It would appear to me that the strongest opponents of the legislation are in no position to say that the Rhode Island Fair Housing Law had turned out to be a "sham" and a disappointment to those who thought it would help them, as stated by Mr. Lynch. As a Negro, as the Executive Secretary of this Rhode Island Commission Against Discrimination which administers the law, and as the Pastor of Hood Memorial A. M. E. Zion Church, I feel fully qualified to speak to this point. Based on my personal feelings, on the reports coming to me as the Executive Official of this state agency, and on opinions of the membership of my congregation, I assure your Honorable Committee that nothing could be further from the truth. Rather, minority group members regard the law as a step forward toward securing their right in the housing market even though they realize full well that, like all initial statutes, this law needs to be strengthened. I am enclosing a copy of the report to Governor John H. Chafee on the first nine months of this Commission's administration of the law; and an editorial from one of our newspapers, the Providence Journal, for review by you, Senator Ervin, as the Chairman, and by all the Members of your Honorable Committee.

Respectfully,

Rev. ARTHUR L. HARDGE,
Executive Secretary.

To: His Excellency, Gov. John H. Chaffee; the Honorable Members of the Senate; and the Honorable Members of the House of Representatives.
From: Rhode Island Commission Against Discrimination.
Subject: Rhode Island Fair Housing Practices Act.

It has been approximately nine months since the passage of the Fair Housing Practices Act. The Commission Against Discrimination believes that it owes the Governor, the Legislature, and the general public a report on the Commission's administration of the Act.

Between the middle of April, 1965, when the Fair Housing Bill became law, and the middle of January, 1966, twenty-six housing complaints were brought to the Commission. Of these, twenty involved rentals; only two involved sale of real estate. Four were miscellaneous complaints involving such matters as alleged discrimination in advertising.

In fifteen of the twenty-six cases, the Commission determined that probable cause existed for believing that unlawful housing practices had taken place or were taking place. Fourteen of these fifteen cases have been conciliated.

Of the fourteen conciliated cases three ended when the respondent decided to sell or rent to the complainant (2 sales, 1 rental). In a fourth the respondent agreed to make available to the complainant a rental unit other than the one originally in question, which the complainant, however, decided he did not want. In seven of the fourteen conciliated cases the rental unit in question was rented to a party other than the complainant before the Commission's efforts to conciliate were completed. In four of these cases the Commission required affidavits of future compliance.

The Commission dismissed seven cases when it was unable to find sufficient evidence to establish probable cause. Three cases involved housing accommodations which are excluded from coverage by the law. One complainant requested that his complaint be withdrawn before the Commission made any determination.

One of the cases in which the Commission found probable cause remains active. The rental unit involved has already been rented to a person other than the complainant. Since, however, the complainant wishes to pursue the case in order that a cease and desist order (if the facts warrant such issuance) may prevent the respondent from continuing his practices in the future, the Commission intends to carry the complaint to a formal hearing as soon as practicable.

Commission members and staff have appeared and made presentations at meetings of many organizations interested in the problems of discrimination in housing (civil rights organizations, groups of realtors and home builders, neighborhood councils, as well as such general organizations as Rotary Clubs). These efforts, together with changes in the Commission's staff and procedures, have, the Commission believes, improved public confidence in the agency. There is some reason to believe that, as a result, a higher proportion of instances of discrimination are now being brought to the Commission for action, whereas

formerly these incidents tended to remain as quietly festering sores in the community. The leaders of the non-white community in particular have had opportunities to meet and talk with the Commission and seem to have more faith that the Commission is "in business," ready and willing to act vigorously when complaints are brought to its attention.

There is no evidence, on the other hand, that either the number of cases or the Commission's procedures reflect the kinds of abuses which were once predicted. To the best of the Commission's knowledge every complaint has been made in good faith—even though subsequent investigation may have demonstrated that a failure in communication rather than outright discrimination had occurred.

Doubt remains, however, as to whether the housing law is sufficient for the Commission to be able to assure the public that it can be effective in as high a proportion of cases as good public order requires.

It is worth underlining that the Commission has received many more complaints of discrimination in rentals than in sales. This proportion was anticipated. Nevertheless, the facts raise a question as to whether the complaints would be even more numerous if the housing law were extended to cover apartment units in owner-occupied, two and three family houses. The Commission's only direct experience in this area is three cases in which complainants did not realize that the owners lived in the buildings in which they were offering apartments for rent and where therefore it remained for the Commission to discover that the units in question fell outside of its jurisdiction.

The Commission has had more direct experience, as already indicated in the statistics cited above, with the need for an injunction provision. The purpose of the injunctive power would be to make it possible for the Commission to go to court and request an order which would prevent a landlord from renting to a person other than a complainant during the period of investigation and conciliation. The Commission has had seven cases in which apartments were rented while a complaint of discrimination was still being discussed. In two of these cases the apartment in question had already been rented by the time Commission investigators first appeared on the scene (within twenty-four hours after receipt of the complaint in both instances). The injunctive power would not have helped in those cases. In five of the cases, however, injunctive power would have been an important factor in the Commission's ability to fulfill the purposes of the housing law. Given the history of Rhode Island's law against discrimination in employment and public accommodation, five cases is a significant number. In addition, it represents approximately one quarter of all the housing complaints received during the nine months being reported on. It should be noted, further, that not all of these cases involve deliberate efforts by respondents to evade the law. The respondent in at least one case was ignorant of the housing law. He had always rented exclusively to members of one particular ethnic group. The Commission encountered difficulty in establishing communication with the lawful owner in addition to his son who was acting as his agent. The case was particularly heartbreaking because the respondent would cheerfully have complied with the law if he had known about it and, indeed, he promised to seek out the complainant the next time an apartment unit became available. Nevertheless, the fact is that the Commission's lack of injunctive power meant ineffectuality in its handling of the case: the apartment unit in question was in fact rented to another party during the course of the Commission's efforts to investigate and conciliate. The Commission believes that the injunctive power would make impossible evasion of the law and would reduce deliberate delays.

In this connection, it should be noted that the overwhelming majority of the Commission's housing cases have been disposed of in a week's time or less. Three cases have required two weeks of work, three cases required three weeks; only one case required as much as a month.

It is evident that finding adequate housing continues to be a source of frustration for the non-white minority. Negroes in our state continue to be relegated to the several ghettoes that have been perpetuated for too long. At the same time, the Commission is convinced that passage of the Fair Housing Practices Act has served and is serving an important function in reducing the level of racial tension in the state. Increased faith in the Commission is serving the same function. Even in those cases in which the Commission has found that discrimination did not occur, the Commission believes it has served an important purpose in determining what the facts were and making these facts evident to

all parties. Misunderstanding is sometimes an important factor contributing to racial tension. Nevertheless, the Commission firmly believes that it will not be fully effective until it has the statutory authority to see injunctions. It needs this power in order to handle cases properly. It needs it also in order to continue the development of public confidence in the agency.

New York and Connecticut laws today contain new injunctive provisions which permit recompense for damages in the event that a respondent against whom a restraining order has been granted is ultimately found to be innocent of discriminatory housing practices. The commission stands ready to give information and advice about these and other developments in the field of fair housing legislation if the Legislature desires them.

Finally, let it be noted that, in addition to processing complaints, the commission is trying to stimulate and encourage programs of "affirmative action," similar to those which exist, for example, in the field of fair employment practices. It is cooperating in the development of "Operation Metropolis," a part of the Federal-municipal antipoverty program in the city of Providence. It is also exploring program ideas with certain nongovernmental groups in the community. Although the housing law emphasizes the establishment of procedures for adjudicating individual complaints, the complex problems associated with the nonwhite ghettos of the State will not be solved on a case-by-case basis. The commission pledges, therefore, to work with all interested parties in order to exercise leadership in the continuing problem of trying to make American democratic principles a living reality.

RHODE ISLAND COMMISSION AGAINST DISCRIMINATION,
Dr. BARRY A. MARKS, *Chairman*,
JOHN A. DALUZ, Jr.,
DANIEL E. HEALY,
R. FRANKLIN WELLER,
ALLEN J. WHITE,
ARTHUR L. HARDGE, *Executive Secretary*.

[From the Providence (R.I.) Journal, June 21, 1966]

FAIR HOUSING LAW FOES REPEAT THE FAMILIAR THEMES

Some of the Rhode Islanders who tried to block fair housing in this state traveled to Washington, D.C., recently to argue against the proposed federal ban on discrimination in housing.

Dennis M. Lynch, president of the Rhode Island Realtors Association, called the administration plan "nothing but a phony, high-sounding effort that unfairly offers pie in the sky to the people who need help."

He then called the Rhode Island fair housing law a failure.

Mr. Lynch neglected to tell the Senate subcommittee on constitutional rights that the efforts of his group helped make it impossible to get a more effective law passed by the state General Assembly.

As weak as it is, the Rhode Island law is less than a sham to the small number of Negroes who have been able to buy or rent property of their choice because it exists.

Mr. Lynch proceeded to set up in Washington the straw men he used to try to defeat fair housing locally. People will begin to wonder, he said, if a new federal law in the future "will restrict their mobility and ability to move from place to place."

This is sheer nonsense! The issue, as it was with respect to the state fair housing law, is whether people should be denied the opportunity to rent or buy property solely because of their race, religion or national origin.

The arguments of Mr. Lynch and the rest of the party ought to be set aside by a majority of Congress as they were by a majority of the Rhode Island General Assembly.

Senator JAVITS (presiding). Governor Chafee, first let me thank you very much for appearing here. You are one of our distinguished and enlightened Governors, and a friend of mine. It is a great pleasure to welcome you.

I have noted your statement with great interest. What I was not here to hear you testify to, I have read.

May I ask you these questions?

I notice that you say that though title IV will reach relatively fewer people than you thought it should, you nonetheless consider it important. Why? Why do you consider it vital if it will reach far fewer people than you believe should be reached?

Governor CHAFEE. I believe this principle of open occupancy is important. We have a very mobile population in the United States. I think that it should not be just dependent upon which States happen to pass such legislation. Of course, if all the States were to pass it by themselves, then I think that would be good, but obviously some are not, will not. Housing is a key thing for Americans. I suppose owning a house is the most important single step a person takes financially. And I think that people all throughout the United States should have this right to buy a house that they economically can afford and not be barred for what I consider to be unimportant reasons; that is, their color or their race or their religion.

Senator JAVITS. Well, now, it is a fact, is it not, that if you buy a house or you own a house and the title is vested in you, it is only possible to do that because of the law?

Governor CHAFEE. That is correct.

Senator JAVITS. We would all be squatters if it were not for the law which insured us our titles; is that not so?

Governor CHAFEE. That is correct.

Senator JAVITS. And the people would throw off the premises those who sought to oust us?

Governor CHAFEE. That is correct.

Senator JAVITS. And the law courts protect our ownership?

Governor CHAFEE. Yes, sir.

Senator JAVITS. That has to yield occasionally to public policy, does it not? For example, even a house which is a person's home can be condemned, even for a new road?

Governor CHAFEE. That is correct; yes, sir.

Senator JAVITS. Do you have any doubts about the constitutional power—leaving aside for the moment the question of Federal or State power—to deal with what is against public policy in respect of home-ownership, to wit, the unwillingness to sell it or to rent it to a person because he is a Negro?

Governor CHAFEE. I do not. I think some 18 States have legislation similar to the general legislation we have in our State. To date, such legislation, to the best of my knowledge, has not been thrown out by any courts.

Senator JAVITS. So the concept of the reach of power is not questioned, in the sense that there is a governmental power which can reach housing, too?

Governor CHAFEE. I believe, based upon general welfare principles, that this is important to our entire citizenry.

Senator JAVITS. Now, can you see much difference between the opportunity to get a job from a person who employs others and the opportunity to rent or buy a house?

Governor CHAFEE. I do not draw a difference between it, no. And we have had, of course, the Fair Employment Practices Act and now the national legislation for a year and a half—a year?

Senator JAVITS. That is right. There is no compulsion here, is there? Nobody is compelled to sell or rent; is that correct?

Governor CHAFEE. No, you are not required, you are not compelled to sell or rent, and you are not compelled to sell or rent to somebody whom you do not wish to sell to for reasons other than these. For example, the examples given that somebody will not tend your lawn when you are gone, or somebody will scar up the house—you can refuse to or reject any of these people for those reasons. If they have 17 children and you do not want them in your house, you can reject them, or if they keep hound dogs and you do not want them, you can reject them. But you cannot reject them because of religion or color or those reasons set forth.

Senator JAVITS. Now, I notice at page 8 of your statement, Governor, that you say we must make known the policy against discrimination in order to have people really take advantage of it. What affirmative steps do you have in mind in order to implement that statement on your part?

Governor CHAFEE. Well, I suggested in here that this legislation, all Federal legislation generally, initiate regional and State and local cooperation which would help us wrestle with some of these problems, particularly in our urban area.

And let me just give you an illustration of how such Federal legislation has helped us in another area. Recently, Federal legislation was passed which encouraged regional cooperation for training schools for, in this instance, our State police. So, in New England, we started a regional State police training school. It seems to me that the Federal legislation could do the same thing, where we could have a training area for those closely associated with these problems that arise under, from discrimination; if we could have it, it could be for a certain limited time, say a week or 2 weeks. And there we would send these social workers who just are brand new to this environment, dealing with people who have been in ghettoes and just do not understand that if you tell them "there is a job available 8 miles away, you can join a car pool and go there." They cannot understand that. People involved with it could be our businessmen who say, "Our doors are open, but no one will come in to take a job."

Or they could be with the politicians who are involved. And I think if the Federal Government could encourage this type of regional setup, in our particular section of the country, it would be very helpful.

Senator JAVITS. That is, the training and orientation in problems related to these people?

Governor CHAFEE. I think so; yes.

Senator JAVITS. That you think ought to be partially financed by the Federal Government?

Governor CHAFEE. It is a way of the Federal Government giving an inducement to it. In all of these programs, the Federal Government starts off inducing States to take an action, and before you know it, the States see the virtue of it, if there is virtue in it, and then generally follow up with the financing itself.

Senator JAVITS. Do you think your State would cooperate in a joint Federal-State effort of that character?

Governor CHAFEE. We definitely do.

Senator JAVITS. I notice on page 9 of your statement, there is a reference to a regional program. Is this the regional program you just testified to?

Governor CHAFEE. Yes, this is the regional approach I was talking to.

Senator JAVITS. Well, you speak of the fact that Community Relations Service sent somebody into a particular area in order to deal with the problem of having people move out of the Negro ghetto in Providence, and that he did some work, but the was forbidden, you say, by Federal policy from sharing the results of his conversations with you. How would you change Federal law or policy to deal with the situation you faced?

Governor CHAFEE. Well, actually, these were two different examples. The man—we could not get the man to help us from the Federal Government on the gretto policy, who would move out. We could not get that man to come because under the Federal program, this was a little different than they were used to dealing with. They have a national policy, and this regional or State difference could not be fitted into their program.

We did have this man come who made a survey in another area. He reported back that he could not tell us what he had learned. That seemed a little foolish to us. I just do not know what Federal rule or regulation he was supported by, was invoking.

Senator JAVITS. Will you be good enough to write me a letter and ask that question, giving me the specific details, and I will find out?

Governor CHAFEE. Fine. I certainly will.

Senator JAVITS. The problem, of course, is that under the community relations statute, what they learn is confidential. But whether or not any effort should be made to give the State authorities the benefit of their findings is a question I shall look into.

Governor, one other thing. I noticed the chairman asked you about women on juries. Do you find anything in title II of this bill which would involve a charge of discrimination against one who voluntarily relinquishes the opportunity to serve on a jury?

Governor CHAFEE. I do not. That is where I differed from his interpretation. The chairman's interpretation seemed to be that each jury, as I understood it, must include people from very varied backgrounds. It seemed to me that if these people were on the jury, in the jury box, or on the jury list, available to be chosen, and were not chosen or voluntarily declined, then it would seem to me that title II would have been taken care of.

Senator JAVITS. Now, Governor, do you have any concern about the constitutionality of the antidiscrimination in housing section?

Governor CHAFEE. Well, this constitutionality business has certainly been widely argued. I was listening to the testimony before, talking about a house not being in interstate commerce. I do not know how a restaurant is in interstate commerce. Legislation has already gone into that area. I do not propose to be an expert, a constitutional expert, of which there are several around who end up with different views on what is constitutional and what is not. I do not see any constitutional problems on it.

Senator JAVITS. Do you think, as a Governor of a State, that Federal legislation is both desirable and necessary in this field?

Governor CHAFEE. Well, it seems to me to be necessary. I wish that it were not. I wish—I would prefer it if each of the States would take action by themselves. I am not a big government man. Unfortunately, they do not seem to be taking such action, and in the absence of such action, it would seem that the legislation were necessary.

Senator JAVITS. Now, as a Governor responsible for law and order in your home community, do you believe that the passage of laws and the honest effort to enforce them related to the struggle against discrimination on racial, color, and religious grounds is an element enabling you better to keep the public order, or the reverse?

Governor CHAFEE. The passage of such legislation is helpful to us. As I indicated, and there is no question about that, as I indicated in my testimony, I would hope that such legislation would not merely be antidiscrimination, but that it would go beyond this and wrestle with the whole package of problems.

I just saw a news article the other day, and I did not see the entire text of it, in which you yourself proposed some sort of legislation along this line. You talked about a Marshall plan, as it were, to attack this whole problem, which involves basically the Negroes. That seemed to me to be much more positive and more helpful in the long run than strictly antidiscrimination legislation.

Senator JAVITS. In other words, we need the antidiscrimination legislation, you will agree with that, but we also need to open up the opportunities of a century of neglect and repression through special training, helpful financing, and providing the necessary facilities, which have been denied, in effect, to Negroes and to other minorities, but mainly to Negroes, for a century?

Governor CHAFEE. I agree.

I would just like to make one final point, if I might, Mr. Chairman. Whereas I pointed out in this testimony that passage of open occupancy legislation affects only a very few of our Negroes, it affects only those who are financially able to take advantage of it and who have had the training and background to take advantage of such laws, however, the virtue of it is that by one of the leaders taking advantage of it, it awakens hope and aspirations within the others, that if so-and-so, a leading member of their group, can go out and get a house in a fine suburb, maybe there is some hope for them. So it sets forth a chain reaction, we hope, which will encourage not only the effort to get better housing, but everything that comes with it, the need for, desire for better education, the need for more savings, working for better skills, and all that.

Senator JAVITS. You are also for some effective program to make up for the disadvantages and handicaps of a century?

Governor CHAFEE. I am, something with some real imagination, very similar to that you yourself proposed, along the lines of the Marshall plan.

Senator JAVITS. Thank you very much, Governor.

Now, counsel for the committee has a question.

Mr. AUTRY. Thank you Senator. I believe the chairman, in this colloquy with you concerning women on juries, mentioned section 9-9-11 of the Rhode Island Code which states that women in certain

courthouses are automatically excluded from jury service in the discretion of the jury commissioner.

(Sec. 9-9-11 follows:)

SERVICE OF WOMEN ON JURIES.—Whenever the jury commissioner shall determine that the accommodations and facilities of the superior courthouse in any county are such as to allow of the service of women as jurors, he shall certify such fact to the secretary of state, and shall include women in the drawings made by him from the cities in such county and shall also direct the town council of each town in such county through the town clerk thereof, to include in the list of persons qualified to serve as jurors, required by the provisions of this chapter, the names of all women over twenty-five (25) years of age who are qualified electors of such town, except such as would be exempted from service under the provisions of subsections 9-9-9⅜ and 9-9-4, and the women whose names are included in such list shall be liable to serve as jurors in the superior court for such county, provided, however, that any women whose name appears on such list who is unable or unwilling to serve as a juror, and shall so notify, over her signature, the jury commissioner or officer who summons her, shall be excused from such service.

Mr. AUTRY. Governor, would you like to identify your associates for the record?

Governor CHAFEE. Yes, sir.

This is Prof. Barry Marks, who is chairman of our commission against discrimination in the State of Rhode Island.

This is Mr. Arthur L. Hardge, who is executive secretary of the commission against discrimination.

Mr. AUTRY. Thank you, Governor.

On page 2 of your statement, you indicate that there are certain exemptions, three or four exemptions, I believe, to the coverage of the Rhode Island law. Would you advocate those exemptions in Federal legislation?

Governor CHAFEE. I would, myself, advocate the exemption that applies to rooms in a roominghouse. I also feel that there should be the exemption of an apartment in at least a two-family house which is owner-occupied. That is an exemption—we go a little further at home; we have three-family owner-occupied house. Such an exemption would be all right with me. I certainly would have the two-family.

Mr. AUTRY. Thank you, Governor.

Thank you, Mr. Chairman.

Senator JAVITS. Governor, do you have any comments on any other aspect of the bill; for example, the right of the person discriminated against to sue and recover fees—that is, his cost of suit—if he succeeds in the suit?

Governor CHAFEE. Well, those are provisions that I will be frank to say I think go pretty far.

Senator JAVITS. They worry you? And you prefer a commission type of administration?

Governor CHAFEE. We ourselves do not have as yet the injunctive provisions. But in our experience, the injunctive provisions would seem to be necessary. All we can do now is investigate, but if the house has been rented to somebody else in the meanwhile, it is just too bad. I must say, we have never thought of going as far as this bill does with the collection of attorney's fees, the provision about mental suffering, is it? Mental pain and suffering. I think those go pretty far.

Senator JAVITS. Is there any other comment, Governor, you wish to make on the bill?

Governor CHAFEE. No. I thank you very much for inviting me down, and I would hope the committee would give some consideration to these points I did raise, which are not specifically concerned with the bill but are concerned with the whole discrimination problem.

Senator JAVITS. Thank you very much, Governor. We appreciate your testimony. It has been very constructive, very helpful, and will help us greatly in our deliberations.

The subcommittee will stand in recess until 2:30.

(Whereupon, at 1 p.m., the subcommittee recessed until 2:30 p.m., the same day.)

AFTERNOON SESSION

Senator ERVIN (presiding). The subcommittee will come to order.

Counsel will call the first witness.

Mr. AUTRY. Mr. Chairman, the first witness this afternoon is John Stemmons, vice chairman of the Legislative Committee of the Texas Real Estate Association, Austin, Tex.

Mr. Stemmons' appearance here has been scheduled at the request of Senator Tower.

Mr. Stemmons, if you would please identify your associates for the record.

STATEMENT OF JOHN M. STEMMONS, VICE CHAIRMAN, LEGISLATIVE COMMITTEE, TEXAS REAL ESTATE ASSOCIATION; ACCOMPANIED BY H. W. BAHNMANN, PRESIDENT, TEXAS REAL ESTATE ASSOCIATION; GEORGE A. McCANSE, PAST PRESIDENT, TEXAS REAL ESTATE ASSOCIATION; AND VINCENT J. SCHMITT, PAST PRESIDENT, TEXAS REAL ESTATE ASSOCIATION

Mr. STEMMONS. Mr. Chairman and members of the committee, I am John M. Stemmons, of Dallas, Tex., a member of and representing the Texas Real Estate Association, an organization of real estate people numbering over 10,000 in the State of Texas.

With your permission, Mr. Chairman, I will present my associates: Mr. H. W. Bahnmann, from Harlingen, Tex., who is president of the association; Mr. George McCanse, from Houston, Tex., who is a past president of the association; and Mr. Vincent Schmitt, from Texas City, Tex., who also is a past president of the association.

We appear here, Mr. Chairman, in opposition to title IV of Senate bill 3296. We contend that government should not deny, limit, or abridge, directly or indirectly, the fundamental right of every person to sell, lease, or rent real property.

Our country has become and remained great because we have held highest two great principles: the inviolateness of the right of the individual and the right to hold private property. There are, of course, limits to all rights. No man is entitled to create a panic which might bring about a calamity such as screaming "fire" in the public theater, and no man can have the right to use of his property to the great detriment of his neighbors. We contend the bill under consideration does not deal with those problems.

It is our solemn belief that the individual American property owner, regardless of race, color, or creed, must be allowed, under law, to retain the right of privacy; the right to choose his own friends; the right to own and enjoy property; the right to occupy and dispose of property without governmental interference; the right of all equally to enjoy property without interference by laws giving special privilege to any group or groups; the right to contract with a real estate broker or other representative of his choice and to authorize him to act for him according to his instructions; the right to determine the acceptability and desirability of any prospective buyer or tenant of his property; the right of every American to choose who in his opinion are congenial tenants in any property he owns—to maintain the stability and security of his income; the right to enjoy the freedom to accept, reject, negotiate, or not negotiate with others. Loss of these rights diminishes personal freedom and creates a springboard for further erosion of liberty.

This country has been a melting pot where ethnic groups have developed competence, stature, and respect by their deeds, not by legislation. We urge you to defeat this vicious bill which would rob us of our birthright.

We appreciate the opportunity to appear before your committee and if there are any questions that you have, we would, of course, endeavor to answer them.

Senator ERVIN. If I interpret the testimony of the Attorney General right, and the Attorney General speaks for the administration, the purpose of the bill is to promote what the administration conceives to be the welfare of nonwhites. Do you think there is any justification for depriving 190 million people of their basic rights of private property for the benefit of any group of Americans?

Mr. STEMMONS. Mr. Chairman, I do not feel that the Negro has any more right than the white man has. I do not feel that the Catholic has any more right than the Protestant has. I think that such legislation as has been proposed here will take away these rights and create literally a Gestapo that would impinge upon every right that we as free people have.

Senator ERVIN. Is it not true that, when you pass legislation for the benefit of certain groups of our population, you are destroying rather than promoting equality?

Mr. STEMMONS. You are destroying the freedom, sir, in my opinion.

Senator ERVIN. Do you not agree with me that the most precious value of civilization is freedom?

Mr. STEMMONS. I do, sir.

Senator ERVIN. And this bill would give some Americans the right to compel unwilling owners to sell and rent property to them contrary to the owners wishes.

Mr. STEMMONS. Mr. Chairman, it would boomerang against all Americans.

Senator ERVIN. Now, for example, this bill says that no owner can discriminate against any person in the sale or rental of property on the basis of race or national origin or religion. Now, I wish you would tell me what is inherently wrong for a member of the Jewish faith, who owns a house in the midst of a residential community, in-

habited by other members of the Jewish faith, to decide that he would rather sell that dwelling to a member of his own faith rather than a member of some other faith? What is inherently wrong in a man having that privilege?

Mr. STEMMONS. There is nothing inherently wrong with it. It is his privilege, sir.

Senator ERVIN. There is nothing inherently wrong with it. Yet under title IV, if that man exercised a perfectly natural preference for a member of his own religion over a person of another religion or no religion, he could be subject to a lawsuit in which he could be assessed an unlimited amount of damages, could he not?

Mr. STEMMONS. Yes, sir. I do not think, Mr. Chairman, that I should be forced to live next to an Episcopalian if I do not want to live next to one, or an Englishman or a Chinaman or a Negro.

Senator ERVIN. Certainly no man ought to be given the legal right to compel you to sell your property to him if you do not want to sell it to him.

Mr. STEMMONS. Certainly not. It takes away my birthright.

Senator ERVIN. Do you not think the right of private property is an inherent right that the Americans have, in the sense that, if you do not have the right to private property, you have no method of enjoying your other rights?

Mr. STEMMONS. This is correct, sir.

Senator ERVIN. Now, in my State, we have several churches which have erected at their own expense, or by use of contributions of their members, homes for the aged members of their denominations, particularly for their retired ministers. Under this bill, if some atheist or a Communist who did not belong to those churches wanted to, he could make these churches rent him an apartment in those buildings, could he not?

Mr. STEMMONS. Yes, sir, by the provision of the establishment of the—I call it the Gestapo under the Attorney General.

Senator ERVIN. Now, on what kind of basis should the Government of the United States assume the power of saying to people of a particular faith that "you are not going to be permitted to rent your property to members of your faith when your property was constructed with that purpose in view"?

Mr. STEMMONS. There is no basis.

Senator ERVIN. Can you think of anything that will do more to destroy the freedom of the American people than the provisions of this law?

Mr. STEMMONS. I think the enactment of this bill would take away our freedom and our birthright.

Senator ERVIN. I have to answer a rollcall. I will be back just as quickly as I can make a trip to the Senate floor and back. In the meantime, counsel would like to ask a couple of questions?

Mr. AUTRY. Mr. Stemmons, there is in the bill, as you probably know, a prohibition against discrimination in what is called "multiple-listing services." Do you use "multiple-listing" services in Texas? I think we need to define this for the record.

Mr. STEMMONS. Well, I am generally familiar with it. Primarily, my business in the real estate business is that of a land developer;

therefore, I am not a member of a multiple listing service, though there are multiple listing services in most of the cities of Texas. The multiple listing service is an agency of the profession itself wherein there is pooled the listings, primarily on residential property, so that there can be a better exposure of this property to people who would be interested in buying it.

Mr. AUTRY. Thank you, sir. I think that will be most helpful to the subcommittee.

You say you are a land developer. Is that about the same as a home builder?

Mr. STEMMENS. Counsel, I actually am an industrial land developer. Most of my work is industrial land development in Dallas, Tex.

Mr. AUTRY. Thank you.

Senator ERVIN. On behalf of the subcommittee, Mr. Stemmons, I want to thank you for making your appearance here and giving us the benefit of your views on this bill.

Mr. STEMMONS. Thank you, Mr. Chairman. We appreciate, very much, your many courtesies, sir.

Mr. AUTRY. Mr. Chairman, the next witness for today is Mr. W. B. Hicks, Jr., executive secretary of the Liberty Lobby, Washington, D.C.

STATEMENT OF W. B. HICKS, JR., EXECUTIVE SECRETARY, LIBERTY LOBBY, WASHINGTON, D.C.

Mr. HICKS. Mr. Chairman and members of the committee, I am W. B. Hicks, Jr., executive secretary of Liberty Lobby. I am here to present the views of our board of policy, in the name of the 175,000 subscribers to our monthly legislative report, Liberty Letter.

Liberty Lobby is opposed to so-called civil rights laws—at least, we do not believe that such legislation is good—primarily because this type of legislation is doing more harm to peaceful relations between the races than all the prejudices and bigotries of the people. These laws are having the cumulative effect of establishing massive and dangerous illusions in the minds of the American people, black and white alike.

With the passage of each new civil rights law, white Americans feel less and less responsble for the welfare of their less fortunate colored neighbors; and more and more convinced that the special protections contained in these laws constitute, in fact, special privileges for one class of Americans. Black Americans, on the other hand, seem to suffer from the illusion that, somehow, the mere passage of a new law is going to create a whole new world of comfort, affluence, and satisfaction of the desire not to be too obviously different from other people.

It is here that the danger lies in this kind of legislation, because, when it becomes apparent to all that this kind of law cannot produce the results that the Negro desires, the black American is going to be the most frustrated of all human beings, and the white American, who has passed one law after another in an effort to satisfy those desires, is going to be completely unsympathetic with the Negro at the time when sympathy will be most needed.

In sum, a civil rights law can have a negative effect on the minds of the American people, but it cannot change their minds in a positive way, or increase the power of their minds to cope with the problems of life. But it can increase the power of the police to control and interfere with the daily lives of Americans of all races, and this is the second general objective of Liberty Lobby to so-called civil rights laws.

Liberty Lobby's specific objections to this year's civil rights proposals are:

1. Title I: This title of the bill purports to forbid any discrimination in Federal court jury selection, but actually requires prospective jurors to give information on race, sex, and religion for entry on records that could be used to accomplish any kind of discrimination desired by the Federal jury officials. Certainly, this is a law that is more likely to be used for jury "packing" than to avoid discrimination. We urge this committee to recommend against that part of title I which provides for the recording of such information.

Senator ERVIN. If you will pardon me for interrupting, what business is it of the Federal Government what the religion of a particular juror is?

Mr. HICKS. Sir, I can think of no business that the Federal Government has with this information, but I can certainly think of possible monkey business that might go on if they have it, and that is exactly the reason why we recommend that such information not be made available to jury officials.

2. Title II: This is a law which admits of just about any interpretation that one chooses to give to the phrase "undue discretion to determine" juror qualifications. Obviously, it can be used for political reasons to prevent the establishment of so-called blue ribbon juries in cases where political interests and politicians are involved. Liberty Lobby points out that such cases happen to be one of the most common instances of the use of blue ribbon juries. Furthermore, it is highly unlikely that such a law will accomplish much racial balance in juries sitting on racial cases, since juror challenges for cause are not touched by the law. Again, as in most civil rights laws, much is promised and expected, but little is changed except, as in this case, another precious right of local government is lost.

3. Title III: Liberty Lobby feels that the courts of the Nation are already open to any legitimate complainant under existing law, and that the powers granted the Attorney General under this title are not needed.

4. Title IV: Liberty Lobby feels that title IV is not only quite unconstitutional on the face of it; but we believe that this title will do much to set back race relations in America. A distinguished member of our board of policy, Dr. Alfred Avins, has written the following statement of our objections to title IV.

Implicit in antidiscrimination legislation in housing is the "conflict between 'reserved private rights such as freedom of association and nonassociation, and nondiscrimination.'" The traditional rights of freedom of choice and association, long thought so inviolate as not to require formal embodiment in constitutional or statutory guarantees, have now been evaporated by the preemption of laws passed without

adequate consideration of the fact that the rights they create must necessarily infringe on the freedom of others, by subjecting them to the exercise of those rights by minority groups.

This statement will deal with the proper identification of those rights, the premises on which they are based, and the persons to whom they properly belong. In so doing, it is hoped that the preservation of these rights may be secured against their prospective demise. [Reading:]

II. FREEDOM OF ENTERPRISE AND PUBLIC UTILITY REGULATION

A. The right to choose customers

The Federal and State due process clauses, which protect liberty and property from governmental deprivation, and meaningless gestures without the underlying assumption of an American economic norm by which yardstick governmental intrusion into private business can be measured. It could hardly be contended that the word "property" in constitutional phraseology comprehends only goods intended for personal consumption—that the due process clause goes no farther than prohibiting government from giving one man's toothbrush to his neighbor. If that is all the protection the Constitution affords, Americans are no better off than Soviet citizens who are also protected in personal consumption property.

The American economic norm, ingrained through centuries of legal development, has been a free enterprise system, characterized by private ownership and control over property, a free competitive market, and only such governmental control or regulation as is made necessary by distortions in the free market. The whole philosophy of our antitrust laws is based on the economic norm of free competition; without such a norm they would be absurd.

A necessary corollary of a free market is the right to choose one's customers free from government dictation. The Fourth Circuit has declared:

"Absent conspiracy or monopolization, a seller engaged in a private business may normally refuse to deal with a buyer for any reason or with no reason whatever."

The United States Supreme Court has consistently upheld the right to refuse to sell when the right has been attacked.

The entire assumption in our economic structure, that economic needs can best be fulfilled by sellers and buyers free to deal with each other, is set at naught when government dictates a choice to either.

B. Public utility regulation

The main characteristics of a public utility is that the public may demand the service as a right. An industry may be closely regulated and yet not be a public utility if it can choose its customers. The true hallmark of public utility is that everyone is entitled to the service without arbitrary discrimination. It is this duty to serve any applicant on equal terms without unreasonable discriminations which constitutes the main difference between public utilities and all other businesses. Accordingly, assuming that discrimination in tenant or vendee selection based on race, creed, color, or national origin is arbitrary, it nevertheless follows that an anti-discrimination law converts private dwellings in particular, and the housing industry as a whole, into public utilities.

The United States Supreme Court has repeatedly held that "the state could not, by mere legislative fiat... convert (private business) into a public utility... for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the 14th Amendment." Since anti-discrimination legislation in housing attempts to impose the obligations of public utilities on private businesses, it is unconstitutional.

III. POLICE POWER AND PROPERTY RIGHTS

A. Police power and market distortions

Those few decisions which uphold anti-discrimination legislation as against due process arguments rely on a series of generalized cliches about the use of the police power, as "one of the least limitable of government powers."

Traditional exercises of the police power fall into two major categories. The first consists of regulating property so that its use does not injure the health or safety of others, or destroy their use of their own property.

The concept that no person can use his property in such a way as to diminish the health, safety, or use of property of others is basic to any orderly society. Anti-discrimination legislation has no relevance to such enactments since it is not the use but the failure to convey the property which is restricted. No attempt has ever been made to support such legislation on this ground; any such attempt would be frivolous.

The other class of cases involves state legislation which was passed to correct deleterious social or economic conditions arising from a distortion in the normal free competitive market, resulting in an inequality in bargaining power and hence the inability of individuals to obtain the benefits of a free competitive market.

The earliest examples of such laws were public utility regulations. Since utilities are by nature monopolies, they represent a permanent distortion of a competitive market norm, and hence justify permanent economic regulation.

Finally where a temporary economic condition, such as war or depression, distorts the normal economic market, the police power permits the state to correct dislocations produced by this condition through temporary legislation which goes no farther than the minimum needed to correct the condition, and lasts no longer than the temporary emergency.

In this connection, rent control is of particular significance because several of the cases which uphold antidiscrimination legislation in housing rely strongly on this precedent. However, rent control is emergency legislation designed to deal with a temporary market imbalance. As Mr. Justice Holmes put it:

The regulation is put and justified only as a temporary measure * * * A limit in time to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.

Anti-discrimination legislation is, of course, nowhere predicated on, or drafted to last for, any purported emergency. Aside from Negro housing, no one has seriously contended that any shortage of housing exists for other groups who are just as much entitled to use the law as Negroes. A look at the New York experience, where the first anti-discrimination law in private housing was passed, shows how utterly baseless is the claim that this legislation is needed to assure good housing to any other segment of the population. Yet the law covers them also.

B. Negro housing needs

Those courts which have done any more than enthuse on how un-American racial or religious discrimination is have totally ignored the alleged need to ban such discrimination against anyone else but Negroes. Instead, they have justified this sweeping legislation on asserted Negro housing needs. We can therefore assume that this constitutes a concession, sub silento, that the statute is unconstitutional as applied to anyone else, and turn to the law as if it singled out Negroes for protection.

As has been noted above, statutes correcting inequalities in bargaining position and thus restoring a normal competitive market have been upheld as appropriate exercises of the police power. However, the mere fact that the state may have a limited interest at some period in time in the correction of a distortion caused by an absence of a normal market does not give it the power to regulate the whole area indefinitely as to both time and people.

Applying these principles to Negro housing, one would expect to find the following limitations to make the statute valid:

(1) The Negro who sought to use the law in fact needed housing.

(2) At the same time and place the law was in effect, a shortage of Negro housing did in fact exist, similar to the shortage producing rent control, and that this shortage did in fact distort a normal competitive market.

(3) Government could find no way consistent with the constitution other than regulation to alleviate the shortage and restore normal market conditions.

(4) The regulation was reasonably calculated to restore normal market conditions. An examination of the typical anti-discrimination law in housing shows that it lacks all four of the above attributes.

First, such legislation does not require that the Negro complainant need the housing. The lower-rent housing, into which Negroes who need housing fall, the shortage of apartments prevents anti-discrimination legislation from being effective because there are enough white applicants to fill all vacancies, while in luxury housing, the small number of Negroes who can afford such accommodations can also afford to have new living quarters built for them.

Since anti-discrimination laws in private housing operate in actuality only in higher rent apartments where there are more vacancies than applicants, only a relatively small percentage of Negroes who are in the upper income brackets and can afford to apply are benefited by them. It is these very people, moreover, who can afford to build new Negro housing. Hence, the 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.

Secondly, anti-discrimination legislation is nowhere limited to places where Negro housing is in short supply, nor is it limited to periods of time during which such shortage exists. The cases simply assume the existence of a shortage, and commentators on both sides have followed suit.

The result of Negro housing gains in the last decade is to make the claim of a Negro housing shortage a myth in many areas and a fading problem elsewhere. If these gains continue at their present rate, the alleged shortage will become fiction in a relatively short time. Like emergency rent control, anti-discrimination legislation in housing is invalid because the emergency is over, and a normal market has been established in many areas.

Thirdly, regulation is not the only way to alleviate what shortage exists. In fact, it is the least efficient. The average Negro needs a house, not a law suit. States can supply housing by building public housing projects for low income Negroes who cannot afford other dwellings, by encouraging private builders to build non-white housing through tax abatement, mortgage reinsurance, and other assistance, and probably most important, by creating a business climate which encourages private building for Negroes. Elimination of restrictions designed to promote integration, such as the ban on newspaper advertisements that indicate that housing is for Negroes, would help by permitting builders for Negroes to reach their market more directly.

Fourthly, anti-discrimination legislation in housing is not only calculated to restore normal bargaining conditions, but as a whole further distorts them. This is because it is both ineffectual in adding to the total Negro housing supply, and creates a number of grave, built-in administrative abuses in being enforced. To demonstrate the problem, we may once again refer to the New York experience, which has the oldest anti-discrimination commissions and laws in housing in the country.

Three years ago, this author pointed out the following facts:

When the law (New York City anti-discrimination ordinance) first went into effect * * * the City Commission on Intergroup Relations, the administrative body charged with administration of this ordinance, received an annual appropriation of $358,050. A year later, only 27 complaints were adjusted to the satisfaction of the complainant or the Commission, for a total cost per dwelling unit obtained via the anti-discrimination law of over $13,000. With this money, the city could virtually have built each of the complainants his own apartment or house.

IV. COMPULSORY INTEGRATION AND FREEDOM OF CHOICE

A. Integration as the motivation for anti-discrimination laws

The asserted justification for these laws as good housing laws cannot stand close scrutiny because it is not in fact their true motivating reason but only their ostensible excuse. The evidence is overwhelming that anti-discrimination laws in housing are motivated by the desire to promote compulsory integration.

The attitude of leading Negro proponents of anti-discrimination legislation and of Negro organizations against proposals for good Negro housing unless it was integrated is well known. Their willingness to sacrifice housing for integration is a matter of record. However, probably the most significant evidence that anti-discrimination legislation is really designed to promote integration comes from New York, which had instituted integration policies in housing at the time such legislation was passed, and pursues them with a single-minded purpose.

The New York City Housing Authority admitted keeping an average of at least 65 apartments in public housing in Negro areas vacant rather than rent them to waiting Negroes in order to obtain whites to better integrate them.

This resulted in a rental loss, in one reported project alone, of $115,000 in less than a year.

It was further reported:

Housing authority officials have conceded that advantages might be given to members of one racial group over those of another in renting a particular apartment in a particular project. But, they have argued, without this policy, projects in certain areas would be tenanted predominately by members of one racial group * * * "Our program * * *" William Reid, Chairman of the Authority, said * * * "is a positive program designed to * * * bring about true integration."

B. Compulsory integration as a negation of freedom of choice

The notion that government can subject people to experiences such as integration to vaccinate them with ideas like it can vaccinate them with medicine must seem a little raw even to the most devoted adherents of an all-powerful state. True, mass brain-washing is not unknown in modern times. In varying degrees, it has been used, and sometimes with remarkable success, in Nazi Germany, Fascist Italy, Communist Russia, and Communist China. But such seeds seem unable to flourish in the soil of non-totalitarian states, where many people are of the view that government has no business meddling with what is in the minds of people.

Senator ERVIN. As a matter of fact, is not this housing section a thought control bill in its ultimate analysis?

Mr. HICKS. Yes, sir; that is exactly the way Liberty Lobby has presented it.

Senator ERVIN. It is to try to compel people not to think of matters of race or matters of religion or matters of national origin when they sell or rent housing?

Mr. HICKS. It is an attempt——

Senator ERVIN. And it punishes people not for what they do but for what they think, in opposition to Government edict.

Mr. HICKS. Well, to the extent that their thoughts are reflected in their outwardly expressed attitudes, it punishes them for thinking, yes, sir. It is an attempt to enforce the biblical injunction to love one's neighbor. That is what it is, and we can see it as nothing more or less than that.

Senator ERVIN. The bill does not condemn an external act, but it condemns the thought which a man has in his mind at the time the external act is done?

Mr. HICKS. That is right, sir. That goes throughout this bill, not just title IV. But when I get to title V, this question of motivation is at the heart of this bill, very definitely.

Senator ERVIN. Yes. That is the reason I say it is an effort on the part of Government by the compulsion of law to make people think like the Government would like them to think, instead of like they may naturally think.

Mr. HICKS. Well, I think we have some evidence to that effect a little further on here in the statement. I do not recall exactly.

In a democracy, people make up their own minds. It is a basic premise that "freedom of the individual in and under a democracy has implicit in it, as an absolute, the freedom of association."

When faced with the fact that antidiscrimination legislation collides head on with freedom of choice, advocates of compulsory integration lose their glib self-assurance and begin to equivocate by trying to find excuses as to why such right should not be considered. These excuses, examined seriatim, are hardly convincing.

The first such argument is moral preachment. A recent case declared:

> The private ownership of private property free of unreasonable restriction upon the control thereof, is truly a part of our way of life, but on the other hand, we as a people do hold firmly to the philosophy that all men are created equal. Indeed, discrimination against any individual here on account of race, color, or religion is antagonistic to fundamental tenets of our form of government and of the God in who we place our trust.

This was a court decision.

It is clear that the only antidote to such a visceral reaction is a theological brief. Research of old cases is only a fruitless road to unnecessary eyestrain. The possibility that Government could enact through penal sanctions whom one shall associate with or talk to is just as absurd as the notion that it could enforce through positive law good table manners or the Boy Scout Code. The intrusion of particular sectarian religious doctrines into the statute books which the above case would sanction is an alarming innovation for a nation of such diverse customs, ideas, and ideals.

Another line of attack is the assertion that the exercise of freedom of choice so as to discriminate based on ethnic grounds lacks a rational basis. To begin with, this contention is irrevelant. It is no more persuasive than would be the contention that freedom of religion should be abolished unless the worshipper could scientifically demonstrate that his mode of worship had a rational foundation, or that freedom of speech should be eliminated unless the speaker could first prove that his thoughts should be heard, or that the right to listen to the radio station which one wants should not be permitted unless he hearer can demonstrate that he has good taste, or that right to choose one's friends should be curtailed unless the person can show that his choice is rational as a matter of social science. The transferring of choice from the individual to government in the realm of personality is the essence of a totalitarian police state.

The short of the matter is that, for all of its fancy trimmings and wrappings, a law banning discrimination in housing is, and is intended to be, a law compelling people to integrate who do not desire to do so. To thus treat human beings as chess pieces, to be moved at the will or whim of others who would like to plan their lives for them, is as flagrant a violation of basic human rights and dignity as can be found in the worst totalitarian system ever devised. Moreover, such integration for the sake of integration over the obvious objections of the people being integrated is patently violative of their constitutional rights. To hold otherwise is to reduce fundamental human rights to the level of norms which can be changed at each passing fad or fancy in social engineering by self-appointed planners for the lives of others.

All the fancy phrases of "democratic living," "fair housing," "open occupancy," and "equality" cannot substitute for the denial of the right of freedom of association. Infringement of this right makes antidiscrimination legislation in houisng violative of fundamental liberties.

5. Title V: Mr. Chairman, Liberty Lobby believes that title V of this act is a prime example of all that is bad in "civil rights" legislation. With the passage of this title of the act, the vast majority of Americans are going to believe that at last there will be an end to the sensa-

tional violence that results from "civil rights" activities in the South. This title is being presented by its proponents as a "law to protect civil rights workers"—no more and no less.

Mr. Chairman, this is no mere "law to protect civil rights workers." It is more than that. It is much less.

First, it is much less, because it is so dependent on a determination of the exact motive that led to the criminal act. In the case of the murdered Mrs. Liuzzo, for example, if the defense could establish that the murderers did not know who the victim was, it could argue that none of the motives specified in this title could apply to the crime—that Mrs. Liuzzo was murdered simply because she was a white woman in intimate association with a black man. As we read this title, such a motive is not covered by the act, and a conviction under this law could not take place.

Even with the passage of this title, there will continue to be acts of violence committed in which a conviction is utterly impossible because of the necessity of proving motive "beyond a shadow of a doubt." This, in turn, is going to lead to increased feelings of pure frustration and disappointment with a law that promised so much, and yet can deliver no more than human beings are capable of delivering. You cannot legislate into being an ability to read the human heart and mind. Yet, that is necessary if you are to fulfill the promise of this proposed title.

And this title is much more than a "law to protect civil rights workers." This is an act to create an entire new criminal code for enforcement by the Attorney General as he sees fit. Far more than "civil rights" is involved in title V.

For example, the Supreme Court of California has declared, in the case of *Mulkey* v. *Reitman*, that so-called "fair housing" is a constitutional right. What good will it do this Congress to decide that title IV of this act should not pass, when it is quite probable, that if the U.S. Supreme Court upholds the California court, then under section 501(a)(5) of title V, "fair housing" can be enforced by the Attorney General as though title IV had passed, but with even harsher penalties?

And what are the union members of the Nation going to think of title V when it is applied to enforce the right of anyone, whether or not a member of the union, to the privilege of union membership? The possibility for abuse of title V is real and sure. Liberty Lobby feels that it should not be passed.

Thank you.

Senator ERVIN. Is it not well recognized that, under the first amendment, the American people have a right to freedom of association?

Mr. HICKS. I have always thought so, sir, but I am not a constitutional expert.

Senator ERVIN. Does not this law undertake to annul the right of freedom of association by compelling the association on the part of people who may not be willing to associate with each other?

Mr. HICKS. Yes, sir, titles IV and V both do this.

Senator ERVIN. We have in North Carolina a very distinguished Negro who was one of the founders of the largest insurance companies that operated and grew among the members of that race, and he has

said on occasion that if a man wants to drink from a cool spring on top of a mountain, he must climb to the top of the mountain to do so. Is not one of the defects in this so-called civil rights bill the fact that it will impart in politicians, also very sincere people as well as politicians, and in the minds of people of the minority race, a conviction that they can have their way legislated into social and economic and other heavens?

Mr. HICKS. Exactly. This is the most dangerous aspect of civil rights legislation.

Senator ERVIN. A person who takes the position that any group of men or any race can legislate their way to the top of the mountain without climbing up there, is either fooling himself or trying to fool somebody else, is he not?

Mr. HICKS. Yes, sir.

Senator ERVIN. And the truth of it is that men of any race can only make a position for themselves in society by their own self-exertion and their own efforts, and there is no other way. There is no way that the Government can transport them to such positions, is there?

Mr. HICKS. Only when it does so at the expense of someone else. There have been persons in and out of government who have gotten rich through government, yes, sir; but only by virtue of taking it away from someone else.

Senator ERVIN. The American government as we now know it was founded upon the idea that all men should stand equal before the law, is that not true?

Mr. HICKS. As I understand it, yes, sir.

Senator ERVIN. And bills of this nature, which are passed for the benefit of one segment of our society, destroy instead of promoting equality, in that they give certain special privileges to one group of people at the expense of the rights of other people. Is that not true?

Mr. HICKS. Yes, sir; and I would like to call your attention to an aspect of this statement that is found in title V, wherein we find the attempt to create a new Federal criminal code which overlooks many of the more common criminal acts of people. In other words, there are many criminal acts such as rape, robbery, purse snatching, that are not covered by this title and yet there are many, many people who would dearly love to see it possible for the FBI to be called in instantly on an interracial rape, for example. But that is not covered by this title.

Senator ERVIN. Well, the truth of it is that this title indicates that the Federal Government is not too much concerned about crimes in general, no matter how atrocious they may be, but only crimes actuated by a certain motive.

Mr. HICKS. And only when certain people have this mental intent. In other words, I feel that many crimes committed on whites by Negroes are also racial crimes, but they are not covered by this title.

Senator ERVIN. Now, is it not true that, under title V, motivation is the primary ingredient rather than external acts?

Mr. HICKS. Yes, sir. In fact, this is the major fault that we find with this whole section, that it depends so much upon proof of motivation, and this is our point, that you cannot legislate into a judge's mind or a jury's mind the ability to discern what is the true intent or motivating purpose behind the act of a person who commits a crime.

There are many persons, I am sure, who have committed atrocious racial crimes in the South about whom none of the motivations herein outlined would apply. I named the *Liuzzo* case as an example, where it is quite likely that Mrs. Liuzzo was not murdered because she was attempting to register voters, but was murdered simply because she was there with a Negro. Yet that is not covered in this title at all.

Senator ERVIN. And under title V the accused would have to be acquitted no matter how atrocious the offense was, if the particular statutory motivation did not exist?

Mr. HICKS. Well, not being a legal expert, sir, I cannot say with great certainly, but I believe that is the case.

Senator ERVIN. Yes. Well, what you said about the nature of these provisions calls to mind something in the Scriptures. As I recall they say that man judges by outward appearances, but God looketh upon the heart. Title V would make the guilt of the man depend upon the condition of the heart rather than external things, would it not?

Mr. HICKS. Yes, sir, and it is this attempt of man to play God—God says, love thy neighbor, so now man is saying, love thy neighbor. And if you do not have love in your heart for your neighbor, man is going to punish you for it. This is the whole principle behind these bills.

Senator ERVIN. And it is a very difficult thing for man to be able to judge the contents of another man's mind or another man's heart, is it not?

Mr. HICKS. History shows that every time a people has attempted to play God, they have ended up on their face.

Senator ERVIN. On behalf of the subcommittee, I thank you for your appearance here in expressing the views of Liberty Lobby in respect to this pending legislation.

We will recess until 10:30 Friday morning.

Thank you.

Mr. HICKS. Thank you.

(Whereupon, at 3:45 p.m., the subcommittee was in recess, to reconvene on Friday, June 24, 1966, at 10:30 a.m.)

CIVIL RIGHTS

FRIDAY, JUNE 24, 1966

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 2 p.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin, Jr., presiding.

Present: Senator Ervin (presiding).

Also present: George Autry, chief counsel and staff director; Houston Groome, Lawrence M. Baskir and Lewis W. Evans, counsel; and Rufus Edmisten, research assistant.

Senator ERVIN. The subcommittee will come to order. Counsel will call the first witness.

Mr. AUTRY. The first witness is Mr. G. V. Viele, president of the Wisconsin Realtors Association. His appearance was scheduled at the request of Senator Proxmire and Senator Nelson.

Would you identify for the record the gentlemen accompanying you.

STATEMENT OF G. R. VIELE, PRESIDENT, WISCONSIN REALTORS ASSOCIATION, MADISON, WIS.; ACCOMPANIED BY EARL A. ESPESETH, PRESIDENT-ELECT AND CHAIRMAN OF THE LEGISLATIVE COMMITTEE; AND DARWIN SCOON, EXECUTIVE VICE PRESIDENT

Mr. VIELE. Mr. Darwin B. Scoon, executive vice president of the Wisconsin Realtors Association of Madison, Wis., and Earl Espeseth, the president-elect of the Wisconsin Realtors Association, also of Madison.

Senator ERVIN. Gentlemen, on behalf of the subcommittee I want to thank you for making your appearance and giving the subcommittee the benefit of your views on title IV.

Mr. VIELE. Thank you for the opportunity.

Mr. Chairman, members of the subcommittee, my name is G. R. "Bob" Viele and I am a realtor doing business in Wausau, Wis. I have been a licensed real estate broker for over 16 years. As president of the Wisconsin Realtors Association, I convened a special meeting of our board of directors for the purpose of ascertaining their position regarding title IV of S. 3296.

I have a unanimous authorization from our directors who represent 30 boards and 2,178 members to appear here today in opposition to title IV of S. 3296.

Wisconsin has a so-called fair housing law. It was passed by our legislature in the fall of 1965 and signed by the Governor December 19, 1965.

In that fair housing law, Wisconsin legislators took a different approach than the one indicated in title IV of S. 3296 by stating that "It is the intent of this act to render unlawful discrimination in housing where the sale, rental or lease of the housing constitutes a business." While the business of housing is not defined, the legislators gave partial recognition to the human right of a property owner to sell and rent to persons of his own choosing by exempting single family dwellings up through four unit dwellings if one of the units is owner occupied.

We feel the legislature compromised the right of a person to the peaceful enjoyment of his property by labeling dwellings as "a business." Nevertheless, the exemption is recognition of the proposition that basic to personal liberty, is each man's right in private life to accept, reject, associate with or disassociate from his fellow men. Further recognition of this principle is contained in the State law by the exemption of roominghouses where the building is occupied by the owner and single rooms are rented to four or less individuals.

I think it is important to emphasize that Wisconsin, in passing this restrictive legislation, recognized that homeowners do have inalienable rights.

Discrimination is obviously a matter of conscience. This legislation, in essence, is an attempt at conscience control. We feel that conscience cannot be "legislated." We don't see how any government can legislate morality unless the convictions of its citizens are in agreement with the moral issue involved. The Volstead Act is a good example of that.

In Wisconsin, churchmen were in the forefront in advocating forced housing laws. We posed this question to them:

> Does your leadership for, and advocacy of, forced occupancy laws come from a sense of frustration because of your inability to inspire your congregations to accept voluntarily open housing policies?
>
> In other words, having failed in the pulpit do you now seek to impose your point of view on your congregations and all other through harsh repressive legislative measures? What basis have you for believing that a law will succeed where your leadership failed?

If we are considering moral issues, where should the burden of proof be? According to the legislation in question, the burden of proof rests on the defendant-homeowner and the homeowner is guilty until he can prove his innocence. Let me illustrate: If a member of a minority group complains that he was refused housing, the presumption is that the refusal is based on religion, race, or national origin. The defendant homeowner must then prove that he refused to rent for a reason other than race, religion, or national origin; and there are other reasons for refusing—lack of finances, children, pets, and so forth.

At this point someone would have to make a determination, or a guess, as to what the defendant homeowner was thinking when the refusal took place. How could anyone evaluate a state of mind? How would you try to answer this problem? The proposed legislation asks others to do so.

This bill purports to make the courts experts in the field of finances. Quite an assignment. To do so they would have to consider many factors. Involved in the price of a house is (1) the credit rating of the buyer; (2) the amount of downpayment; (3) the availability of money to lend. The proposed bill authorizes the courts, in effect, to determine rates of interest, terms and conditions of sale or rental, land contracts, and mortgages, and all of this must necessarily relate back to the lender's state of mind. And there we go again; the real reason for refusal to rent, sell, or lend is always difficult to prove (or to support by concrete evidence) other than the defendant homeowner's statement; because a state of mind is highly subjective and influenced by so many factors.

Earlier, I mentioned existing legislation. What affect has it had? Wisconsin's housing law, in effect since December 19, 1965, has produced six complaints despite a vigorous program of solicitation. Five have been dismissed for lack of evidence. One is still in question. A program which has produced one complaint, on which no decision has been reached, is a poor record. It suggests that there is a less than overwhelming need for housing laws? The overwhelming thought is that thousands of Wisconsin taxpayer dollars have been spent to produce one complaint.

Proponents of housing laws assume that the main reason minorities do not move into other areas is because of discrimination. We claim this is the "big lie" that is being perpetrated on the American public.

In fact, however, the paucity of complaints apparently stems from the lack of an active demand from members of minority groups for integrated housing.

We make this statement because—

1. An overwhelming percent of our realtors have never had a member of a minority group ask for service.

2. Most selling homeowners have never had a member of a minority group even look at their home with a view to buying it.

3. Several years ago the Federal Housing Authority and the Veterans' Administration in Metropolitan Milwaukee had over 400 homes to which they had acquired title. Most of them in all-white neighborhoods. Virtually none of these homes were sold to members of a minority group even though the terms of financing were superior to the terms available from private lenders. And this, in spite of the fact that civil rights leaders were fully informed of their availability.

4. The housing division of the Milwaukee Committee for Equal Opportunity acquired 268 listings on properties which were available in all areas of Milwaukee to anyone. The program was discontinued because only four families had been placed during the 2 years the program was in effect.

Let's turn from Milwaukee to our second largest city. Madison, Wis., has had a housing law for several years. In that time there has been no apparent change in housing patterns in that city.

What about "forced morality" legislation in other States? Has there been a general movement toward integrated neighborhoods in those States where forced housing laws are in effect? We understand not. And certainly in Wisconsin there has been no discernable change.

How do you explain the foregoing? We feel that:

1. The most obvious reason is lack of purchasing power by members of minority groups.

2. Many of those who are able to finance a home purchase in a white neighborhood do not do so because—

(*a*) Fear of an unfriendly neighborhood situation.

(*b*) Fear of loss in value (don't forget these are the people who have acquired economic stability. They are smart and knowledgeable people who won't waste their money on poor investment).

(*c*) Many minority families really don't want to move away from friends and relatives. Ethnic groups have characteristically throughout the American history lived together in groupings. Housing legislation in now way encourages a family to be a looker, nor does it induce real estate brokers to actively recruit potential buyers among minority groups.

Since there has been little or no activity as a result of existing legislation, let's ask the real question: What are we trying to legislate, fair housing, or integration? In Wisconsin is it a problem of adequate housing for minority groups? Antidiscrimination in housing legislation seems unconcerned with housing for minority groups. The emphasis is apparently on compulsory integration.

Integration exists in a neighborhood up to the moment the last nonminority group resident departs from that neighborhood. It follows, therefore, that you can achieve integration only through legislation controlling the movement of people. This poses the absurd question: If I want to move from an integrated neighborhood, must I find a white buyer for my property?

Nowhere in the proposed bill is there any provision concerning the good faith of the person who asks about the availability of property for rent or sale. (See clipping printed at end of statement.) In Wisconsin we call it testing, otherwise known as entrapment. Title IV is so written as to put the defendant homeowner at the mercy of the unscrupulous rabble-rouser.

What actions have we realtors taken in order to help minority groups finding housing? In view of the claim that minority groups in Wisconsin were unable to find suitable housing, two separate committees were set up by boards of realtors—one in Milwaukee, the biggest city of Wisconsin and the other in Madison, the second largest. Public announcements were made that these committees would help a member of any minority group find housing. In Madison there were no applicants. In Milwaukee there were 12 or 14 applicants, all of them white, all with large families.

In December 1964 hearings were held by the industrial commission concerning opportunities for housing for members of a minority group. These hearings clearly developed the thesis that housing was available to members of a minority group who had the economic means to pay the rent or purchase price and in the neighborhood of their selection. True the precise house or apartment was not always available. The one across the street equally priced and equally adequate was.

Let me reiterate: In Wisconsin there has been no demonstrated need for forced housing legislation either prior to or subsequent to the passage of Wisconsin's housing law.

Proponents of such forced housing argue that the lack of complaints is brought about by homeowners and landlords fear of the punitive provisions of the law. On the contrary, the reason is that actual cases of outright discrimination are the exception rather than the rule. It would indeed be tragic if fundamental rights of private property ownership were swept aside by a law making it in effect a Federal offense to exercise freedom of contract and freedom of choice in determining with whom one may execute a sale or rental contract.

We strongly urge that you eliminate title IV from the pending bill.

(The supplement to Mr. Viele's statement follows:)

[From the Milwaukee Star, July 10, 1965]

AROUND MADISON

(By Larry Saunders)

HOUSING IN MADISON

Old-timers will probably say that Madison has a housing problem. I'm sure there is some truth to the statement. But, when landlords read the equal opportunity law, and realize that this law protects both landlord and tenant, then fears should disappear.

I personally made some inquires. I tried three areas in different parts of the city—westside, eastside and southside. On the eastside and westside the response was very good. I had no problems.

I used a real estate concern to work for me on the southside. The agent never showed up, and never called me back. But, two out of three is a vast improvement over a few years ago. Which proves laws do change many people's ideas.

I say all this to say. If you want a job done—be it apartment hunting or job hunting—do it yourself. Learn to stand on your own two feet. You will be much more respected.

Senator ERVIN. I read an editorial in a leading newspaper of the country some time ago which stated in substance that, in our solicitude for the welfare of so-called minority groups, our thinking was becoming twisted to the point where there are many people who consider minority groups have rights superior to the majority. Do you not think this is rather queer thinking?

Mr. VIELE. Yes, sir; I would agree with you.

Senator ERVIN. Has it not been your observation that particular ethnic groups prefer to live in residential neighborhoods with other members of the same ethnic group?

Mr. VIELE. Yes, sir. And we do have this in our area. We have entire little villages that are ethnical groups. For instance we have several little cities that are predominantly Polish, or predominantly German Lutherans, or predominantly German Catholic.

Senator ERVIN. This is a result of quite a natural instinct on the part of people—that people find other people with similar cultures and similar ethnic origin more congenial to live among than people of different ethnic groups and different ideas?

Mr. VIELE. Yes, sir; we also find that where we have the Amish buying farms in areas in Wisconsin. They wish to group together.

Senator ERVIN. You have given us a very illuminating résumé of what has happened under the so-called fair housing law in Wisconsin. How is that fair housing law administered?

Mr. SCOON. It is administered by the industrial division, a division of the industrial commission. It is by a panel.

Senator ERVIN. And they have employees, do they not?

Mr. SCOON. Yes, sir.

The CHAIRMAN. When the law went into effect, I imagine a great deal of notoriety was given to the fact that it had been passed.

Mr. SCOON. Yes, sir. A colored man was hired to head up the division.

Senator ERVIN. And undoubtedly it has cost the State of Wisconsin a great deal of money to set up the machinery to administer the law.

Mr. SCOON. Something in excess of $50,000.

Senator ERVIN. In excess of $50,000. I believe you stated there have been five complaints filed?

Mr. SCOON. Six complaints in 6 months.

Senator ERVIN. And five of the complaints have been rejected as unsupported by the evidence?

Mr. SCOON. Yes, sir.

Senator ERVIN. And the other one has not yet been determined?

Mr. SCOON. That is correct, sir.

Senator ERVIN. Don't you believe, Mr. Viele, that one of the most fundamental rights of human beings is the right to acquire property, and to use that property as they see fit, and to sell that property to whom they please, or rent it to whom they please.

Mr. VIELE. Yes, sir; I believe that very deeply.

Senator ERVIN. Don't you think it is a departure from the American dream of freedom to propose that the Federal Government should deny 190 million people the right to sell or lease their property to whom they please?

Mr. VIELE. I believe this very deeply. I believe this is the thing that made this country great—the right to hold property the way you wish.

Senator ERVIN. I assume in Wisconsin, as it is in most States, that your laws require that a contract relating to the sale of real property, to be enforcible, shall be in writing, signed by the party that is seeking to enforce the contract?

Mr. VIELE. Yes, sir. All of our agreements in Wisconsin relative to real estate must be in writing.

Senator ERVIN. Is it not your belief that was put in the law in order to furnish stability to real estate titles and make it certain what the terms of the contracts were with respect to real estate?

Mr. VIELE. I think Mr. Scoon might be able to answer that better.

Mr. SCOON. That is correct. It is spelled out in our statute of frauds.

Senator ERVIN. Now, if this title IV were enacted into law, it would to all practical intents and purposes nullify the wisdom that prompted the passage of State laws requiring contracts relating to real estate to be in writing.

Mr. SCOON. It would depart; that is right, sir.

Senator ERVIN. It would introduce chaos into this field by making controversies concerning real estate dependent upon oral testimony, would it not?

Mr. SCOON. Yes, sir; it would. In addition to that, the authority to issue injunctive relief for specific performance would add to the un-

certainty with regard to the status of the property and the transfer of it.

Senator ERVIN. Are you a member of the bar?

Mr. SCOON. Yes, sir.

Senator ERVIN. Title IV, authorizes a court to grant any relief that the court deems appropriate, is that not out of harmony with general rules of law that the relief which one is entitled to is defined by the law itself, rather than by the will of the court?

Mr. SCOON. Yes, sir. That is my understanding. It is in derogation of the common law.

Senator ERVIN. And under the power to issue injunctions, the court could nullify the bargains made between the seller and the purchaser by granting an injunction to preclude the carrying out of those contracts, although they might be in writing and in conformance with the law of Wisconsin or any other State where the property is located.

Mr. SCOON. I believe that is a proper conclusion to be drawn; yes, sir.

Senator ERVIN. Can you imagine any more serious inroads on the right of freedom of Americans than to pass a law and let the coercive power of law be used to determine who shall purchase property or reside in certain communities, instead of allowing those matters to be settled by the consent of the people in those communities?

Mr. SCOON. We always thought that a good many people immigrated to this country so that they could enjoy the right of property, and to enjoy the fruits of the property which they have earned through their own efforts, to hold and dispose of as they saw fit.

Senator ERVIN. Would not this law be passed for the purpose of giving a relatively small segment of the American population rights superior to those of the great majority of Americans, depriving the great majority of Americans of the right of ownership of private property.

Mr. SCOON. If this type of legislation can be passed, where do we stop?

Senator ERVIN. I want to thank you gentlemen for your appearance here today, and for giving the subcommittee the benefit of your views on this most important title.

Mr. VIELE. Thank you, sir.

Mr. AUTRY. Mr. Chairman, the next witness is Mr. John W. Dutton, president of the Pennsylvania Realtors Association, whose appearance is scheduled at the request of Senator Scott.

Senator ERVIN. Mr. Dutton, for the purpose of the record, would you introduce the gentlemen who accompanies you?

STATEMENT OF JOHN W. DUTTON, PRESIDENT, PENNSYLVANIA REALTORS ASSOCIATION, HARRISBURG, PA.; ACCOMPANIED BY PAUL H. RITTLE, PRESIDENT, GREATER PITTSBURGH BOARD OF REALTORS; AND WARREN G. MORGAN, COUNSEL, PENNSYLVANIA REALTORS ASSOCIATION

Mr. DUTTON. Thank you, Senator. On my left is Warren G. Morgan, counsel for the Pennsylvania Realtors Association. On my right is Mr. Paul G. Rittle, from Pittsburgh, president of the Greater Pittsburgh Board of Realtors.

Thank you, sir.

Senator ERVIN. On behalf of the subcommittee, I wish to thank all of you gentlemen for making your appearance here for the purpose of giving the Subcommittee your views on title IV.

Mr. DUTTON. It is our honor to be here, sir.

Mr. Chairman and members of the subcommittee, I am John W. Dutton, a realtor engaged in the business of real estate brokerage in Wayne, Pa. I appear here today as president of the Pennsylvania Realtors Association. Accompanying me are Warren G. Morgan, Esq., the association's counsel, from Harrisburg, and Paul H. Rittle of Pittsburgh, president of the Greater Pittsburgh Board of Realtors. We wish to testify in opposition to title IV of S. 3296.

The Pennsylvania Realtors Association represents more than 3,500 relators engaged in the real estate profession. It consists of 49 member boards from all parts of the State, and is affiliated with the National Association of Real Estate Boards.

May I begin by saying that we share with many members of the Congress a desire to find a meaningful solution to the problem of "open occupancy" in housing. We believe that the future happiness of our children, as well as the continued greatness of this country, in no small way depend upon finding such a solution. In our considered opinion title IV of S. 3296 will not provide the desired solution.

This legislation would unnecessarily and imprudently supersede State and local ordinances governing fair housing in Pennsylvania.

In addition—as others who have preceded me have testified—this legislation would supplant voluntary effort with naked compulsion. It would inject Federal police powers into an area of private domain; and would destroy that prerequisite to the establishment of a binding contract, mutual assent of both parties.

In our judgment, title IV would retard rather than enhance the progress that has been made in the general area of interracial relations in the State of Pennsylvania.

We would like to make it unmistakably clear that we do not oppose open occupancy, or equal opportunity for all to obtain housing. We believe that our association in Pennsylvania has demonstrated this by the degree with which we have cooperated with the Pennsylvania Human Relations Commission, which has been in operation since 1961.

We oppose the intervention of Federal power and force in private relations and the use of legal compulsion to force a pattern of housing that we believe can be accomplished only through education, mutual understanding, and voluntary effort.

We are opposed to the use of Federal power to force a contract between buyer and seller which, in the absence of such force, would not be executed. We can think of no proposal that is more destructive of individual freedom and personal liberty than title IV.

We further believe that the enforcement of title IV would result in confiscation of personal rights by the Federal Government.

It would deprive a property owner of his right to "freedom of contract" and also, the traditional right to dispose of his property in accordance with his own desires.

We are gravely concerned over the inequities which run through this legislation. For example, allowing a complainant the services of

Federal attorneys, at no cost and with no financial responsibility, invites flagrant misuse of the legal apparatus of the Department of Justice to harass and exploit property owners with all the taxpayers bearing the cost.

The constitutional questions raised against this proposal have been effectively dealt with by others much more competent in this field. We will not touch on this area except to state that we share the opinion that this proposal exceeds the powers granted the Congress by the Constitution.

We believe it is necessary, however, to direct specific criticism to the enforcement procedures set forth in title IV of the bill, and their potential for gross injustice, harassment, and multiplicity of actions. Section 406, which provides for suit by private persons through civil actions in the U.S. district courts, demonstrates a striking disregard for the rights of defendants. In addition to equitable remedies, a prevailing plaintiff may recover punitive damages and compensation for humiliation as well as mental pain and suffering, and counsel fees. No provision whatsoever is made for a vindicated defendant who, in addition to costs of the suit, may well have suffered substantial inconvenience and financial loss by reason of restraint on the fight to dispose of his property.

It is important to understand that apart from judicial restraint the mere filing of a suit could well affect the stability of title to property, so as to effectively inhibit disposition of the property during pendancy of the suit.

Experience reveals that the subject matter of title IV generates extreme emotional reactions by potential complainants. Even if we choose to ignore the inherent possibilities of fraudulent claims to coerce settlements, the provisions of section 406 for court-appointed counsel and exemption from fees and costs amounts to an open invitation to irresponsible and unfounded suits. It would place in the hands of extremists a potent weapon for harassment of innocent property owners.

We submit that the enforcement procedures of section 406 are unreasonable and contrary to traditional concepts of the administration of justice.

Representing a State which has had a "Human Relations Act" since 1961, we wish to state that our association at that time, as well as today, opposed the enactment of such legislation. We believe that this is moral legislation and that no law—State or Federal—will achieve by force what can be attained only through education, understanding, and voluntary effort.

In the 5 years of its existence this State law has by no means brought about open occupancy housing. On the contrary, we witness almost daily innumerable threats of intimidation, designed to force the property owner to submit to demands which are not even required by the law.

We feel that the injustices inherent in the proposed title IV are far greater than those which flow from the Administration of our State act.

Without compromising our position, we would like to state for the record that our members are complying with the State law, and many

go much further than this in their cooperation with Pennsylvania's Human Relations Commission.

We further oppose title IV on the grounds that its enactment would have a devastating effect on voluntary neighborhood patterns. The neighborhood is the basic pattern for the American way of life. It brings together people because of common interests, congeniality, and acceptance.

We believe that if there is any one factor basic to a neighborhood it is the "pride of ownership." By depriving the property owner of his freedom and contract, and injecting the use of force by Federal statute to compel him to sell to a buyer not of his own choosing, the Congress, in enacting title IV would destroy this most important attribute of private property ownership.

As we stated earlier, we share with the Congress the concern that an appropriate solution to this problem must be found.

We believe that time—not force—will bring about an orderly solution.

We urge the subcommittee to reject title IV.

I thank you, Mr. Chairman, and the members of the subcommittee, for giving us this opportunity to appear before you today.

Senator ERVIN. I would like to ask Mr. Morgan one or two questions.

Mr. MORGAN. Yes, sir.

Senator ERVIN. Mr. Morgan, is it not your understanding that the Constitution of the United States was drafted and ratified in order to commit to the National Government the solution of national problems, and to leave to States and local governments the solution of local problems?

Mr. MORGAN. That is emphatically my understanding.

Senator ERVIN. Can you imagine anything more local than real estate and transactions relating to real estate within the borders of a State?

Mr. MORGAN. I cannot, sir.

Senator ERVIN. Has it not always been a fundamental principle in our law that the owner of real estate not only has dominion over the physical property itself, but also has certain rights which may be called attributes of the right of property—namely, the right to use his property as he sees fit, and the right to sell his property to whom he pleases, and the right to lease his property to whom he pleases?

Mr. MORGAN. These are basic philosophies as far as I am concerned, Senator.

Senator ERVIN. In addition to that hasn't it been the basic philosophy of our Government that the making of individual contracts between individuals is a matter of regulation for State law rather than Federal law?

Mr. MORGAN. Yes, sir.

Senator ERVIN. Now, title IV of this bill would curtail to a very substantial degree the right of private property, would it not; in that it would deprive the owner of the right to determine to whom he should sell his property, or to whom he should lease his property?

Mr. MORGAN. Precisely—that is our objection.

Senator ERVIN. And by so doing it would destroy two of the great attributes of private property, would it not?

Mr. MORGAN. Yes, sir.

Senator ERVIN. And has it not been generally held throughout the United States when you destroy or seriously curtail one of the attributes of private property, you are taking private property without due process of law?

Mr. MORGAN. That is my understanding of the law.

Senator ERVIN. Now, the fifth amendment has a provision that no private property shall be taken for public use without the payment of just compensation.

Is there not a fundamental principle of interpretation of a written document, whether it is the Constitution or a statute or a contract, that the expression of one thing is the exclusion of other things?

Mr. MORGAN. I think that is a proper statement of law, sir.

Senator ERVIN. And would you not construe that provision of the fifth amendment which I have summarized to exclude the idea that there can be under any circumstances the taking of private property for private use?

Mr. MORGAN. This is my construction.

Senator ERVIN. Now, isn't one of the fundamental objects of this bill to take private property for private use?

Mr. MORGAN. That is certainly my impression.

Senator ERVIN. Do you not think that in the practical operation of this bill, that a person who had property to sell or to lease, if he wanted not to be involved in controversy and litigation, where a person of his own race or a person of his own religion wanted to purchase the property, and a person of another race or another religion wanted to purchase the property on the same terms, would invariably yield to the temptation to discriminate against the man of his own race or his own religion in favor of the man of a different race or different religion? That would be the only way he could keep out of the danger of being involved in a lawsuit for an unlimited amount of damages, is it not?

Mr. MORGAN. I think this is of substantial concern.

Senator ERVIN. So you agree with me that legislation of this character is very well described as forced housing, because it does attempt to force a man to sell to persons other than his own race or own religion in preference to those of his own race or religion?

Mr. MORGAN. We think that language is entirely apt.

Senator ERVIN. Now, hasn't it always been a principle of our law that not only the title to real estate should be regulated by the State where the real estate is situated, but also that contracts relating to such real estate should also be regulated by the law of the State?

Mr. MORGAN. I personally regard this as fundamental.

Senator ERVIN. And does not this statute impair to a very considerable degree the right of people to make contracts, the freedom of contract with respect to real estate?

Mr. MORGAN. This is an ultimate concern.

Senator ERVIN. And it abolishes, as Mr. Dutton so well stated, the theory that contracts relating to real estate should be contracts made by mutual consent of the parties?

Mr. MORGAN. Precisely.

Senator ERVIN. Can you think of any legislative proposal which threatens more injury to freedom than title IV?

Mr. MORGAN. Sir, I cannot. As a lawyer I am shocked by the text of this particular proposal.

Senator ERVIN. Mr. Dutton's statement pointed out I think very well the fact that title IV would have a tendency to promote fraudulent claims.

Is it not true that virtually all of the States of the Union, in an effort to prevent fraudulent claims concerning the title to real estate and contracts relating to the title of real estate, have statutes which are called statutes of fraud?

Mr. MORGAN. I am sure they all have.

Senator ERVIN. These statutes provide that contracts relating to real estate should be in writing to be enforcible.

Mr. MORGAN. Exactly.

Senator ERVIN. Would not title IV, if enacted into law, and upheld by the courts, destroy the purpose for which these statutes were passed in all the 50 States?

Mr. MORGAN. It introduces a whole new concept in my judgment.

Senator ERVIN. Instead of having the requirement of written contracts where title to real estate is concerned, you would have all of a man's earnings, savings, and everything else of that nature put in jeopardy by a fraudulent claim of one party, who would merely orally assert that he attempted to purchase a man's property, and the man refused to sell it to him on account of his race or religion?

Mr. MORGAN. Precisely. It violates historically tested precedent.

Senator ERVIN. And under the remedial provisions of title IV, the man would have a right to collect unlimited damages for mental anguish and humiliation—the sky would be the limit.

Mr. MORGAN. That is our understanding.

Senator ERVIN. Now, do you not believe, as a member of the bar, that procedure should be equally concerned with the rights of plaintiffs and defendants?

Mr. MORGAN. I do, and we stated that objection in Mr. Dutton's remarks.

Senator ERVIN. Yes, you stated it exceedingly well. Now, this law ignores that fundamental principle, and provides that the court can appoint an attorney to represent the plaintiff, but there is no provision for an attorney to represent the defendant, is there?

Mr. MORGAN. None that we can find, sir.

Senator ERVIN. And it also contains a provision that a prevailing plaintiff may recover counsel fees, but the prevailing defendant may not?

Mr. MORGAN. In the Commonwealth of Pennsylvania this is a complete departure from precedent.

Senator ERVIN. There is something in the Scriptures saying the devil travels to and fro seeking whom he may devour. Don't you think there may be some danger that a small segment of the bar would travel to and fro, to stir up litigation in which they would hope to have their fee paid by the defendant whom they did not represent?

Mr. MORGAN. It has been suggested that a small segment of the bar might be so inclined.

Senator ERVIN. Do you not consider that the best principle concerning counsel fees in litigation is that the lawyer should look to his own client for the payment of his fee, rather than his adversary?

Mr. MORGAN. Very emphatically.

Senator ERVIN. Gentlemen, I want to thank you for a very clear and lucid statement.

Mr. AUTRY. Gentlemen, I have just two questions.

Either Mr. Morgan or Mr. Dutton may reply.

As Mr. Dutton pointed out, the emphasis in Pennsylvania State law is on conciliation. If there is a complaint, you must proceed with conciliation first with the Human Relations Commission. Is that correct?

Mr. MORGAN. Yes, that is so.

Mr. AUTRY. What would be the effect on Pennsylvania law if title IV is passed as introduced. What happens? I suppose the complainant would have his choice of forums.

Mr. MORGAN. As we examine these statutes, it appears that he could proceed under the Pennsylvania act, and obtain such remedy as he might be awarded there, and then proceed under the Federal law for damages. Of course under Pennsylvania law we do not have any provision for money awards.

Mr. AUTRY. No punitive damages in the Pennsylvania law.

Mr. MORGAN. Precisely.

Mr. AUTRY. And no damages for humiliation. So he could receive the benefits of the conciliation portion of the Pennsylvania statute, and then proceed to receive money damages through the Federal provision.

Mr. MORGAN. It appears that way from the language of 406—that the money award is possibly in the alternative.

Mr. AUTRY. Thank you.

The other question I wanted to ask you is this:

Section 403(c) prohibits "printing or publication, or causing to be printed or published any notice, statement, or advertisement with respect to the sale, rental, lease of a dwelling which indicates any preference, discrimination, with relation to race, color, religion, or national origin." Assume a Catholic family living near Duquesne put an advertisement in the paper merely stating "Catholic family has room to rent for Duquesne student," what would be your interpretation of the effect of that advertisement under this section?

Mr. RITTLE. According to your interpretation, it certainly would be an implied preference, and certainly in violation of the written act as it is, or the proposed act.

Mr. AUTRY. The defendant would be subject to all of the penalties under Pennsylvania law and to additional penalties under the Federal law; is that correct?

Mr. RITTLE. That is correct.

Mr. AUTRY. That is all. Thank you very much, gentlemen.

Senator ERVIN. The hearing will recess until 10:30 Tuesday morning.

(Whereupon, at 2:45 p.m. the committee recessed, to reconvene at 10:30 a.m., Tuesday, June 28, 1966.)

CIVIL RIGHTS

TUESDAY, JUNE 28, 1966

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:35 a.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin, Jr., presiding.

Present: Senators Ervin (presiding) and Javits.

Also present: George Autry, chief counsel and staff director; Houston Groome, Lawrence M. Baskir, and Lewis W. Evans, counsel; and Rufus Edmisten, research assistant.

Senator ERVIN. The subcommittee will come to order.

Counsel will call the first witness.

Mr. AUTRY. Mr. Chairman, the first witness is the Honorable Robert C. Byrd, Senator from West Virginia.

Senator ERVIN. On behalf of the subcommittee, Senator, I want to welcome you to the hearing and express to you the gratitude of the subcommittee for your appearance and the expression of your views.

STATEMENT OF HON. ROBERT C. BYRD, A U.S. SENATOR FROM THE STATE OF WEST VIRGINIA

Senator BYRD. Thank you, Mr. Chairman.

I have a somewhat lengthly statement here. I shall not take the time of the committee to read all of the statement, but I shall attempt to touch the highlights and then I would ask that the entire statement be printed in the record.

Senator ERVIN. Let the record show that the entire statement will be printed verbatim in the record following the Senator's oral testimony.

Senator BYRD. Mr. Chairman, I voted for the 1957 Civil Rights Act, the 1960 Civil Rights Act, and the 1962 resolution providing for a constitutional amendment to abolish the poll tax as a prerequisite for voting in Federal elections.

I voted against the 1964 Civil Rights Act because, among other things, it constituted, in my judgement, a serious and unconstitutional invasion of property rights and opened the way, through the "blackjack" title VI of that act, for the ruthless withholding of Federal funds from States which are reluctant to bow to the whims of Federal bureaucrats.

I voted against the so-called Voting Rights Act of 1965, not because I would deny the constitutional rights of any qualified elector

to vote, but because of my belief that article I, section 2, of the Federal Constitution, and article II, section 1, of the Federal Constitution and the 17th amendment to the Federal Constitution clearly empower the States to determine the qualifications of electors and therefore the Federal Congress lacks the power under the Constitution to enact laws which have the effect of qualifying persons to vote who are not otherwise qualified, under State laws, to vote.

I have never doubted for one moment, and I have often so stated, that the Supreme Court of the United States, as presently constituted, would uphold both the 1964 act and the 1965 act, but this did not, and it does not now, change my opinion of the basic unconstitutionality of both acts.

Senator ERVIN. If I may interject myself at this point with a question which I think is directly pertinent to your statement, does not the Constitution of the United States require each Senator to take an oath or to make an affirmation that he will support the Constitution?

Senator BYRD. It does.

Senator ERVIN. And does not this oath, in your opinion, obligate each Senator to determine for himself whether or not proposed legislation meets the requirements of the Constitution or violates those requirements?

Senator BYRD. In my opinion, it does.

The Congress has now been asked by the President to enact the Civil Rights Act of 1966, and it has been introduced in the Senate as S. 3296.

Title I of this act deals with the selection and assignment of jurors; title II deals with discrimination in the selection of grand and petit juries in State courts; title III is designed to further facilitate forced integration in the schools and other public facilities; title IV is designed to eliminate discrimination in housing; title V provides new and strengthened criminal penalties to protect Negroes and civil rights workers; and title VI authorizes the necessary appropriations to implement the provisions of the bill.

As I have said on previous occasions, it is difficult to vote against a bill carrying a civil rights title. We are all in favor of equal civil rights under the Constitution, and a civil rights title carries with it an aura of respect and humanitarianism that immediately, and almost automatically and unequivocally, commands veneration and support. But the title of "civil rights" may be misleading insofar as the substantive provisions of a legislative measure are concerned. This was especially true in the case of the 1964 Civil Rights Act.

The so-called Civil Rights Act of 1966 is another example of a legislative "wolf in sheep's clothing." I refer to the measure as a "so-called" Civil Rights Act for the simple reason that it is not truly a civil rights act at all. It purports to insure and protect the civil rights of some people, but it would violate the constitutional and civil rights of others. As a matter of fact, it would violate the property rights of all property owners, whatever the owners' race.

I make particular reference to title IV of the act, which some people like to call the "open housing" section but which can be more accurately labeled, I think, the "forced housing" section. If ever there a disturbing example of attempted governmental interference with property rights in the United States of America, this section of the

bill is, by any standard, such an example. It is so monstrously shocking to the concept of true civil rights as to be outright deceptive when it carries a civil rights label. This section does violence to every principle upon which the constitutional, legal, and national rights of property are based.

Now, there are those who argue that human rights are above property rights, but the two are, in fact, inseparable. The right to own, use, manage, and dispose of real property is a profoundly basic human right. This is a human right which existed long before the Constitution of the United States. The natural and inherent property rights of man were acknowledged by the eighth commandment in the Decalogue, propounded on Mount Sinai: "Thou shalt not steal."

Gottfried Dietze, professor or political science at the Johns Hopkins University, in his book "In Defense of Property," says that:

> The freedom of men consists of particular, specific rights or liberties. These rights can be classified into two major categories, namely, the liberal rights to be free from coercion and the democratic rights to participate in government. Property rights, constituting a prominent part of the first group, are superior to the rights of the latter group.

St. Augustine had this to say about property:

> Whence does each possess what he does possess? Is it not human right? For by divine right "the earth is the Lord's and the fullness thereof"; poor and rich are supported by one and the same earth. But it is by human right he saith, "This estate is mine, this house is mine, this slave is mine."

Sir John Fortescue maintained that property existed prior to human law—a popular theory convenient for limiting the claim of government.

John Locke, who lived in the latter part of the 10th century, believed that property was one of the sacred trinity of natural rights. Locke maintained that private property is an institution of nature rather than an institution of men. He maintained that Adam and his posterity were born with property rights but that political rights evolved from agreements among men.

Sir William Blackstone, in the 18th century, wrote thusly:

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

The Encyclopaedia Britannica of 1778–83 specified that every Briton was endowed from birth with the three great and primary rights of "personal security, personal liberty, and private property."

James Madison's reference in the 10th Federalist paper to "the diversity in the faculties of men, from which the rights of property originate," and to the "different and unequal faculties of acquiring property" from which the possession of different degrees and kinds of property immediately results," are clearly Lockean.

In the American Democrat, 1838, James Fenimore Cooper spoke of property as "the base of all civilization," and of the rights of ownership as created by labor, human or animal, he said "the food obtained by toil, cannot be taken from the mouth of man, or beast, without doing violence to one of the first of our natural rights."

Life, liberty and property had been equally entitled to the protection of the English sovereign since King John attached his signa-

ture to the great charter "in the meadow which is called Runnymeade. and life, liberty and property were, by the constitutions of the recently established governments equally entitled to the protection of those governments. Man's life and his liberty could only be taken, if the public good demanded it, after trial by jury. Likewise, a man could be shorn of his property or his property rights only after proper trial and just compensation. These three cardinal rights were co-equal and not one was subordinate to another.

Our constitutional forebears had great respect for property and the rights of property owners, and the Constitution is replete with provisions securing the rights which attach to property. The same can be said with regard to the Bill of Rights, and in these first 10 amendments we find again that our forebears sought to protect not only personal rights, but property rights as well.

In the 14th amendment, insofar as the supreme law of the land, as written, was concerned, property rights were on a parity with personal rights. Property rights as well as personal rights were protected by due process. Unlawful seizure of either property or person was prohibited. Litigants over property were entitled to trial by jury as when the life or liberty of the litigants was involved.

Take away this basic human right—the right to own, use, manage, and dispose of one's own property—and what will happen to American free enterpises? What will happen to the individual American's incentive to labor and save and build for himself and his children? What will happen to that basic concept of freedom, that one has a moral and legal and natural right to enjoy the fruits of his own just labors and the product of his own honest sweat? What will have become of the priceless concept, so clearly enunciated by Sir Edward Coke, English jurist and political philosopher, "For a man's house is his castle"? The concept had appeared earlier in various Latin maximums, and the third and fourth amendments to the Federal Constitution are concerned with this idea.

And if the Federal Government may interfere with the constitutional, legal, and natural rights of the owner in the sale, lease, or rental of real property, what will hinder an all-powerful Federal Government from arrogating to itself the power, at some future time, to control the terms of sale or the price of the rental? What will hinder the Federal Government from arrogating to itself the power, at some future time, to control the use and disposal of the household furnishings and other personal property of an owner?

The gradual erosion of property rights which we have seen taking place, unnoticed to some people, but at the advocacy of others, will receive a massive impetus if title IV of this bill is enacted.

Title IV makes it unlawful for the owner of any building or land used for residential purposes to refuse to sell, rent, or lease such dwelling or land to any person if such refusal constitutes discrimination. It will be unlawful for the owner to publish any notice or advertisement, with respect to the sale, rental, or lease of a dwelling, that indiates any preference or discrimination based on race, color, religion, or national origin. It will also be unlawful for any bank, insurance company, or other lending institution to deny loans to persons applying therefor for the purpose of purchasing dwellings if such denial constitutes discrimination.

Senator ERVIN. If I may interrupt at this point with a question, you point out very correctly that, under title IV of the pending bill, it will be unlawful for the owner to publish any notice or advertisement with respect to the sale, rental, or lease of a dwelling that indicates any preference or discrimination based on race, color, religion, or national origin. But the question is this: If the Congress has the power to prohibit advertisement, which is nothing in the world but the exercise of the right to freedom of speech, in this particular field, what is there to prevent Congress from prohibiting free speech in every other field?

Senator BYRD. I see nothing, Mr. Chairman, to prohibit its doing so. I believe that perhaps a little later, I do touch on this point in a way to show that, under the commerce clause, while the Congress has gone a long way—too far, in reality, in my judgment—there still is a bar under the commerce clause which would prevent the Congress, in my judgment, from going this far, even.

Senator ERVIN. Some of the members of our Supreme Court say that the right of freedom of speech is absolute and subject to no limitation, and others say the right to freedom of speech is subject to only a few limitations, such as that a man shall not commit libel and the like. Now, to me it seems we have reached a tragic condition in this Nation if Congress can prohibit advertisements of this nature. If the Congress can do this, it can prohibit political advertisements and any other form of freedom of speech.

Senator BYRD. Mr. Chairman, I share that viewpoint. I feel that it would be unconstitutional for the Congress to enact this provision, but I have not—I must say that I have been surprised in the past to see Congress enact provisions, which, in my judgment and in the judgment of others who are far better constitutional lawyers than I ever expect to be, and in the fact of past decisions of the Supreme Court, are clearly unconstitutional. But even so, even though this title would appear to fly in the face of the Constitution, I would not be surprised, if the Congress shows the bad judgment to enact this bill, I would not be surprised to see the Supreme Court of the United States, as presently constituted, uphold the law.

Of course, instances of discrimination in the rental and sale of property based on religion or national origin are relatively rare, but these terms have been included to make the legislation more palatable. Why the legislation does not make it unlawful for property owners to discriminate against elderly people or against parents with children has not been explained, but one may conjecture that it is perhaps because the elderly folks and the large families have not yet taken to the picket lines and have been noticeably absent from the sit-ins and, thus far, have not threatened to riot.

Any plaintiff, under this section of the bill, may bring a civil action in a U.S. court, and the court may appoint an attorney for the plaintiff and authorize commencement of the action without payment of fees, cost, or security. Moreover, the U.S. Attorney General may intervene for, or in the name of the United States if he certifies that the action is of general public importance, with the United States being entitled to the same relief as if it instituted the action. The defendant property owner, of course, will have to furnish his own attorney and pit his own resources, be they great or small, against the all-pow-

erful Federal Department of Justice and its lawyers whose salaries his own taxes help to pay.

The court may grant such relief as it deems appropriate including a temporary or permanent injunction, restraining order, or other order, and it may award damages to the plaintiff including damages for humiliation and mental pain and suffering, and up to $500 punitive damages. The court may also allow a prevailing plaintiff a reasonable attorney's fee as part of the costs. No provision is made, however, for allowing a prevailing defendant an attorney's fee as part of the costs of successfully defending his case against an unjust charge. This is inequitable, because if it is fair for the prevailing plaintiff to be allowed an attorney's fee, it should be fair for the prevailing defendant to be allowed an attorney's fee, and there is ample precedent.

I submit that this legislation is unconstitutional in that it is weighted against the property owner, denying him the equal protection of the law, and insofar as it constitutes governmental interference with his ownership, use, management, and freedom to dispose of his property, it deprives him of property without due process and thus contravenes the fifth amendment to the Federal Constitution.

I have not reached any decision as to the other sections of this bill, but my study of the "forced housing" section convinces me that it is an invasion of property rights, whether the property owner is white or nonwhite, and is thus unfair and unconstitutional.

I recognize that every man has a right to buy or rent property, but, by the same token, the owner of property has an equal right to refuse to sell or refuse to rent if he so chooses, and, in my judgment, he is not dutybound to explain his reasons.

Christ admonished us to "love thy neighbor as thyself," but he did not deny one's right to choose his associate or his neighbor. In this regard, it may also profit one to reflect upon Christ's parable of the laborers hired for the vineyard, in which parable the householder, in reference to his property, answered his critics by saying, "Is it not lawful for me to do what I will with mine own?"

If a man, white or Negro, of his own volition, wishes to sell or rent to a party of another color, that, in my judgment, is his prerogative, and he cannot legally be prevented from so doing. But I do not believe that he should be under compulsion to do so, against his own free will, by virtue of governmental constraints of any sort.

Mr. Chairman, I have cited a number of cases in the next several pages which, in my judgment, clearly indicate that this title of the bill, cannot be based upon the 14th amendment, nor can it be based upon the commerce clause. I think it would be clearly unconstitutional, and I therefore have attempted so to state by citing the cases and by quoting from the rulings therein.

I shall move to page 18.

The Supreme Court has not yet held that the 14th amendment in any way limits an owner's right to refuse to sell or lease a home or apartment on racial grounds. It has not yet held that where a State or political subdivision exercises no element of coercion upon a homeowner to discriminate, the homeowner is not free to discriminate without violating the provisions of the 14th amendment. The Court has not even been able to muster a majority to hold that the 14th amend-

ment prohibits the owner of a restaurant or other place of public accommodation from discriminating among customers on account of race, which is a much easier conclusion to support. See *Bell* v. *Maryland* 378 U.S. 226 (1964).

To conclude that the 14th amendment, itself, does not prohibit the homeowner from discriminating on account of race is not necessarily to conclude that, in the exercise of its power to enforce the 14th amendment, the Congress could not prohibit such discrimination. However, the Court has held, in the civil rights cases, to which I have previously alluded in my statement—that the 14th amendment does not empower the Congress to prohibit owners of inns, carriers, and places of amusement from discriminating on account of race. Although Congress, in 1964, enacted new legislation prohibiting owners of certain inns, restaurants, and places of amusement affecting commerce from discriminating on account of race, basing the act in part on its power to enforce the 14th amendment, the Court has held the legislation constitutional on the basis of the commerce power. Two of the Justices would have upheld the law on the basis of section 5 of the 14th amendment.

To the extent that the *Civil Rights* cases, supra, would confine the power of the Congress under section 5 of the 14th amendment to the adoption of "appropriate legislation for correcting the effects of * * * prohibited State laws, and State acts, and thus to render them effectually null, void, and innocuous," three Justices have indicated a readiness to overrule it. (*United States* v. *Guest*, supra, opinion of Mr. Justice Brennan, joined by the Chief Justice and Mr. Justice Douglas, concurring in part and dissenting in part, slip opinion at 9.) To the extent that the *Civil Rights* cases would be inconsistent with the conclusion that "the specific language of section 5 empowers Congress to enact laws punishing all conspiracies—with or without State action—that interfere with 14th amendment rights" three additional Justices have indicated a willingness to overrule it without specifically naming it. (Id. concurring opinion of Mr. Justice Fortas, slip opinion at 2.) Can these three and three be put together to add up to a majority that would hold title IV to be a valid exercise of congressional power under section 5? Not necessarily.

Let us assume for a moment, what would seem to be, or at least about to become a completely valid assumption, that section 5 does empower Congress to enact laws punishing all conspiracies—with or without State action—that interfere with 14th amendment rights. Is the right of a prospective home buyer not to have his purchase offer refused on account of his race such a right? It has never been held to be and the combined opinions in *Guest*, supra, would not seem to compel such a conclusion.

In measuring the breadth of Federal power to be inferred from the dictum, in *Guest*, that section 5 of the 14th amendment "empowers the Congress to enact laws punishing all conspiracies—with or without State action—that interfere with 14th amendment rights," it should be noted that the acts with which the Court was there concerned, were conspiracies carried out in part "by shooting Negroes; by beating Negroes; by killing Negroes." They were acts clearly criminal and the only question was whether the United States had made them punishable or had the power to make them punishable by Federal law.

To the extent that title IV prohibits the intimidation or coercion of a mob attempting to prevent a Negro family from moving into a neighborhood, the dicta in *Guest* would seem to indicate that the 14th amendment is a sound constitutional basis for title IV. The acts reached are clearly criminal and the only question is whether the Congress has a concurrent jurisdiction with the States to punish them. To the extent that title IV forbids an individual homeowner to refuse to sell his home, or rent an apartment or room in it because of the race of a prospective purchaser, there would seem to be a leap beyond the dicta in *Guest*. Nothing in the 14th amendment makes the discriminatory act of the homeowner in refusing to sell or rent on account of race unlawful. Nothing in the 14th amendment, as it has been construed until now, requires the State to make such discriminatory act unlawful. What 14th amendment right would Congress be enforcing?

Attorney General Katzenbach argues persuasively that Federal prohibition of discrimination in the sale or rental of housing is an appropriate exercise of the power of Congress to enforce the 14th amendment.

It may be Mr. Justice Harlan, in his concurring opinion in *Peterson* v. *Greenville*, supra, and I think it worth repeating, who has given the most eloquent answer to this argument:

> Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: liberty and equality. Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be arbitrary, capricious, even unjust in his personal relations are things entitled to a large measure of protection from governmental interference. This liberty would be overridden, in the name of equality, if the strictures of the (14th) amendment were applied to governmental and private action without distinction. Also inherent in the concept of State action are values of federalism, a recognition that there are areas of private rights upon which Federal power should not lay a heavy hand and which should more properly be left to the more precise instruments of local authority.

There is not much doubt that title IV lays a heavy Federal hand on areas of rights which had heretofore been considered private. It admits no exceptions to its restrictions. The private religious home which rents accommodations to the elderly of its faith would no longer be able to exclude members of other faiths. The Swedish Old Folks Home would be required to open its doors to the elderly of other ancestries. The owner of a home who has fallen upon hard times and decides to rent a few rooms to tide him over would have his choice of tenants circumscribed.

If the Federal power can reach this far into individual private lives, is there anything to prevent it from reaching into private associations—private clubs, private schools, private organizations of any kind?

There would seem to be little doubt, now, that the constitutionality of legislation to enforce the 14th amendment will be measured by the test formulated by Mr. Justice Marshall in *McCulloch* v. *Maryland*, 4 *Wheat.* 316, 420 (1819).

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

The question to be answered by the Court, should title IV be enacted, would seem to be: "Is this law prohibited?" By the first amendment prohibition against denials of the right to freedom of association? By the fifth amendment prohibition against deprivations of property without due process of law or against the taking of property for public use without just compensation? By the ninth amendment's recognition of the existence of rights retained by the people, with the classical expression of one such right perhaps being that "a man's home is his castle"? Or by the 10th amendment, which is more than a State's rights amendment, reserving as it does those "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, * * * to the States respectively or to the people"?

Both precedent and reason would seem to answer a resounding "Yes" to the question "Is this law prohibitive?"

It is clear that, under its commerce power, the Congress can prohibit certain aspects of racial discrimination. It is also clear that under the commerce power the Congress can regulate intrastate activities if they have a substantial effect upon commerce. The cases hold that the commerce power can reach retailers whose sales are wholly intrastate and only one-ninth of whose purchasers are made out of State. *Meat Cutters* v. *Fairlawn Meats*, 353 U.S. 20 (1957). The cases hold that Congress can reach a farmer who grows wheat on his own farm for his own consumption even though the amount he grows may be trivial. *Wickard* v. *Filburn*, 317 U.S. 111 (1942).

Is there really any activity which can be considered so local that Congress cannot regulate it? Are the limitations on the commerce power real or only theoretical?

It is not too difficult to find some limits within the Constitution itself. In *Mabee* v. *White Plains Publishing Co.* 327 U.S. 178 (1946), it was shown that even a daily newspaper, whose out-of-State circulation was only about one-half of 1 percent of its sales, could be reached under the commerce power by way of the Fair Labor Standards Act. Suppose, however, Mr. Chairman, that instead of trying to regulate the wages and hours of the newspaper's employees, Congress tried to regulate its editorial policy. Suppose, for instance, that there had been so much editorializing on automobile safety that people stopped buying automobiles which in turn, cause plant shutdowns and threatened the entire economy of the Nation. Suppose that Congress, after extensive hearings linking the economic depression to safety editorials, decided that the only way to relieve unemployment and get the Nation back on its wheel was to prohibit editorials on automobile safety. Could this be a valid exercise of the commerce power?

In addition to the question whether the rental of a room or the sale of a house by its owner is a transaction so strictly local that the Congress cannot reach it under the commerce power, title IV, as presently framed, presents questions akin to that posed by an attempt to reach a newspaper's editorial policy under the commerce power. Does title IV, by prohibiting a religious home from discriminating on account of race or religion in the disposition of its rooms, infringe upon the first amendment right to free exercise of religion?

Does title IV, by permitting a court to order a man to sell his home, on which he has invited bids, to a person whose bid was rejected on account of race, religion, or national origin, interfere with any of the homeowner's constitutional liberties?

Does title IV infringe on any constitutional liberty of a racial, religious, or national group by prohibiting it from subdividing an island or other tract of land for homesites to be sold or leased only by approval of the group?

Does title IV infringe any constitutional liberties of a man who rents a room or two in the house in which he lives by requiring him not to discriminate among prospective tenants on account of race, religion, or national origin.

Whatever determination the Congress makes with respect to these threshold questions will be entitled to great weight in the Supreme Court's deliberations in the event of title IV's enactment. It is the Court, however, which will have the final word, since the Court is the ultimate arbiter of the meaning of the Constitution. Although the commerce power of the Congress may be plenary, it is the Court which will determine whether the activity reached is truly commerce as well as whether the method by which Congress has chosen to regulate it is prohibited by some other provision of the Constitution. Perhaps the fairest generalization which may be made is that the closer Congress comes to restricting the purely private prejudices of the individual homeowner, the more likely will the Court be to find that the Congress has exceeded its power.

I, as a U.S. Senator, believe that the Congress will have once again exceeded its power if it enacts title IV and I, therefore, am opposed to title IV, the "open occupancy section of S. 3296.

(The complete statement of Senator Byrd follows:)

STATEMENT BY U.S. SENATOR ROBERT C. BYRD, IN OPPOSITION TO TITLE IV OF S. 3296, THE CIVIL RIGHTS ACT OF 1966

I voted for the 1957 Civil Rights Act, the 1960 Civil Rights Act, and the 1962 resolution providing for a Constitutional amendment to abolish the poll tax as a prerequisite for voting in Federal elections.

I voted against the 1964 Civil Rights Act because, among other things, it constituted, in my judgment, a serious and unconstitutional invasion of property rights and opened the way, through the "blackjack" Title VI of that Act, for the ruthless withholding of Federal funds from states which are reluctant to bow to the whims of Federal bureaucrats.

I voted against the so-called Voting Rights Act of 1965, not because I would deny the constitutional rights of any qualified elector to vote, but because of my belief that Article I, Section 2 of the Federal Constitution, and Article II, Section 1 of the Federal Constitution, and the 17th Amendment to the Federal Constitution clearly empower the states to determine the qualifications of electors and, therefore, the Federal Congress lacks the power under the Constitution to enact laws which have the effect of qualifying persons to vote who are not otherwise qualified, under state laws, to vote.

I have never doubted for one moment, and I have often so stated, that the Supreme Court of the United States, as presently constituted, would uphold both the 1964 Act and the 1965 Act, but this did not, and it does not now, change my opinion of the basic unconstitutionality of both Acts.

The Congress has now been asked by the President to enact the Civil Rights Act of 1966, and it has been introduced in the Senate as S. 3296.

Title I of this Act deals with the selection and assignment of jurors; Title II deals with discrimination in the selection of grand and petit juries in state courts; Title III is designed to further facilitate forced integration in the

schools and other public facilities; Title IV is designed to eliminate discrimination in housing: Title V provides new and strengthened criminal penalties to protect Negroes and civil rights workers; and Title VI authorizes the necessary appropriations to implement the provisions of the bill.

As I have said on previous occasions, it is difficult to vote against a bill carrying a Civil Rights title. We are all in favor of equal civil rights under the Constitution, and a Civil Rights title carries with it an aura of respect and humanitarianism that immediately, and almost automatically and unequivocally commands veneration and support. But the title of "Civil Rights" may be misleading insofar as the substantive provisions of a legislative measure are concerned. This was especially true in the case of the 1964 Civil Rights Act.

The so-called Civil Rights Act of 1966 is another example of a legislative "wolf in sheep's clothing." I refer to the measure as a "so-called" Civil Rights Act for the simple reason that it is not truly a civil rights act at all. It purports to insure and protect the civil rights of some people, but it would violate the constitutional and civil rights of others. As a matter of fact, it would violate the property rights of all property owners, whatever the owners' race.

I make particular reference to Title IV of the Act, which some people like to call the "open housing" section but which can be more accurately labeled, I think, the "forced housing" section. If ever there were a disturbing example of attempted governmental interference with property rights in the United States of America, this section of the bill is, by any standard, such an example. It is so monstrously shocking to the concept of true civil rights as to be outright deceptive when it carries a civil rights label. This section does violence to every principle upon which the constitutional, legal, and natural rights of property are based.

Now, there are those who argue that human rights are above property rights, but the two are, in fact, inseparable. The right to own, use, manage, and dispose of real property is a profoundly basic human right. This is a human right which existed long before the Constitution of the United States. The natural and inherent property rights of man were acknowledged by the Eighth Commandment in the Decalogue, propounded on Mt. Sinai: "Thou shalt not steal."

Gottfried Dietze, professor of political science at the Johns Hopkins University, in his book "In Defense of Property," says that:

"The freedom of men consists of particular, specific rights or liberties. These rights can be classified into two major categories, namely, the liberal rights to be free from coercion and the democratic rights to participate in government. Property rights, constituting a prominent part of the first group, are superior to the rights of the latter group."

Jean Bodin, in the 16th century, referred to the opponents of private property as foolhardy dreamers:

"In taking away these words of Mine and Thine, they ruine the foundation of all Commonweales, the which were chiefly established to yield unto every man that which is his own."

St. Augustine had this to say about property:

"Whence does each possess what he does possess? Is it not human right? For by divine right 'the earth is the Lord's and the fullness thereof': poor and rich are supported by one and the same earth. But it is by human right he saith, 'This estate is mine, this house is mine, this slave is mine.' "

Sir John Fortescue maintained that property existed prior to human law—a popular theory convenient for limiting the claims of government.

Fortescue defended the rights of inheritance by reference to the divine edict: "In the sweat of thy face shalt thou eat bread, till thou return unto the ground."

He maintained that man was thus granted a property in the things he should acquire by his labor, for since the bread which a man gained by labor was his own, and no man could eat bread without the sweat of his own brow, every man who toiled not was prohibited from eating the bread which another man had acquired by his own sweat; property in the bread so gained accrued only to the man who labored for it, and in this way property capable of descent first originated.

John Locke, who lived in the latter part of the 10th century, believed that property was one of the sacred trinity of natural rights. Locke maintained that private property is an institution of nature rather than an institution of men. He maintained that Adam and his posterity were born with property rights but that political rights evolved from agreements among men.

Sir William Blackstone, in the 18th century, wrote thusly:

"There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."

The Encyclopaedia Britannica of 1778–83 specified that every Briton was endowed from birth with the three great and primary rights of personal security, personal liberty, and private property.

Edmund Burke, in his "Reflections on the Revolution in France," published in 1790, write:

"I should therefore suspend by congratulations on the new liberty of France until I was informed how it had been combined with government * * * with solidity and property, with peace and order * * *. All these (in their way) are good things, too; and without them liberty is not a benefit whilst it lasts, and is not likely to continue long."

James Madison's reference in the 10th Federalist paper to "the diversity in the faculties of men, from which the rights of property originate," and to the "different and unequal faculties of acquiring property" from which "the possession of different degrees and kinds of property immediately results," are clearly Lockean.

In the first half of the 19th century, property rights usually received protection under the contract clause. As early as 1787, John Marshall wrote to Joseph Story, his future colleague on the Bench, that he considered the clause that no State shall pass any law impairing the obligation of contracts to be of "high value." As Chief Justice, by employing a far broader conception of contract than had been prevalent in 1787, and by combining this conception with the principles of 18th century natural law, he was able to make of the contract clause a mighty instrument for the protection of the rights of private property. It has been suggested that he did so in order to promote national power. It is probably more correct that the great disciple of Hamilton believed that the protection of property was of primary concern. Like Hamilton, Marshall considered a more perfect Union as a means for securing the rights of the individual, among which those of property figured prominently. He never altered his opinion. Toward the end of his career, Marshall was a "supreme conservative" rather than a nationalist, a man who wanted protection of property more than anything else.

In the American Democrat, 1838, James Fenimore Cooper spoke of property as "the base of all civilization," and of the rights of ownership as created by labor, human or animal, he said "the food obtained by his toil, cannot be taken from the mouth of man, or beast, without doing violence to one of the first of our national rights."

In the Supreme Court, Joseph Story had been a stanch supporter of John Marshall, and made statements that were as good as any that were made in defense of property. In 1821, he wrote Marshall on the situation in his home State of Massachusetts:

"Considering the popular cant and popular prejudices, I have some fears that we shall not have wisdom enough to maintain ourselves upon the present decided basis that protects property."

In his remarks on the contract clause, Story quotes with approval the 44th essay of the Federalist Papers with its strong denunciation of legislative activities that are inimical to property rights, and gives a broad interpretation of the clause. Having praised the provision that no person shall be deprived of his property without due process of law, he writes on the concluding clause of the fifth amendment which provides that private property shall not be taken for public use without due process of law:

"This is an affirmation of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government, almost all other rights would become utterly worthless, if the government possessed an uncontrollable power over the private fortune of every citizen. One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature, and the rulers."

Life, liberty and property had been equally entitled to the protection of the English sovereign since King John attached his signature to the great charter

"in the meadow which is called Runnymeade, between Windsor and Staines, on the 15th day of June, in the 17th year of our reign," and life, liberty and property were, by the constitutions of the recently established governments equally entitled to the protection of those governments. Man's life and his liberty could only be taken, if the public good demanded it, after trial by jury. Likewise, a man could be shorn of his property or his property rights only after proper trial and just compensation. These three cardinal rights were coequal and not one was subordinate to another.

Our constitutional forebears had great respect for property and the rights of property owners, and the Constituption is replete with provisions securing the rights which attach to property. The same can be said with regard to the Bill of Rights, and in these first 10 amendments we find again that our forebears sought to protect not only personal rights, but property rights as well.

In the 14th amendment, insofar as the supreme law of the land, as written, was concerned, property rights were on a parity with personal rights. Property rights as well as personal rights were protected by due process. Unlawful seizure of either property or person was prohibited. Litigants over property were entitled to trial by jury as when the life or liberty of the litigants was involved.

Of course, the law balances the right of the individual to the free and untrammeled use of his property against the interests of society. This is why the doctrine of nuisances evolved. A man is free to use his property as he desires only to the extent that he does not injure others in doing so.

The power of the Government to tax property or the profits thereof is itself a recognition of the right of the Government to limit the profits of property for public purposes.

The concept of eminent domain should also be mentioned here. This doctrine of the right of the sovereign to take the property of an individual was recognized by the courts subject to two stringent restrictions. The taking must be for a public use, and the owner must be paid just compensation.

Take away this basic human right—the right to own, use, manage, and dispose of one's own property—and what will happen to American free enterprise? What will happen to the individual American's incentive to labor and save and build for himself and his children? What will happen to that basic concept of freedom, that one has a moral and legal and natural right to enjoy the fruits of his own just labors and the product of his own honest sweat? What will have become of the priceless concept, so clearly enunciated by Sir Edward Coke, English jurist and political philosopher, "For a man's house is his castle"? The concept had appeared earlier in various Latin maxims, and the Third and Fourth Amendments to the Federal Constitution are concerned with this idea.

And if the Federal Government may interfere with the constitutional, legal, and natural rights of the owner in the sale, lease or rental of real property, what will hinder an all-powerful Federal Government from arrogating to itself the power, at some future time, to control the terms of sale or the price of the rental? What will hinder the Federal Government from arrogating to itself the power, at some future time, to control the use and disposal of the household furnishings and other personal property of an owner? Far fetched? Not at all, if one may judge by recent experience.

The gradual erosion of property rights which we have seen taking place, unnoticed to some people, but at the advocacy of others, will receive a massive impetus if Title IV of this bill is enacted.

Title IV makes it unlawful for the owner of any building or land used for residential purposes to refuse to sell, rent, or lease such dwelling or land to any person if such refusal constitutes discrimination. It will be unlawful for the owner to publish any notice or advertisement, with respect to the sale, rental, or lease of a dwelling, that indicates any preference or discrimination based on race, color, religion, or national origin. It will also be unlawful for any bank, insurance company or other lending institution to deny loans to persons applying therefor for the purpose of purchasing dwellings if such denial constitutes discrimination.

Of course, instances of discrimination in the rental or sale of property based on religion or national origin are relatively rare, but these terms have been included to make the legislation more palatable. Why the legislation does not make it unlawful for property owners to discriminate against elderly

people or against parents with children has not been explained, but one may conjecture that it is perhaps because the elderly folks and the large families have not taken to the picket lines and have been noticeably absent from the sit-ins and, thus far, have not threatened to riot.

Any plaintiff, under this section of the bill, may bring a civil action in a U.S. Court, and the court may appoint an attorney for the plaintiff and authorize commencement of the action without payment of fees, cost, or security. Moreover, the U.S. Attorney General may intervene for, or in the name of, the United States if he certifies that the action is of general public importance, with the United States being entitled to the same relief as if it had instituted the action. The defendant property owner, of course, will have to furnish his own attorney and pit his own resources, be they great or small, against the all-powerful Federal Department of Justice and its lawyers whose salaries his own taxes help to pay.

The court may grant such relief as it deems appropriate including a temporary or permanent injunction, restraining order or other order, and it may award damages to the plantiff including damages for humiliation and mental pain and suffering, and up to $500 punitive damages. This court may also allow a prevailing plaintiff a reasonable attorney's fee as part of the costs. No provision is made, however, for allowing a prevailing defendant an attorney's fee as part of the costs of successfully defending his case against an unjust charge. This is inequitable, because if it is fair for the prevailing plantiff to be allowed an attorney's fee, it should be fair for the prevailing defendant to be allowed an attorney's fee, and there is ample precedent.

I submit that this legislation is unconstitutional in that it is weighted against the property owner, denying him the equal protection of the law, and insofar as it constitutes governmental interference with his ownership, use, management and freedom to dispose of his property, it deprives him of property without due process and thus contravenes the Fifth Amendment to the Federal Constitution.

I have not reached any decision as to the other sections of this bill, but my study of the "forced housing" section convinces me that it is an invasion of property rights, whether the property owner is white or non-white, and is thus unfair and unconstitutional.

I recognize that every man has a right to buy or rent property, but, by the same token, the owner of property has an equal right to refuse to sell or to refuse to rent if he so chooses, and, in my judgment, he is not duty bound to explain his reasons.

Christ admonished us to "love thy neighbor as thyself," but he did not deny one's right to choose his associate or his neighbor. In this regard, it may also profit one to reflect upon Christ's parable of the laborers hired for the vineyard, in which parable the householder, in reference to his property, answered his critics by saying, "Is it not lawful for me to do what I will with mine own?"

If a man, white or Negro, of his own volition, wishes to sell or rent to a party of another color, that, in my judgment, is his prerogative, and he cannot legally be prevented from so doing. But I do not believe that he should be under compulsion to do so, against his own free will, by virtue of governmental constraints of any sort.

I realize that one who opposes this so-called civil rights proposal runs the risk of being labeled a bigot by the anti-bigot bigots, but I feel that my position is constitutionally sound. It is a position that protects property rights, a basic human right, of both Negro and white property owners, against governmental invasion.

DOES CONGRESS HAVE POWER TO PROHIBIT RACIAL DISCRIMINATION IN THE RENTAL, SALE, USE, AND OCCUPANCY OF PRIVATE HOUSING?

The Administration's spokesmen have no doubt that constitutional basis for Title IV are to be found in the Fourteenth Amendment and the Commerce Clause. There are others, however, who have pronounced doubts about the efficacy of the one or the other of these constitutional provisions as a basis for federal legislation restricting rights which have heretofore been considered so personal and transactions which have been considered so local that no power of Congress could reach them.

Of course, the ultimate resolution of the constitutional issues raised by Title IV must await action by the Supreme Court if Congress indeed enacts Title IV. The Congress, however, has an obligation to make its own initial determination.

THE POWER OF CONGRESS UNDER THE FOURTEENTH AMENDMENT

From 1883, when it decided the *Civil Rights Cases*, 109 U.S. 3 (1883), through March 28, 1966, when it decided *United States* v. *Price*, 383 U.S. 787, and *United States* v. *Guest*, 383, U.S. 745, the Supreme Court has consistently held that the Fourteenth Amendment protects the individual against state action, not against wrongs done by individuals. As it stated in *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948):

"* * * the action inhibited by the First Section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

Most recently, in *United States* v. *Guest*, *supra*, (decided March 28, 1966, slip opinion, p. 9) the Court said:

"It is a commonplace that rights under the Equal protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority. The Equal Protection Clause "does not . . . add anything to the rights which one citizen has under the Constitution against another." *United States* v. *Cruikshank*, 92 U.S. 542, 554–555. As Mr. Justice Douglas more recently put it, "The Fourteenth Amendment protects the individual against *state action*, not against wrongs done by individuals." *United States* v. *Williams*, 341 U.S. 70, 92 (dissenting opinion). This has been the view of the Court from the beginning. *United States* v. *Cruikshank*, supra; *United States* v. *Harris*, 106 U.S. 629; *Civil Rights Cases*, 109 U.S. 3; *Hodges* v. *United States*, 203 U.S. 1; *United States* v. *Powell*, 212 U.S. 564. It remains the Court's view today. See e.g., *Evans* v. *Newton*, 382 U.S. 296 (1966) *United States* v. *Price*, *supra*."

In the *Civil Rights Cases*, *supra*, the Court did more than hold that the Fourteenth Amendment itself did not reach an individual's acts of discrimination; it held that Congress, in the exercise of its power to enforce the Fourteenth Amendment, could not reach an individual's acts of discrimination. It held unconstitutional Sections 1 and 2 of the Civil Rights Act of 1875 (c. 114 §§ 1 and 2, 18 Stat. 335, 336) which guaranteed all persons the right to equal enjoyment of the accommodations and privileges of inns, public conveyances on land and water, theaters and other places of public amusement without regard to race or color, and punished violations of those rights. Although this case has not been overruled, that aspect of it which would deny to Congress the power to punish individuals for interfering with rights guaranteed by the Fourteenth Amendment may well be overruled as soon as the Court is presented with a case in which such a holding would be appropriate.

In considering the cases in which discrimination in housing has been dealt with by the Supreme Court, the issue of judicial enforcement of racially restrictive covenants was reached in *Shelley* v. *Kraemer*, supra. Covenants restricting occupancy to members of the Caucasian race had been enforced by State court orders which enjoined Negro purchasers from continuing to occupy the properties. The Supreme Court held that judicial enforcement of racially restrictive covenants was state action prohibited by the Fourteenth Amendment. In an opinion to which there was no dissent, though three Justices did not participate, Mr. Chief Justice Vinson noted, however, that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful" and stated:

"We conclude therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated." *Id.* at 13.

On the same day, the Court considered arguments that enforcement of such covenants by courts in the District of Columbia violated the due process clause of the Fifth Amendment. In *Hurd* v. *Hodge*, 334 U.S. 24 (1948), the Court found it unnecessary to decide that constitutional question, holding instead that enforcement by District of Columbia courts violated a statute derived from § 1 of the Civil Rights Act of 1866. The statute provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." (Now found at 42 U.S.C. § 1982 (1964))

Of that statute, the Court said:

"We may start with the proposition that the statute does not invalidate private restrictive agreements so long as the purposes of those agreenients are achieved by the parties through voluntary adherence to the terms. The action toward which the provisions of the statute under consideration is directed is governmental action." *Id.* at 31.

The Court also stated, however, that, even in the absence of the statute, the District of Columbia courts could not have enforced such restrictive convenants because it would have been contrary to the public policy of the United States to permit them "to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the equal protection of the laws."

It was in *Barrows* v. *Jackson*, 346 U.S. 249 (1953), that the Court held that judicial enforcement of such covenants by assessment of damages was prohibited. But again in *Barrows*, the Court cited with approval the language of *Shelly* indicating that racially restrictive covenants were not prohibited by the Fourteenth Amendment. *Id.* at 253.

There stands the matter of racially restrictive covenants. They are not enforceable but they are not void.

The more recent decisions, though they do not deal with residences, do deal with privately-owned facilities or private acts of one kind or another. The rational the Court has used to find in them violations of the Fourteenth Amendment is to find in them links with the State which convert them from individual acion to "state action." Thus, in *Terry* v. *Adams*, 345 U.S. 461 (1953), the Court prohibited the Jaybird Party in Texas, a private club, from excluding Negroes because the function it performed was an integral part of the election process even though not formally recognized by State law. The function the club performed was so much a public one that its private act of discrinmination constituted "state action" prohibited by the Fourteenth Amendment.

In *Peterson* v. *Greenville*, 373 U.S. 244 (1963), the link was found in a city ordinance requiring separation of the races in restaurants. In *Lombard* v. *Louisiana*, 373 U.S. 267 (1963), there was neither a State statute nor a city ordinance requiring separation of the races. In reversing convictions for violation of a trespass statute, the Court did not hold the statute invalid or even inapplicable to enforce refusals of service because of race, but simply unenforceable in these particular cases because there had been statements by the Mayor and the Superintendent of Police to the effect that the City of New Orleans would not permit Negroes to seek desegregated service in restaurants. The statements of these officials linked the discrimination to the State.

In *Peterson*, the Court said:

"It cannot be disputed that under our decisions 'private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it.'" (Citations omitted) 373 U.S. 244, 247 (1963).

And in his concurring opinion, Mr. Justice Harlan stated:

"The ultimate substantive question is whether there has been 'State action of a particular character' (*Civil Rights Cases*, *supra* (109 U.S. at 11))—whether the character of the State's involvement in an arbitrary discrimination is such that it should be held *responsible* for the discrimination.

"This limitation on the scope of the prohibitions of the Fourteenth Amendment serves several vital functions in our system. Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: liberty and equality. Freedom of the indivdual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overriden in the name of equality, if the strictures of the Amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority." *Id.* at 249–50.

In the *Lombard* case, *supra*, in which the link with the State was found in the statements of the Mayor and Chief of Police, Mr. Justice Douglas, though he

joined in the Court's opinion, wrote a separate concurring opinion in which he stated his view that even in the absence of any exhortations by governmental officers, the convictions could not stand. He would have extended the rule of *Marsh* v. *Alabama*, 326 U.S. 501 (1946), and held that the Fourteenth Amendment prohibited discrimination in all privately owned public resturants just as *Marsh* prohibited discrimination in a privately owned company town. He drew a careful distinction, however, between a restaurant business and a home:

"If this were an intrusion of a man's home or yard or farm or garden, the property owner could seek and obtain the aid of the State against the intruder. For the Bill of Rights, as applied to the States through the Due Process Clause of the Fourteenth Amendment, casts its weight on the side of the privacy of homes. The Third Amendment with its ban on the quartering of soldiers in private homes radiates that philosophy. The Fourth Amendment, while concerned with official invasions of privacy through searches and seizures, is eloquent testimony of the sanctity of private premises. For even when the police enter private precincts they must, with rare exceptions, come armed with a warrant issued by a magistrate. A private person has no standing to obtain even limited access. The principle that a man's home is his castle is basic to our system of jurisprudence." 373 U.S. 267, 274–75.

Mr. Justice Goldberg, in his opinion in *Bell* v. *Maryland*, 378 U.S. 226 (1964), was careful to draw a distinction between the protection afforded a man's private and his public choices, between civil rights and social rights:

"* * * Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.

"Indeed, the constitutional protection extended to privacy and private association assures against the imposition of social equality. As noted before, the Congress that enacted the Fourteenth Amendment was particularly conscious that the 'civil' rights of man should be distinguished from his 'social' rights."

The Supreme Court has not yet held that the Fourteenth Amendment in any way limits an owner's right to refuse to sell or lease a home or apartment on racial grounds. It has not yet held that where a State or political subdivision exercises no element of coercion upon a home owner to discriminate, the home owner is not free to discriminate without violating the provisions of the Fourteenth Amendment. The Court has not even been able to muster a majority to hold that the Fourteenth Amendment prohibits the owner of a restaurant or other place of public accommodation from discriminating among customers on account of race, which is a much easier conclusion to support. See *Bell* v. *Maryland* 378 U.S. 226 (1964).

To conclude that the Fourteenth Amendment, itself, does not prohibit the home owner from discriminating on account of race is not necessarily to conclude that, in the exercise of its power to enforce the Fourteenth Amendment, the Congress could not prohibit such discrimination. However, the Court has held, in the *Civil Rights Cases*, that the Fourteenth Amendment does not empower the Congress to prohibit owners of inns, carriers and places of amusement from discriminating on account of race. Although Congress, in 1964, enacted new legislation prohibiting owners of certain inns, restaurants and places of amusement affecting commerce from discriminating on account of race, basing the Act in part on its power to enforce the Fourteenth Amendment, the Court has held the legislation constitutional on the basis of the Commerce Power. Two of the Justices would have upheld the law on the basis of § 5 of the Fourteenth Amendment. *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964).

To the extent that the *Civil Rights Cases*, *supra*, would confine the power of the Congress under § 5 of the Fourteenth Amendment to the adoption of "appropriate legislation for correcting the effects of * * * prohibited State laws, and State acts, and thus to render them effectually null, void, and innocuous," three Justices have indicated a readiness to overrule it. (*United States* v. *Guest*, *supra*, opinion of Mr. Justice Brennan, joined by the Chief Justice and Mr. Justice Douglas, concurring in part and dissenting in part, slip opinion at 9.) To the extent that the *Civil Rights Cases* would be inconsistent with the conclusion that "the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere

with Fourteenth Amendment rights" three additional Justices have indicated a willingness to overrule it without specifically naming it. (Id. concurring opinion of Mr. Justice Clark, joined by Mr. Justice Black and Mr. Justice Fortas, slip opinion at 2.) Can these three and three be put together to add up to a majority that would hold Title IV to be a valid exercise of congressional power under § 5? Not necessarily.

Let us assume for a moment, what would seem to be, or at least about to become, a completely valid assumption, that § 5 does empower Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights. Is the right of prospective home-buyer not to have his purchase offer refused on account of his race such a right? It has never been held to be and the combined opinions in *Guest*, *supra*, would not seem to compel such a conclusion.

In measuring the breadth of Federal power to be inferred from the dictum, in *Guest*, that section 5 of the Fourteenth Amendment "empowers the Congress to enact laws punishing all conspiracies—with or without State action—that interefere with Fourteenth Amendment rights," it should be noted that the acts with which the Court was there concerned, were conspiracies carried out in part "by shooting Negroes; by beating Negroes; by killing Negroes." They were acts clearly criminal and the only question was whether the United States had made them punishable or had the power to make them punishable by Federal law. To the extent that Title IV prohibits the intimidation or coercion of a mob attempting to prevent a Negro family from moving into a neighborhood, the *dicta* in *Guest* would seem to indicate that the Fourteenth Amendment is a sound constitutional basis for Title IV. The acts reached are clearly criminal and the only question is whether the Congress has a concurrent jurisdiction with the States to punish them. To the extent that Title IV forbids and individual home owner to refuse to sell his home, or rent an apartment or room in it because of the race of a prospective purchaser, there would seem to be a leap beyond the dicta in *Guest*. Nothing in the Fourteenth Amendment makes the discriminatory act of the home owner in refusing to sell or rent on account of race unlawful. Nothing in the Fourteenth Amendment, as it has been construed until now, requires the State to make such discriminatory act unlawful. What Fourteenth Amendment right would Congress be enforcing?

Attorney General Katzenbach argues persuasively that Federal prohibition of discrimination in the sale or rental of housing is an appropriate exercise of the power of Congress to enforce the Fourteenth Amendment:

"Segregated housing is deeply corrosive both for the individual and for his community. It isolates racial minorities from the public life of the community. It means inferior public education, recreation, health, sanitation and transportation services and facilities. It means denial of access to training and employment and business opportunities. It prevents the inhabitants of ghettos from liberating themselves, and it prevents the federal, state and local governments and private groups and institutions from fulfilling their responsibility and desire to help this liberation.

"I have pointed out already how segregated living is both a source and an enforcer of involuntary second-class citizenship. To the extent that this blight on our democracy impedes states and localities from carrying out their obligations under the Fourteenth Amendment to promote equal access and equal opportunity in all public aspects of community life, the Fourteenth Amendment authorizes removal of this impediment."

It may be Mr. Justice Harlan, in his concurring opinion in *Peterson* v. *Greenville*, *supra*, and I think it worth repeating, who has given the most eloquent answer to this argument:

"Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: liberty and equality. Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be arbitrary, capricious, even unjust in his personal relations are things entitled to a large measure of protection from governmental interference. This liberty would be overridden, in the name of equality, if the strictures of the (Fourteenth) Amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should more properly be left to the more precise instruments of local authority."

There is not much doubt that Title IV lays a heavy Federal hand on areas of rights which had heretofore been considered private. It admits no exceptions to its restrictions. The private religious home which rents accommodations to the elderly of its faith would no longer be able to exclude members of other faiths. The Swedish Old Folks Home would be required to open its doors to the elderly of other ancestries. The owner of a home who has fallen upon hard times and decides to rent a few rooms to tide him over would have his choice of tenants circumscribed.

If the Federal power can reach this far into individual private lives, is there anything to prevent it from reaching into private associations—private clubs, private schools, private organizations of any kind?

There would seem to be little doubt, now, that the constitutionality of legislation to enforce the Fourteenth Amendment will be measured by the test formulated by Mr. Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 420 (1819):

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

The question to be answered by the Court, should Title IV be enacted, would seem to be "Is this law prohibited?" By the First Amendment prohibition against denials of the right to freedom of association? By the Fifth Amendment prohibition against deprivations of property without due process of law or against the taking of property for public use without just compensation? By the Ninth Amendment's recognition of the existence of rights retained by the people, with the classical expression of one such right perhaps being that "a man's home is his castle"? Or by the Tenth Amendment, which is more than a State's rights amendment, reserving as it does those "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, * * * to the States respectively or to the people"?

Both precedent and reason would seem to answer a resounding "Yes" to the question: "Is this law prohibitive?"

It is clear that, under its commerce power, the Congress can prohibit certain aspects of racial discrimination. It is also clear that under the commerce power the Congress can regulate intrastate activities if they have a substantial effect upon commerce. The cases hold that the commerce power can reach retailers whose sales are wholly intrastate and only one-ninth of whose purchases are made out of state. *Meat Cutters* v. *Fairlawn Meats*, 353 U.S. 20 (1957). The cases hold that Congress can reach a farmer who grows wheat on his own farm for his own consumption even though the amount he grows may be trivial. *Wickard* v. *Filburn*, 317 U.S. 111 (1942).

Is there really any activity which can be considered so local that Congress cannot regulate it? Are the limitations on the commerce power real or only theoretical?

It is not too difficult to find some limits within the Constitution itself. In *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178 (1946), it was shown that even a daily newspaper, whose out-of-state circulation was only about one half of one per cent of its sales, could be reached under the commerce power by way of the Fair Labor Standards Act. Suppose, however, Mr. Chairman, that instead of trying to regulate the wages and hours of the newspaper's employees, Congress tried to regulate its editorial policy. Suppose, for instance, that there had been so much editorializing on automobile safety that people stopped buying automobiles which, in turn, caused plant shutdowns and threatened the entire economy of the Nation. Suppose that Congress, after extensive hearings linking the economic depression to safety editorials, decided that the only way to relieve unemployment and get the Nation back on its wheels was to prohibit editorials on automobile safety. Could this be a valid exercise of the commerce power?

In addition to the question whether the rental of a room or the sale of a house by its owner is a transaction so strictly local that the Congress cannot reach it under the commerce power, Title IV, as presently framed, presents questions akin to that posed by an attempt to reach a newspaper's editorial policy under the commerce power. Does Title IV, by prohibiting a religious home from discriminating on account of race or religion in the disposition of its rooms, infringe upon the First Amendment right to free exercise of religion?

Does Title IV, by permitting a court to order a man to sell his home, on which he has invited bids, to a person whose bid was rejected on account of race,

religion or national origin, interfere with any of the homeowner's constitutional liberties?

Does Title IV infringe on any constitutional liberty of a racial, religious or national group by prohibiting it from subdividing an island or other tract of land for homesites to be sold or leased only by approval of the group?

Does Title IV infringe any constitutional liberties of a man who rents a room or two in the house in which he lives by requiring him not to discriminate among prospective tenants on account of race, religion or national origin?

Whatever determination the Congress makes with respect to these threshold questions will be entitled to great weight in the Supreme Court's deliberations in the event of Title IV's enactment. It is the court, however, which will have the final word, since the Court is the ultimate arbiter of the meaning of the Constitution. Although the commerce power of the Congress may be plenary, it is the Court which will determine whether the activity reached is truly commerce as well as whether the method by which Congress has chosen to regulate it is prohibited by some other provision of the Constitution. Perhaps the fairest generalization which may be made is that the closer Congress comes to restricting the purely private prejudices of the individual home owner, the more likely will the Court be to find that the Congress has exceeded its power.

I, as a United States Senator, believe that the Congress will have once again exceeded its power if it enacts Title IV and I, therefore, am opposed to Title IV, the "open occupancy" section of S. 3296.

Senator ERVIN. Senator, you pointed out certain constitutional principles which you think are incompatible with the enactment of title IV. I will ask you if it is not the initial provision in the fifth amendment which says that private property shall not be taken for public use except upon the payment of just compensation.

Senator BYRD. Yes, that is the fifth amendment.

Senator ERVIN. Now, is it not a basic rule of interpretation applicable to all written documents, whether they be constitutions or statutes or contracts, that the expression of one thing is the exclusion of another, and does not that principle, in your judgment, exclude any theory that private property can be taken for private use even with the payment of just compensation?

Senator BYRD. Yes, I share that viewpoint which has been expressed.

Senator ERVIN. You point out very well in your statement that in your judgment, title IV would permit a person of a different faith to compel a home established for people of another particular faith to take him into the home as a renter. I will ask you if that does not violate both the right of association and the right of freedom of religion guaranteed by the first amendment?

Senator BYRD. I think it does, particularly the first of the two named.

Senator ERVIN. In other words, people of a religious faith certainly have the right to freedom of association under the first amendment and that right of freedom of association cannot be impaired by legislative action under the Constitution as thus far interpreted.

Senator BYRD. I think that is right, and under this provision as I interpret it, if a Catholic should wish to rent his home or part of his home to another Catholic and should exclude a Protestant in so doing, I think he would be subject to the prohibition of the law and vice versa.

Senator ERVIN. Do you not think that in its practical operation, title IV would, in effect, discriminate against persons of the race or the religion of the seller or renter in that the seller or renter, in order

to avoid conflict with the law and being sued for unlimited damages, would sell or rent to a person of another religion or another race in preference to a person of his own race or religion?

Senator BYRD. I think that is true, and I said the same thing with regard to, I believe it is title VII in the Civil Rights Act of 1964, which dealt with so-called equal opportunities in employment, that the person of a minority race would have an advantage over a person of the majority race and that the employer would more likely be prone to employ such a person in preference to the person of the majority race for fear that he would be subjected to litigation if he did otherwise.

Senator ERVIN. Has it not always been a basic principle of our law that the right to regulate the title to real estate and contracts relating to real estate has been a power which belonged to the States and not to the Federal Government?

Senator BYRD. Would you repeat that, please?

Senator ERVIN. Has it not always been a basic principle of our system of jurisprudence that the power to regulate the title to real estate and contracts relating to real estate belongs to the States rather than to Congress?

Senator BYRD. I think that is right, Mr. Chairman. I would certainly feel that you, as a former justice of the Supreme Court of the State of North Carolina, would certainly be correct in your assumption.

Senator ERVIN. Now, is it not also true that all of the States in the Union have adopted what they call statutes which require that the contracts relating to the sales of land should be in writing and that they be signed by the party against whom the contract is sought to be enforced?

Senator BYRD. Yes.

Senator ERVIN. Were not these passed in order to make the titles to real estate secure and save people against litigation affecting the title of real estate or controversy about real estate where there was no written contract?

Senator BYRD. That is my understanding of the history of the statute.

Senator ERVIN. Would not title IV, in effect, impair the efficacy of those laws by making the cases brought under title IV dependent upon oral testimony rather than written testimony?

Senator BYRD. I think it would.

Senator ERVIN. Senator, I want to commend you on the excellence of your statement and say that I know of no man in public life who is more devoted to constitutional principles than yourself and no man who studies constitutional law more diligently than you do.

Do you have any questions?

Senator JAVITS. No questions, thank you.

Senator BYRD. Thank you, Mr. Chairman. You have been overly generous. I appreciate your remarks and your questions.

Senator ERVIN. Thank you for your appearance.

Mr. AUTRY. Mr. Chairman, the next witness is Mr. Nathaniel S. Keith, president, National Housing Conference.

Senator ERVIN. Mr. Keith, on behalf of the subcommittee, I wish to thank you for making your appearance and giving us the benefit of your views on this legislation.

STATEMENT OF NATHANIEL S. KEITH, PRESIDENT, NATIONAL HOUSING CONFERENCE, WASHINGTON, D.C.

Mr. KEITH. Thank you, Mr. Chairman. I have a brief prepared statement which, if it is agreeable with you, I will read.

Mr. Chairman and members of the committee, I appreciate this opportunity to present the views of the National Housing Conference on title IV of S. 3296, the proposed Civil Rights Act of 1966.

The National Housing Conference, which has been in existence for 36 years, is the principal national public interest organization in the field of housing and community development. Our membership consists of community leaders, private enterprise leaders, representative professionals, and leaders of labor, religious, and other public interest organizations from all sections of the United States who share a common objective of furthering improved housing and improved neighborhoods for all segments of the American people.

Because of its concentration on these problems over the years, the National Housing Conference has long recognized that the most critical phase of the national housing problem is the concentration of predominantly low-income families and individuals in substandard and slum housing, whether it be in the slums of medium size or large cities or in pockets of rural slums. The existence of these deplorable housing conditions is of course a glaring contradiction to the promise and accomplishments of American society. The social consequences of the continuation of these conditions have become more and more evident over the years. As the statistics show, furthermore, under contemporary conditions the predominant occupancy of these areas is on the part of racial minority groups, hemmed in by longstanding patterns of discrimination.

The National Housing Conference recognizes that poor housing is only one element in the overall problem of the poverty stricken in this country. We welcome the growing recognition by the Nation that intensive programs of education, job training, and social services are also essential to make significant progress in overcoming these problems. Nevertheless, to us it is crystal clear that a comprehensive attack to remove slum housing and slum neighborhood environments are an indispensable part of any program to meet the problems of the poor, and particularly to open up new opportunities and new hope for the youths and the children who are now prisoners of this environment.

Throughout its entire life the National Housing Conference has been committed to the principle of equal opportunity for all American families to secure good housing in good neighborhoods. While recognizing the small but significant progress that has been achieved in recent years, our organization deplores the fact that this opportunity is still denied to millions of American families throughout every section of the land because of their race, color, creed, or national origin, and especially because of their color. We have therefore long supported the principle of a competitive housing market open to free bargaining by all American families without regard to racial or ethnic background.

The conference has observed the generally successful, even if limited, application of the President's Executive order on equal oppor-

tunity in housing. However, since the scope of this order is confined to housing in which the Federal Government has a direct financial relationship, its impact has been confined to a relatively small segment of the total national housing market. To extend the principle of equal opportunity in housing to the market as a whole, much more comprehensive measures are essential.

For this reason, the National Housing Conference generally supports title IV, the pending bill, and its establishment as the policy of the United States "to prevent, and the right of every person to be protected against, discrimination on account of race, color, religion, or national origin in the purchase, rental, lease, financing, use, and occupancy of housing throughout the Nation." However, in order to assure the achievement of these principles and objectives, we recommend to your committee that administrative remedies be incorporated in title IV rather than to rest the implementation of that title largely on individual actions by persons discriminated against. We note with interest that Senator Javits has introduced an amendment designed to accomplish this general objective.

The conference is convinced that this legislation is an essential element in an overall approach to resolving the problems of the poor and of racial minorities. As pointed out before, we also recognize that intensive programs of education, training, and social services are likewise essential elements. Further, we recognize that the accomplishment of the policy proposed by title IV will require not only the elimination of slums and ghettos but also a massive expansion in the supply of decent housing and good neighborhoods, available on a nondiscriminatory basis. This goal therefore must involve a coordinated and intensive effort by the Federal Government and State and local governments and by private enterprise in the fields of housing real estate, and mortgage finance.

I appreciate this opportunity to present the views of the National Housing Conference on title IV of the proposed Civil Rights Act of 1966.

Senator ERVIN. I take it that your organization recognizes that title IV of the bill is designed to deprive all Americans of the right to sell or rent their property freely according to their own choices.

Mr. KEITH. Well, I believe that the position of our organization, Senator, is that the solution to the problem in the pattern of discrimination in housing requires this kind of intervention by the Federal Government.

Senator ERVIN. Well, that is the question I am asking you. In other words, your organization favors a law which is designed to deprive all American citizens of the right to sell or rent their property freely to persons of their own choice? That is what this bill does, does it not?

Mr. KEITH. Certainly it does.

Also, I might point out, Senator, that there are historically in the real estate market many limitations on the freedom of the property owner to dispose of their property, such as zoning or——

Senator ERVIN. Can you tell me a single one of those limitations upon the freedom of property which has been imposed by an act of Congress in the whole history of this Nation?

Mr. KEITH. No, sir; it only has been established under the local police powers.

Senator ERVIN. Do you have any questions?

Senator JAVITS. Yes, I have.

Mr. Keith, is it not a fact that 20 percent of the housing has been similarly regulated by the President's Executive order?

Mr. KEITH. That is true, as far as new construction is concerned.

Senator JAVITS. And in the experience of your organization, have you heard any large outcry over that from owners or renters or real estate people?

Mr. KEITH. No, definitely not, Senator. It has been quite evident that the functioning of that order in new FHA housing and housing developed in urban renewal projects and so on, new public housing projects, has proceeded without any serious problems.

Senator JAVITS. It is a fact, is it not, that those premises described as public accommodations in the Civil Rights Act of 1964 are also privately owned real estate, are they not?

Mr. KEITH. That is true.

Senator JAVITS. Like a store or a moving picture theater?

Mr. KEITH. That is true.

Senator JAVITS. And is it not a fact that this regulates the ability of the owner of that property to decide who will enter his property?

Mr. KEITH. That is correct.

Senator JAVITS. Do you see an analogy between that and renting the whole property? If you cannot prevent somebody from coming on your property, this is not too different from an unrestricted license to decide to whom you are going to rent or sell to. Would you say that is correct?

Mr. KEITH. That would seem to me the same principle.

Senator JAVITS. The Supreme Court has sustained as constitutional, has it not, the fact that by law we have denied the right to the owner or occupier of that property, if it is a public accommodation, store, motion picture theater, et cetera, to decide who will come on it and we have forbidden him from barring people because of their color, is that correct?

Mr. KEITH. That is correct.

Senator JAVITS. Your organization has been active in the housing field a long time, has it not?

Mr. KEITH. It has.

Senator JAVITS. How many years?

Mr. KEITH. Thirty-six years.

Senator JAVITS. What has been the general activity in which it has been engaged during these 36 years?

Mr. KEITH. Our focus has been on the problems of housing overall, but with particular attention to the problems of housing for the disadvantaged and the people of poor and moderate income who have not been——

Senator JAVITS. When you speak of the disadvantaged, you are not speaking of the physically disadvantaged?

Mr. KEITH. No, I am speaking of economically and socially disadvantaged.

Senator JAVITS. Your organization has been one of the outstanding advocates of government-aided housing?

Mr. KEITH. Correct.

Senator JAVITS. At all levels of government?

Mr. KEITH. At all levels.

Senator JAVITS. Local, State, and Federal?

Mr. KEITH. Correct.

Senator JAVITS. In all these 36 years, have you adopted a policy with respect to making this housing available without discrimination on grounds of race, creed, or color?

Mr. KEITH. That has been our consistent policy.

Senator JAVITS. In this work, you have cooperated, have you not, with literally thousands of owners, renters, and public authorities; is that correct?

Mr. KEITH. Correct.

Senator JAVITS. Now, how much mischief do you predict a Federal law against discrimination in housing will cause?

Mr. KEITH. Based on the current experience with the President's Executive order, it would be our expectation that this kind of regulation against discrimination would not exert any upsetting effect on the overall real estate and housing problem.

Senator JAVITS. What is your reason for recommending administrative rather than judicial means for enforcing this statute?

Mr. KEITH. Well, primarily, Senator, because the principal burden of present discriminatory practices in the field of housing rests on persons of low income and primarily on persons of racial minorities of low income. Consequently, it seems to us that for persons in that segment of our society, the necessity for undertaking their own initiative and action to protect their rights would tend to vitiate their use of the protections intended by this law.

Senator JAVITS. So that your advocacy of administrative means is intended, is it not, to lessen rather than increase the burdens involved in the administration of this law, is that right?

Mr. KEITH. Correct.

Senator JAVITS. You feel it would be easier on all parties concerned if the means were administrative rather than as prescribed in title IV?

Mr. KEITH. Yes.

Senator ERVIN. It would also tend to keep people from having the right to adjudicate their controversies in courts of law, would it not?

Mr. KEITH. I did not quite understand that.

Senator ERVIN. Administrative enforcement would also have the tendency to keep people from having the right to have their rights adjudicated in courts of law?

Mr. KEITH. Well, I would assume that the function of such a commission would be to negotiate settlements in a number of cases.

Senator ERVIN. Now, has it not always been one of the proud boasts of our law that every man's home is his castle?

Mr. KEITH. Well, that is a principle, Senator, certainly.

Senator ERVIN. And you see no distinction between a law that compels a man to accept customers in a place of business he opens to the public and a law which compels a person to receive unwillingly renters in his dwelling house?

Mr. KEITH. I would say, Senator, that I think the principle is primarily the same. I would also point out again that with respect to housing that is now covered by the provisions of the President's Executive order, in effect, the same limitations proposed by this bill are now in effect.

Senator ERVIN. Mr. Keith, do you not see any possible line of distinction between housing which is built with Government aid and housing which is built as the result of the endeavors of the individual who built it without Government aid?

Mr. KEITH. Well, most housing that is built is certainly built under the usual practices in the building industry. Some of it involves FHA insurance or GI-insured loans. Other involves loans made by commercial banks which also have a relationship to the Federal Government—not as direct, but there. Others, a very high percentage, are built by savings and loan associations that have the benefit of Federal insurance.

Senator ERVIN. All they get from the Government is guarantee of deposits up to $10,000, for which they pay the Government a premium, just like you pay a premium on your personal insurance. Is that not true?

Mr. KEITH. Yes, that is true. This is also true of FHA insured mortgages, that the money is advanced by private lenders.

Senator ERVIN. Yes, but you have the Government guarantee and that is the only reason money is advanced, is it not? People put their deposits in banks and savings and loans before there was any guarantee of savings and loan deposits, did they not?

Mr. KEITH. I would say the depositor relies on the Federal guarantee as the lender relies on the FHA insurance.

Senator ERVIN. Now, your organization has been in existence, you say, 35 years?

Mr. KEITH. Thirty-six years.

Senator ERVIN. And is not the housing situation worse today than it was when your organization started?

Mr. KEITH. No; I would not say that, Senator.

Senator ERVIN. It has not improved very perceptibly, has it?

Mr. KEITH. No; I would say there has been a considerable improvement in certain segments of the housing market. There still remains the fact that there is a great deal that still has to be done. But whereas in the mid-thirties, President Roosevelt could refer to the fact that one-third of the Nation is ill-housed, I think that percentage has now been cut down to about one-fifth. It is still too high. But there has been progress made.

Senator ERVIN. But these residential sections where you have de facto segregation still persist, do they not?

Mr. KEITH. A great many of them.

Senator ERVIN. Is not Washington one of the strongest illustrations of it in this country? I believe your office is here in the District of Columbia.

Mr. KEITH. Yes; that is correct.

Senator ERVIN. Has not a large part of the Caucasian population of Washington moved out of the District into the suburbs?

Mr. KEITH. That is true.

Senator ERVIN. Now, up to the present time, residential patterns have been determined by the will of the people, have they not?

Mr. KEITH. Yes.

Senator ERVIN. And title IV contemplates that the people shall no longer have the right or the power to determine what the residential patterns of the Nation shall be, but that that power shall be assumed by the coercive force of Federal law, does it not?

Mr. KEITH. Well, this proposal would certainly have an impact on the pattern of housing occupancy.

Senator ERVIN. It would certainly have an impact upon the right that people have heretofore enjoyed as far as Federal law is concerned.

Mr. KEITH. It would certainly——

Senator ERVIN. Does not the destruction of freedom cause you any concern?

Mr. KEITH. Well, if I considered that this is a destruction of freedom, Senator, I do not believe I would support it.

Senator ERVIN. Does it not destroy the freedom of everybody in the United States to sell or lease their property to whom they please?

Mr. KEITH. Well, as Senator Javits has pointed out, that principle has already been accepted with respect to commercial property.

Senator ERVIN. Because it has been destroyed in certain areas is not a good and valid reason for destroying it in all other remaining areas, is it?

Mr. KEITH. In the field of FHA housing and GI housing, the same kind of limitation has been in effect for several years now, the same way in the public housing program, in urban renewal projects. I have seen no evidence of any real problems created by the effects of that order.

Senator ERVIN. We have a tremendous problem in this field right now. Is that not the occasion for this proposed legislation?

Mr. KEITH. Well, true.

Senator ERVIN. And does not this proposed legislation say in effect that all American people, everybody in America, shall be denied the right to select the persons to whom they shall sell their dwellings or rent their dwellings? Do you not consider that a very drastic destruction of freedom?

Mr. KEITH. It would certainly limit the freedom to discriminate.

Senator ERVIN. Of course, you would substitute Government standards and let the Government regulate it, but I am at a loss to understand how any man enjoys any freedom unless he has a right to act, what you might call, in a foolish way as well as in a wise way. If the Government is going to direct his action, he has no freedom.

I want to thank you for your appearance and giving us the benefit of your views and those of your organization.

Senator JAVITS. Mr. Keith, just one other question. By what authority does a person buy or sell a house in any State in this country? By law, does he not?

Mr. KEITH. Certainly.

Senator JAVITS. Is that not correct?

Mr. KEITH. That is right.

Senator JAVITS. Some State or Federal law—generally State, of course—under which he acts, registers his title, and transfers his title?

Mr. KEITH. Correct.

Senator JAVITS. So there is the possibility of owning and enjoying ownership only by virtue of law; is that not so?

Mr. KEITH. Correct.

Senator JAVITS. That is what assures uninterfered-with possession; is that correct?

Mr. KEITH. Correct.

Senator JAVITS. So that the law should have the right, if it does sanction possession and protect possession, to have something to say

about whether other elements of the law are being observed in connection with possession; is that true?

Mr. KEITH. That is true.

Senator JAVITS. Are you well aware of the fact that owners of property must comply with codes of sanitation, health, and the like?

Mr. KEITH. That is true.

Senator JAVITS. Would you say as a person engaged in the housing field that there is an untrammeled right to own and dispose of property in this country without any restraint whatever?

Mr. KEITH. No, sir.

Senator ERVIN. And you can say by the same power of reasoning, since law guarantees property ownership, that law should abolish property ownership in the interest of the great majority. That is, you can say that, if you do not believe in freedom, can you not?

Mr. KEITH. I would not say this abolishes the right of ownership.

Senator ERVIN. It abolishes one of the great attributes of private property, which is the right to sell to whom one pleases.

Mr. KEITH. It puts a limitation on the rights of ownership, along with many other limitations.

Senator ERVIN. If the Government is going to assume the power to tell you how you can use your property, what you can do with it, and leave you merely the naked legal title, property does not mean very much, does it?

Mr. KEITH. Well, many of the States have already done this, Senator, as you know.

Senator ERVIN. Seventeen of them. But not as drastic as this bill.

And, incidentally, according to testimony adduced here the other day, one of the witnesses said New York has laws of this nature, and some of these public housing developments are partly vacant because they hold the rooms for rental to white people and white people do not move in.

Mr. KEITH. I am not familiar with that.

Senator ERVIN. Thank you for coming and expressing the views of your organization.

Mr. KEITH. Thank you.

Senator ERVIN. Call the next witness.

Mr. AUTRY. Mr. Chairman, the next witness is Harry G. Elmstrom, president of the New York State Association of Real Estate Boards, whose appearance is scheduled at the request of Congressman Carleton J. King.

Mr. Elmstrom, would you care to introduce your associate?

STATEMENT OF HARRY G. ELMSTROM, PRESIDENT, NEW YORK STATE ASSOCIATION OF REAL ESTATE BOARDS, ALBANY, N.Y.; ACCOMPANIED BY WILLIAM R. MAGEL, EXECUTIVE VICE PRESIDENT

Mr. ELMSTROM. Yes, my associate is William R. Magel, from Albany, N.Y., the executive vice president of the New York State Association of Real Estate Boards.

Mr. Chairman and members of the subcommittee, my name is Harry G. Elmstrom, of Saratoga County, N.Y. As president of the New York State Association of Real Estate Boards, I speak in be-

half of the 58 local real estate boards in New York State and their over 35,000 licensed real estate brokers and sales people in addition to the hundreds of thousands of property owners we serve each year.

Let me express my appreciation on behalf of our organization for having been granted this opportunity to appear before you.

One week from yesterday, this country will be busily engaged in celebrating their Independence Day, the most important day in the life of free people everywhere.

In 1776 when this Nation received its independence, one of the foremost considerations was the right of an individual to own property without the interference or coercion of his government. The occasion of the signing of the Declaration of Independence was in itself a reaffirmation of the rights set forth in the Magna Carta—rights alluding to the fact that a man's home was his castle and his right to own and enjoy it, unassailable. This important document marked the end of the feudal system, whereby title to all land rested with the crown and individuals who wished to occupy it were subject to the whims and fancies of the central government; and for whatever property rights and privileges were granted, homage was demanded and paid at an unparalleled price.

It is ironic that today nearly 200 years after this Nation has thrown off this undemocratic system that the Congress should be considering a law which would destroy the basic human right of private property ownership.

I am, of course, making reference to title IV of the 1966 proposed civil rights law. We believe that this bill not only flouts our U.S. Constitution and the rights it guarantees to our individual citizens but impairs one's right to own and freely enjoy their property. The proposal strikes a piercing blow at the heart of individual liberty.

Under the guise of civil rights, proponents of this bill undoubtedly feel that if enacted, this law would strengthen property rights and insure equal opportunity in housing. However, it would not only fail to achieve its intended purpose but it would sacrifice one of the most treasured rights of all property owners—the right to determine the disposition of his property without legal coercion on the part of his government. Indeed at stake is the basic principle of freedom of contract: the right of an individual to enter into or refuse to enter into a contract in the disposition of his property based entirely upon his own judgment.

The laws of our land are historically made in the public interest and I submit to you that title IV is not only against the public interest in that it deprives individual citizens of their rights, but is, in fact, against the will of the people of this great country. In every instance that the voters have had the opportunity to express their desires on this very question, this type of legislation has been rejected by an overwhelming majority. The most recent poll on the national level conducted by the National Broadcasting Co. indicated an overwhelming failure on the part of the people to support this legislative concept.

I should like to make clear that our association is dedicated to equal opportunity in the housing field. Our policy states that we will support and promote the right of an individual to own real property and to exercise and enjoy the freedom of this ownership. We

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recognize that this is not a privilege of any particular group but one that is possessed by all of our citizens. However, we also recognize that this freedom of ownership includes the right to determine the disposition of one's property.

New York State property owners have been encumbered with a law similar to the one before you for a number of years, and today its most outspoken proponents admit that the law has failed its intended purpose, and has, in many areas of our State, done little more than to create chaos in the housing market.

Our New York State law has not succeeded in achieving equal opportunity in housing or for that matter the ultimate goal of integration. Indeed, it has, if anything, created a favorable climate for panic peddlers who use racial or ethnic movement to profiteer in the housing market and not only at the expense of the minority groups but indeed at the expense of all unsuspecting property owners. It has succeeded in shifting areas of heavy ethnic concentration from one part of a community to another rather than eliminating them. It has eliminated the property rights of all citizens, minorities and majorities alike, and any law which curtails the rights of all citizens to freely enjoy their property as they see fit, so long as their use is not injurious to their neighbors, is a bad law.

Since some of our local communities in New York State have also enacted these laws, property owners are confused and bewildered since three or even sometimes four agencies are involved, each with a different set of regulations. A Federal law would only add another agency further confounding the property owner.

It is literally impossible, as has been proven in New York State, to eliminate prejudice and discrimination by use of legislation and police tactics. The curtailing of rights of all citizens is not the answer to insuring equal opportunity for our Nation's minorities. Americans living in a free democratic society will not, through the use of legislative coercion, be forced into an unwilling or unwanted position concerning the disposition of their property. Legislation of this type will not only impede the progress already underway, but, almost assuredly, will set us back in our quest for complete freedom of opportunity in the housing field. The gains in this area that have been recognized to date have come about primarily due to the influence of churches, schools, and men of good will through the use of the educacational process and voluntary acceptance by the public.

The New York State law, which does not have the rigid enforcement procedures of the Federal proposal but is indeed a conciliatory law, has proven itself to be a vehicle by which publicity seekers who have proven themselves not interested in the goals of equal opportunity but only in individual personal advancement to unjustifiably harass, frighten, and even threaten property owners.

A forced housing law such as this that tramples on a fundamental right will not advance this extremely important cause. In addition to the fundamental right that this proposed law would destroy, I wish to point out that it is in every sense contrary to our entire system of laws as we know them today in this country.

It, in a sense, places a citizen in a position of being guilty until he has proven himself innocent and makes him subject to virtually un-

limited penalties. In addition, the proposed bill puts at the disposal of his accuser all of the machinery and assistance of the Federal Government and indeed calls upon the property owner to stand alone in his own defense. It imposes penalties in the way of injunctive restrictions on the disposition of the property even before the accused has had his constitutionally guaranteed "day in court," let alone having been adjudged guilty of infractions under the law.

While all of these penalties and restrictions are set forth in the law, nowhere is there the right or opportunity for the accused who is adjudged blameless to recover damages that he may have suffered. It is interesting to note that in all of these forced housing laws that appear around the Nation, not one sets forth penalties prohibiting a purchaser or prospective tenant from discriminating in his selection of property to purchase or rent because of race, creed, or ethnic origin. As a matter of fact, nothing short of thought control legislation would succeed in eliminating this situation. Until such a time as this Nation, its buyers, its sellers, landlords, and tenants alike, accept voluntarily the principle of equal opportunity in housing, all attempts to legislate prejudice and discrimination out of existence will not only fail but will deter the very cause they were intended to promote.

It is our solemn belief that the individual American property owner, regardless of race, color, or creed, must be allowed, under law, to retain:

1. The right of privacy.
2. The right to choose his own friends.
3. The right to own and enjoy property according to his own dictates.
4. The right to occupy and dispose of property without governmental interference in accordance with the dictates of his conscience.
5. The right of all equally to enjoy property without interference by laws giving special privilege to any group or groups.
6. The right to maintain what, in his opinion, are congenial surroundings for tenants.
7. The right to contract with a real estate broker or other representative of his choice and to authorize him to act for him according to his instructions.
8. The right to determine the acceptability and desirability of any prospective buyer or tenant of his property.
9. The right of every American to choose who in his opinion are congenial tenants in any property he owns—to maintain the stability and security of his income.
10. The right to enjoy the freedom to accept, reject, negotiate, or not negotiate with others.

Loss of these rights diminishes personal freedom and creates a springboard for further erosion of liberty.

In summary, the proposed law is a bad law. It is contrary to the public interest and is being offered in direct opposition to the expressed will of the people.

The members of our association and the thousands of property owners that they service ask you to protect and safeguard the human rights of all citizens and reject this legislation.

Senator ERVIN. Title IV of this bill would, if enacted into law and upheld, deprive every American who owns property of the right to sell or lease such property freely according to his own judgment, would it not?

Mr. ELMSTROM. We feel this right would be removed, yes.

Senator ERVIN. Title IV also undertakes to deprive real estate brokers of the right to carry out the instructions of those who entrust their property to them for sale or rent.

Mr. ELMSTROM. Yes.

Senator ERVIN. Title IV would also limit the right of financial institutions to loan their own funds or the funds of their depositors to persons desiring to purchase homes, would it not?

Mr. ELMSTROM. Yes, it would.

Senator ERVIN. Can you imagine any legislative proposal which is more calculated to impair the right of private property as well as the right of contract than title IV?

Mr. ELMSTROM. We stand utterly opposed to this title IV. We believe it is wrong for the property owners and the citizens.

Senator ERVIN. Thank you.

Do you have any questions?

Senator JAVITS. Mr. Elmstrom, first let me welcome you as a New Yorker. Even though we do not agree, I am still glad to see you and, of course, there are many areas in which I am in complete agreement with the real estate industry in New York.

Aside from the administration of the Federal law, do you see any great difference—you do not have to be too detailed as a lawyer, but just answer as a real estate man—do you see any great difference between the Federal law and the New York State law, leaving aside the question of administrative suits and——

Mr. ELMSTROM. That is where we see the greatest difference, in the penalties and the method of approach. We refer to the New York law and we firmly believe it is more of a conciliatory law. It has a machinery connected to it that allows people to appear before a commission and so forth, without penalties, that usually they try to conciliate the problem, and I believe it is working out in most cases that way. But this law is highly restrictive and has very severe penalties.

Senator JAVITS. Is it fair to say that it would be much more feasible and practical from even your point of view if title IV had administrative remedies analogous to those in the New York law, rather than the individual suit provision which it has now?

Mr. ELMSTROM. I have to repeat that we stand opposed, to title IV, even if it were to be amended.

Senator JAVITS. Completely, I understand.

Mr. ELMSTROM. I would have to see exactly what was proposed, but I believe what you are saying there would obviously improve the bill. I would have to see what you mention first, though, before I comment on it.

Senator JAVITS. Would you tell us which year, from 1959 to 1966, inclusive, has been the best year from the point of view of residential property in the real estate business?

Mr. ELMSTROM. You mean financially?

Senator JAVITS. From the point of view of most transactions, most turnovers? I know that is what interests you the most.

Mr. ELMSTROM. Well, our State is a big one and we have many problems in one area that we do not have in another. I could not honestly state which was the best year. I would have no figures to support myself.

Senator JAVITS. For example, has 1965 been worse or better than 1959 or——

Mr. ELMSTROM. Much better, of course. Inflation takes care of some of this.

Senator JAVITS. The real estate base, as we say colloquially, has been better in 1965 than 1959.

Mr. ELMSTROM. Yes.

Senator JAVITS. I notice you say that the New York State law has "in many areas of our State, done little more than to create chaos in the housing market."

What do you mean by that?

Mr. ELMSTROM. The reason this is in our statement, Senator, we have areas of our State—and I refer you to Cambria Heights as one, I refer you to Laurelton, Long Island, with which I am sure you are familiar—in this area there has been a strong change in the ethnic makeup of these neighborhoods. The chaos was created at one point as a result of a cease-and-desist order issued by our secretary of state to solicit no business in that area. The effort was made to hold the proportion of whites versus Negroes. This created a number of problems down there. We believe that we have worked very hard to try to solve that problem. Even now the problem is not solved—everybody is working hard on it. As a result of the way it did turn out, we believe if the New York law had not been in effect, we could have solved it. The citizens could have solved it much easier than trying to hold a certain percentage of different races.

We have records full in our offices of incidents that happened there which indicate that if it were not for this law, a better balance would probably have been maintained in the neighborhood. But as it is, people cannot refuse to sell to anyone, so there is no way of maintaining a balance.

Senator JAVITS. The cease-and-desist order was directod toward block busting, was it not; that is, panicking white residents into selling their property?

Mr. ELMSTROM. We were told that that is why it was issued. It was issued through the secretary of state.

Senator JAVITS. The secretary of state's orders in New York are judicially reviewable, are they not?

Mr. ELMSTROM. Yes.

Senator JAVITS. Was there any judicial review of this order?

Mr. ELMSTROM. Not that I know of.

Senator JAVITS. Can you tell us in New York how many complaints have actually been issued in New York under this antidiscrimination in housing law?

Mr. ELMSTROM. Statewide?

Senator JAVITS. Yes.

Mr. ELMSTROM. May I check with my people?

Senator JAVITS. If they know.

Mr. ELMSTROM. I am told they are averaging 500 a year at this point.

Senator JAVITS. Those are complaints.

Mr. ELMSTROM. Complaints, yes.

Senator JAVITS. These are complaints which the agency issues against property owners, realtors, and others; is that correct?

Mr. MAGEL. This is total complaints, either filed or initiated.

Senator JAVITS. That is a very different point.

Mr. MAGEL. The administrative agency has only this year had the right to initiate complaints.

Senator JAVITS. Nonetheless, you are giving us the global figure of complaints filed, 500 per year. What percentage is that of the aggregate real estate transactions in residential housing in New York State?

Mr. MAGEL. We have no idea.

Senator JAVITS. How many cease-and-desist orders have been issued since the commission came into being?

Mr. ELMSTROM. Cambria Heights is the only one I am familiar with. I know of no others in our State.

Senator JAVITS. Now, Laurelton and Cambria Heights are by no means the most significant real estate areas in the State?

Mr. ELMSTROM. Oh, no; they are one small segment of our State.

Senator JAVITS. Of course. You have an enormous area.

I notice on page 3 you state that since some of our local communities in New York State have also enacted some of these laws, property owners are confused and bewildered.

Who was confused and bewildered, and how?

Mr. ELMSTROM. The reason for the confusion—again it is an administrative one. We have in the State, as you well know, a human rights commission. You know that many of our cities also have human rights commissions. You know that the attorney general has power in this field. All anyone has to do is file a complaint. He does not have to justify his complaint particularly to file it. I know in my own area, I have made a check, and I do not think 1 percent of our knowledgeable people, after all the years our bill has been in existence, have any concept that there is such a bill and that it applies to them. I would certainly furnish documentation for that with names of doctors and lawyers, who, when you tell them that this bill applies to them, say, "Absolutely not, never heard of such a thing." We are furnishing copies of this bill continuously, trying and hoping to educate our people with it. But it is a tragedy that very few of them are aware of this bill. They go about their business in their own way.

Senator JAVITS. Does that not rather indicate that the administration of the antidiscrimination law in New York has not in fact been the big chaotic, bewildering and confusing mess that you have described in your statement?

Mr. ELMSTROM. No, sir; it does not. I am speaking of my own area. We have no particular problem in Saratoga. I live in a village of 5,000 people. It is quite a little different up there. I was merely referring that to my own area. But there is confusion in many areas of our State. They are spotty areas.

Senator JAVITS. Can you cite specific areas that justify your statement that there is chaos or bewilderment and confusion? Which areas?

Mr. ELMSTROM. We started off with the Cambria Heights—Laurelton area, right there. There has been a great deal of trouble in Yonkers, N.Y., and I believe in most of your major cities. And I was thinking also of Buffalo, which has had problems with this bill.

Senator JAVITS. Is it not fair to say that there is no widespread outcry against this legislation in New York?

Mr. ELMSTROM. I cannot say that, because there is no way that I could possibly know. We have found that when people find out about this bill, they cannot understand why it should be in existence. I believe quite frankly, if I may say so, if this were put to a referendum of the people in New York State, the bill would be soundly rejected. This is my personal belief.

Senator JAVITS. That is your personal opinion. But this has been on the books now since 1959, and there has been no real effort to repeal it, has there, in the legislature?

Mr. ELMSTROM. No.

Senator JAVITS. Or to defeat the people who sponsored the bill in the first place?

Mr. ELMSTROM. Well, after all, one bill like this is only part of the legislator's work and there are many things that defeat them or get them into office. No, I could not attach directly to the bill——

Senator JAVITS. Has your association passed any resolution denouncing this New York State bill?

Mr. ELMSTROM. We stand in opposition to the bill.

Senator JAVITS. But you have passed no resolution denouncing it, have you?

Mr. ELMSTROM. No, sir.

Senator JAVITS. Have you petitioned the legislature to repeal it?

Mr. ELMSTROM. No, sir.

Senator JAVITS. Have you sought in any way to raise public sentiment against it?

Mr. ELMSTROM. Yes, sir.

Senator JAVITS. In an organized way?

Mr. ELMSTROM. In an organized way; no.

Senator JAVITS. In other words, your members are unhappy, at least some of them, as far as you know, is that right?

Mr. ELMSTROM. Well, we do not like the bill. Obviously we live with any law and we follow it strictly to the letter. But we would feel, quite frankly, that the bill is not necessary in New York State and is not serving its intended purpose.

Senator JAVITS. But there has been no organized effort by you or any other group to bring about its repeal?

Mr. ELMSTROM. Because of the situation in New York State, where the people do not have the right of referendum, it would be politically impossible, we feel, to get the New York State Legislature to change this law.

Senator JAVITS. But you have fought a lot of other legislative battles in New York law, have you not? On other things such as taxation?

Mr. ELMSTROM. Yes.

Senator JAVITS. Correct; but not this one. Have you engaged in a legislative struggle on this one?

Mr. ELMSTROM. No.

Senator JAVITS. Thank you very much.

Senator ERVIN. Let me make some contributions to the effort of New York City to bring about integrated housing. I would like to read into the record a statement which appears on page 30 of Alvin Avins' book entitled "Open Occupancy Versus Forced Housing Under the 14th Amendment":

> Moreover, the New York City Housing Authority admitted keeping an average of at least 65 apartments in public housing in Negro areas vacant rather than rent them to waiting Negroes in order to obtain whites and better integrate them. This resulted in the rental loss, in one reported project alone, of $115,000 in less than a year. Refusal to sell to needy Negro tenants to promote integration in Negro areas became so widespread that the New York State Commission Against Discrimination was provoked by complaints of a number of Negro families to investigate the situation.

And also I would like to read this about the New York City anti-discrimination ordinance by the same author. This book was published in 1963 and he says, "Three years ago"—which would have been in 1960:

> Three years ago, this author pointed out the following facts:
> When the law (New York City's anti-discrimination ordinance) first went into effect, the City Commission on Intergroup Relations, the administrative body charged with the administration of this ordinance, received an annual appropriation of $358,050. A year later, only 27 complaints were adjusted to the satisfaction of the complainant or the Commission for a total cost per dwelling unit obtained via the anti-discrimination law of over $13,000. With this money, the city would virtually have built each of the complainants his own apartment or house.

That is the end of the quotation. The author adds this:

> Four years of experience has simply reinforced the above observation. During this period, the City Commission's budget rose to almost a half million dollars. It had 1,167 cases, but only 101 complainants eventually got apartments through the agency's efforts. This averages almost $20,000 per apartment.

Now, those are some observations by a man who has made a study of the New York situation. It seems to me if those observations are correct, it would be a better policy for the Federal Government just to undertake to build everybody a house or get him an apartment. It would be cheaper.

Any questions?

Mr. AUTRY. Just one.

How long has the New York State law been in effect?

Mr. ELMSTROM. It was originally enacted in 1959, I believe. Then it was amended as it now stands in 1963.

Mr. AUTRY. As you probably know, the Attorney General has given as one of the chief reasons for proposing this bill the elimination of the ghetto; throughout his statement he alluded to the problem of the ghetto. Have you noticed any marked impact on "ghettoes" since the enactment of the New York law?

Mr. ELMSTROM. The word "ghetto" is a very bad word. I do not like it.

Mr. AUTRY. It is the word the Attorney General uses.

Mr. ELMSTROM. I do not quite know what the exact definition of this word is—but if I interpret it correctly, I cannot conceive that there has been one single change. The area might have changed. It might have moved from here to here, but I know of no instance of elimination of so-called ghettoes. I myself was brought up in what was referred to as a slum of Brooklyn that might very well have been referred to as a ghetto in this interpretation.

Mr. AUTRY. I quote from page 9 of the Attorney General's statement:

> For example, in Harlem, 287,792 people lived in a 3½-square-mile area, or 100 people per acre.

I suppose those figures are for this year. Is this a substantially lower concentration than existed in 1959 when the law was passed?

Mr. ELMSTROM. I would have to check the figures. I could not answer you.

Senator JAVITS. Just one question, Mr. Chairman, if I may.

Senator ERVIN. Yes, sir.

Senator JAVITS. These figures would be materially affected, would they not, by the in-migration of Negroes or Puerto Rican families to New York? In other words, you could not take the absolute figure of diminution or increase of the concentration of minority population, in Harlem or Bedford-Stuyvesant or the East Bronx, and stand on these alone. If you want to get an evaluation of the impact of the New York law, you could not get it solely by the absolute population content of these areas even if you define the areas, at a given stage; is that not so?

Mr. ELMSTROM. I agree with your statement. Many more things would have to enter into this determination.

Mr. MAGEL. May I comment on Mr. Autry's question? It is my impression that he was concerned with the ethnic or racial makeup of an area which he calls the ghetto. By the old definition, the ghetto is something you cannot move out of. I think we refer to it as a heavy ethnic concentration or racial concentration. Our experience under the law, the exact point Mr. Elmstrom was making, and the law in the Laurelton area, is that what really happens is you cannot totally achieve integration, simply because buyers and renters still may discriminate. As a result, you find the heavy ethnic concentration areas moving from one part of a community to another rather than being integrated. It is the goal, I assume, of all proponents of legislation of this type to achieve equal and spreadout opportunity in this field, and, frankly, this law practically prohibits it, because no individual can refuse to sell, when he wants to——

Mr. AUTRY. Voluntarily integrated neighborhoods, then, under this bill or under the New York State law, would be, by the letter of the law, prohibited?

Mr. MAGEL. Yes.

Senator JAVITS. Would counsel yield on that?

Mr. AUTRY. Yes, sir.

Senator JAVITS. I do not understand what you mean by "prohibited." Would you explain what you mean?

Mr. AUTRY. The subcommittee has received some statements to the effect that voluntary integrated neighborhoods around the country are maintained by self-imposed voluntary quotas.

Senator JAVITS. I agree that it is self-imposed. I understand.

Mr. AUTRY. In that connection, just one more question. The Attorney General also based part of the constitutionality for this legislation on what he considers an adverse impact on commerce by discrimination. Now, in your experience with the New York State law, has there been less discrimination and has the flow of commerce improved since enactment?

Mr. ELMSTROM. Are you addressing that to me?

Mr. AUTRY, Either of you.

Mr. ELMSTROM. It is impossible for us to conceive, with all due respect to the Attorney General of the United States, how a private citizen selling a private home to another private citizen can in any way, manner, or form, be related to the commerce clause. We believe this bill is reaching way beyond any intent of the commerce clause of the Constitution. It is not conceivable to us that this would apply either on a State basis or a national basis.

Mr. AUTRY. Did you notice any change in the flow of commerce because of the impact of the enactment of the New York State law? The Attorney General, of course, alleges that this law would change, would help the flow of commerce because discrimination would be abolished.

Mr. ELMSTROM. I cannot conceive at all that it would help the flow of commerce. I would answer definitely not in my opinion.

Senator ERVIN. It is always bad to put an interpretation on another man's language, because you can misinterpret what he was saying, but I think the Attorney General's theory was that if you deprive all real estate owners of the right to choose the persons to whom he would sell, then all Americans would move from one State to another in order to get housing under the provisions of this bill. Do you think it would have any such effect as that?

Mr. ELMSTROM. Well, I do not know.

Senator ERVIN. On behalf of the subcommittee, I wish to thank you for making your appearance here and giving us the benefit of your views.

Mr. ELMSTROM. Thank you for allowing us to come.

Senator ERVIN. The subcommittee will stand in recess until 2:30.

(Whereupon, at 12:10 p.m. the subcommittee recessed, to reconvene at 2:30 p.m. the same day.)

AFTERNOON SESSION

Senator ERVIN. The subcommittee will come to order.

The counsel will call the first witness.

Mr. AUTRY. The first witness this afternoon is Mr. Andrew J. Biemiller, director, department of legislation, American Federation of Labor and Congress of Industrial Organizations.

Senator ERVIN. On behalf of the subcommittee, I want to thank you for making your appearance here and giving us the views of the organization which you represent, on this legislation.

STATEMENT OF ANDREW J. BIEMILLER, DIRECTOR, DEPARTMENT OF LEGISLATION, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; ACCOMPANIED BY THOMAS HARRIS, ASSOCIATE GENERAL COUNSEL

Mr. BIEMILLER. Thank you, Mr. Chairman. For the record, my name is Andrew J. Biemiller. I am legislative director for the American Federation of Labor and Congress of Industrial Organizations. Accompanying me is Thomas E. Harris, our associate general

counsel. We appreciate this opportunity to present the views of the AFL-CIO on this important matter.

The proposals which this subcommittee are considering deal with two major problem areas in the functioning of American democracy. The first has to do with the administration of justice; the second, with discriminatory housing practices.

In both of these fields there are large and acute evils which must be eradicated; and the AFL-CIO welcomes the determination of the President and the Congress to face and face squarely the difficult issue of how best to remedy these deficiencies.

We all, I hope, believe in equal justice under law; and we all, I hope, believe that no part of our population should suffer discrimination in so vital a matter as a place to live. The question is how to implement these principles.

The AFL-CIO endorses and supports S. 3296. We think it provides constructive and effective cures for the evils with which it deals, and we urge its enactment. We believe that the bill could be strengthened in a few particulars which we suggest below, but in general we are for it.

I will discuss successively the various titles of the bill, indicating in each instance what, if any, changes we think might be made.

TITLES I AND II

Titles I and II undertake to end discrimination in jury systems, in, respectively, the Federal and State courts.

Up until now three different groups have been discriminated against in various areas as respects selection for jury service.

Senator ERVIN. I am very sorry but there is a live quorum call and I have to run off and leave you. I will be back as soon as I can.

Mr. BIEMILLER. I understand perfectly, Mr. Chairman.

(Brief recess.)

Senator ERVIN. Proceed, Mr. Biemiller.

Mr. BIEMILLER. These groups are: first, Negroes and perhaps members of certain other minorities; second, women; and third, people with low incomes. The discrimination may be de facto or de jure.

Discrimination against Negroes is unquestionably most acute in the South.

Discrimination against women is also concentrated in the South but is probably also more prevalent de facto in rural and small town areas than in cities. Also, both of these types of discrimination are more prevalent in State than in Federal courts.

On the other hand discrimination in selection for jury service against people having low incomes is decidedly not a peculiarly southern vice, and it is probably more prevalent in Federal than in State courts and in cities than in rural areas. Mr. Thomas Dewey, when he was a young district attorney, was an advocate of the so-called blue ribbon jury—in State courts in New York City. But the use of blue ribbon juries is at least as prevalent in Federal courts as in State courts generally.

Prosecutors have the idea that juries drawn from the upper economic strata are readier to convict. We commend Attorney General Katzenbach for his willingness to forego this advantage for prosecu-

tors, if indeed it is one, and for his recognition that discrimination on grounds of economic status is just as violative of the equal protection of the laws as discrimination on grounds of race or sex.

There is another reason for banning discrimination on the basis of economic status. It is that if such discrimination is permitted, it will perpetuate, in a different guise, discrimination against Negroes and other minority groups.

We therefore agree with the sponsors of S. 3296 that all three types of discrimination—that is, on grounds of race, sex, or economic status—should be ended. Further, we agree that the language of the bill is clear and straightforward; namely (p. 2, lines 9 to 12):

> No person or class of persons shall be denied the right to serve on grand and petit juries in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status.

The same terminology is used in the provision as to State courts.

As respects the Federal courts, the bill's ban on discrimination is affirmatively implemented by providing that names for a master jury wheel shall be selected "at random" from the voter registration lists, and, if the judicial council of the circuit so determines, other sources. As respects to State courts, however, the bill contains no parallel affirmative requirement for selection at random, but only the general ban on discrimination.

Thus the bill seems to leave it open to the States to prescribe the qualifications other than those banned, such, for example, as a college degree. We urge that this opportunity to perpetuate undemocratic jury selection systems, and to evade the bill's prohibitions, be foreclosed. The States should be affirmatively required to select persons for jury service at random, just as the Federal courts are, and the maximum qualifications prescribed for Federal jury service (p. 7, line 22; p. 8, line 10) should be made the maximum permissible qualifications for State court jury service.

Perhaps the Attorney General had doubts at the time the bill was drafted as to the constitutional reach of the power of the Congress under the 14th amendment to prescribe State court jury qualifications to insure the equal protection of the laws. Any such doubts have, however, been set at rest by the decision of the Supreme Court in *Katzenbach* v. *Morgan*. The Court here made it clear that the 14th amendment is a source of Federal substantive legislative power, just as are the other grants of legislative power in the Constitution, and that Congress has broad discretion in legislating standards to implement the equal protection clause. Thus there is no constitutional need for the disparate approaches used in the bill as to Federal and State jury qualifications; and the need for affirmatively prescribing the permissible qualifications is greater in the case of States than of Federal courts.

Further, we urge that the procedures for enforcing these qualifications be strengthened as regards both Federal and State courts.

In the case of State juries, the bill authorizes the Attorney General to bring injunctive proceedings against State jury officials. However, the bill does not contain any such authorization in the case of Federal juries, evidently upon the assumption that Federal judges and jury commissioners will be readier to implement the bill's standards

than will their State counterparts. Even if this assumption is correct there has been, as the Attorney General acknowledges, some discrimination in the Federal courts, and we see no reason why the provision for suits by the Attorney General should not be applicable to Federal juries as well as to State.

More important, we are doubtful that the enforcement provisions of the bill are adequate even in the case of State juries. The bill does provide a discovery procedure to make it easier to find out whether unlawful discrimination has occurred in the jury selection process. This procedure is available to the Attorney General in civil suits brought by him and to defendants in criminal prosecutions. However, for enforcement of its bans on discrimination the bill relies exclusively on adjudications in individual lawsuits, either where the issue is raised by private litigants or in suits brought by the Attorney General.

We are doubtful that this sort of spot policing will be adequate to end jury discrimination. It has not been adequate to end discrimination in other fields.

As respects the right to vote, for example, legislation prior to the Voting Rights Act of 1965 relied for enforcement on suits brought by the Attorney General or by voters. Suit had to be brought in each election district, and in each separate suit there had to be an adjudication whether there had been an unlawful deprivation of the right to vote. We foresaw that these provisions would prove to be inadequate. We testified, when the bill was before Congress, that implementing the 15th amendment by lawsuits was like trying to paint a wall with a fountain pen.

Our forebodings proved to be well founded, as is shown by the Voting Rights Act of 1965.

That act utilized several novel devices to counter enforcement difficulties. It provided an automatic triggering test; that is, whether fewer than 50 percent of eligible persons were registered or voted. It provided for determinations applicable throughout major geographic units; that is, State or counties. It provided for the use of Federal examiners to register voters, and for Federal observers at elections.

These provisions, in contrast to their predecessors, seems to be working reasonably well.

As respects school desegregation, too, individual lawsuits proved to be a slow and ineffective way of vindicating constitutional rights. Hence, title VI of the Civil Rights Act of 1964.

On the basis of these experiences, we suggest that broader scale procedures for the implementation of title II may be needed than enforcement through individual lawsuits. We believe the suggestions on this point made by Roy Wilkins in his testimony for the Leadership Conference on Civil Rights have substantial merit and deserve the attention of this committee.

TITLE III

This title deals with discrimination in the schools and other public facilities. It eliminates certain existing limitations on the bringing of suits by the Attorney General, and provides for broadened relief.

We are in favor of the enactment of title III as written.

Since the Attorney General's testimony of this title was rather general, we propose to give a concrete illustration of why this title is needed.

In 1950 some Negro parents brought suit against school officials in Clarendon County, S.C., seeking the admission of their children to the white schools. In 1951 the Federal district court ruled that the schools were very separate but not very equal, and that the plaintiff's rights under the 14th amendment were being violated. However, the court did not order that the children be admitted to the white schools: it ordered that the Negro schools be made equal.

In 1954 the Supreme Court likewise held that the Negroes' constitutional rights were being violated, on the ground that segregation by races is inherently unequal. This case was one of the four decided by the Supreme Court in *Brown* v. *Board of Education* (347 U.S. 483). In 1955 the Supreme Court, on reargument, ruled that integration should proceed with "all deliberate speed," and the case went back to the district court.

In the district court the deliberation has been more evident than the speed. It was not until the fall of 1965 that the district court finally required the admission of six Negro children to white schools in Clarendon County.

Of course, these were not the same children whose parents had started the litigation. A child who was 6 years old in 1950 was 21 in 1965. However, one Negro girl whose parents had intervened later, and were parties in the 1954 *Brown* cases in the Supreme Court, did finally get into a white school at age 17 after 11 years of litigation. Incidentally, according to news reports, the whites have been giving her a bad time.

Of course, the litigation isn't over. The court has retained jurisdiction and has ordered further desegregation next fall. Anyway, Negro parents, with the help of the legal defense fund of the NAACP, have been carrying on this litigation for 16 years, and the end is not in sight.

The Department of Justice has not brought suit in this situation. The burden of the litigation has been left to the parents and to the legal defense fund. The Department of Justice could bring suit under title III of the Civil Rights Act of 1964 if the Attorney General certified that the parents were unable to maintain appropriate legal proceedings, which means under the statute that they "are unable either directly or through other interested persons or organizations, to bear the expense of the litigation * * *."

How can the Attorney General determine such a thing as that? The legal defense fund of the NAACP is presumably able to sustain a certain volume of litigation, but what is the basis for saying that it is able to maintain one particular suit and not another?

More broadly, it is our view that the burden of vindicating these constitutional rights should rest on the Federal Government, and that it should rest there regardless of whether particular parents can or cannot afford to sue. That is one reason why we urge the enactment of title III.

The other reason is the physical and economic intimidation which faces Negro parents in some areas. Title III authorizes the Attorney

General to seek injunctions against such intimidation, and we are of course strongly in favor of that.

TITLE IV

The AFL–CIO likewise strongly supports title IV of the proposed Civil Rights Act of 1966.

Organized labor has long been in the forefront in the fight for fair housing legislation. Laws enacted by a large number of States and municipalities to outlaw discrimination in housing have been placed on the statute books with the full backing, and often on the initiative of, organized labor.

The Sixth Constitutional Convention of the AFL–CIO, held last December, called for equal housing opportunity in these words:

> A key feature of labor's housing program is its drive for equal housing opportunity for all Americans. There is no place in America for racial ghettos. Equal access, without regard to race, creed, color, or national origin, to every residential neighborhood in every American community should be assured for every family in America.

The national purpose was pledged by Congress in the Declaration of National Policy set forth in the National Housing Act of 1949 (Public Law 171, 81st Cong.; 63 Stat. 413; 42 U.S.C. 1441), which stated:

> The Congress hereby declares that the general welfare and security of the Nation and the health and living standards of its people require * * * the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation.

This congressional affirmation should be viewed in the light of the Nation's resolve proclaimed by the 14th amendment to the Constitution. The 14th amendment declares that no State shall deny "the equal protection of the laws" to any person, regardless of race.

The Supreme Court has said (*Shelley* v. *Kraemer*, 334 U.S. 1 (1948)):

> It cannot be doubted that among the civil rights intended to be protected from discriminatory State action by the 14th Amendment are the rights to acquire, enjoy, own, and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of the amendment as an essential precondition to the realization of other basic civil rights and liberties which the amendment was intended to guarantee.

And the Supreme Court held, in that case, that the 14th amendment prohibits the courts, as instrumentalities of the States, from enforcing private racially restrictive convenants. In another case (*Hurd* v. *Hodge*, 334 U.S. 24 (1948)), the Supreme Court applied similar prohibitions to the Federal Government and its courts, as well.

The U.S. Civil Rights Commission, in its 1961 report on housing, reviewed this constitutional background and arrived at this compelling conclusion:

> * * * it poses the question whether, as a matter of national policy, the Federal Government can permit itself to be involved in the denial of equal opportunity; whether the Federal Government, which has established national housing programs to achieve a national purpose, should not take affirmative steps to move upward the achievement of equal opportunity in housing for all Ameri-

cans. The Supreme Court has recognized that "Equality in the enjoyment of property rights" is "an essential precondition to the realization of other basic civil rights." If the achievement of this "essential precondition" is not here the explicit command of the Constitution, it is nonetheless its promise.

Much of the opposition to the assurance of equal opportunity in housing to all Americans is, we think, based on misinformation.

One widely broadcast misconception is that property values will drop whenever nonwhite families move into a previously all-white neighborhood. There is absolutely no evidence to support this contention.

A comprehensive study of property values was conducted for the Commission on Race and Housing, a distinguished citizens' group which included nationally known specialists in the social sciences, by Dr. Luigi Laurenti. Its findings are included in the volume, Property Values and Race (University of California Press, 1960). Dr. Laurenti's research involved 20 neighborhoods in San Francisco, Oakland, and Philadelphia, where Negroes had entered during a span of 12 years.

With each of the three cities he studied, Laurenti compared price movements in "test" neighborhoods with those in similar neighborhoods which had remained all white over the same period.

Senator ERVIN. I am sorry, I have to leave for a vote on the floor.

(Brief recess.)

Senator ERVIN. I hope you will forgive me, and I hope we make a little more progress before another rollcall.

Mr. BIEMILLER. Thank you, Senator.

The price transactions studied covered a 12-year period from 1943 to 1955. Over 9,900 sales prices were analyzed comprising about 40 percent of all the sales during the study period. Almost all the neighborhoods consisted of single-family, owner-occupied residences and were not contiguous to other areas of nonwhite population.

In 44 percent of the comparisons, prices showed gains which ranged from 5 to 26 percent. Another 41 percent of the comparisons showed no significant change in price behavior. The other 15 percent showed declines, but none were over 15 percent.

Put another way, 85 percent of the cases either showed upward improvement or remained stable.

The results of the studies in these three cities are consistent with those made by other investigators who studied similar areas in Chicago, Kansas City, Detroit, and Portland, Oreg.

In the volume "Property Values and Race," Laurenti concluded:

> The major statistical finding of the present study is that during the time period and for the cases studied the entry of nonwhites into previously all-white neighborhoods was much more often associated with price improvement or stability than with price weakening. A corollary and possibly more significant finding is that no single or uniform pattern of nonwhite influence on property prices could be detected. Rather, what happens to prices when nonwhites enter a neighborhood seems to depend on a variety of circumstances which, on balance, may influence prices upward or downward or leave them unaffected.

Another myth, long since exploded, is that neighborhood standards will go down whenever Negro families become part of the neighborhood.

Extensive studies have shown that Negro homeowners are just as concerned with neighborhood standards as any other citizens. Even

a poll conducted more than 20 years ago by the National Association of Real Estate Boards supported the fact that Negro homeowners maintain their properties as well as whites.

There are good standards and bad standards in both white and nonwhite neighborhoods.

Overcrowding, economic exploitation, and neglect of buildings by landlords contribute to the creation of slums, regardless of the color or national origin of the residents. But slum areas, with which the Negro stereotype is all too often associated, generally were badly deteriorated before Negro residents fell heir to them.

Equal access to housing, regardless of race, creed, or national origin, in a free market, should be a part of the American way of life. Equal opportunity in housing is intimately linked to equal opportunity in schooling and to other civil rights.

The AFL–CIO strongly supports the enactment of title IV because it will remove the obstacles that impede the rights and opportunities of Americans on the unjust basis of their race, creed, or national origin. We support it, above all, because its enactment will broaden the horizon of American democracy and will extend the opportunity to contribute to the strengthening of community life to every citizen of our country.

In addition, we believe the committee would be well advised to explore with care the possibility of adding administrative enforcement procedures to this title. We believe that administrative enforcement is less cumbersome, more immediate, and generally more effective in matters of this kind. We hope you will consider carefully adding administrative procedures to this title.

TITLE V

This title has to do with crimes against Negroes and civil rights workers.

There have been numerous such crimes in recent years, but very few convictions in either the State or the Federal courts. Something needs to be done; and if anyone has any doubt of that we suggest that they read the 1965 report of the U.S. Commission on Civil Rights. The shocking breakdown of law enforcement in the South, as respects Negroes and civil rights workers, is there set forth in horrifying detail.

Senator ERVIN. There is another quorum call. I am sorry to have so many interruptions.

(Brief recess.)

Senator ERVIN. Thank you for waiting.

Mr. BIEMILLER. Certain violent deprivations of civil rights are made criminal by the Federal Criminal Code (18 U.S.C. 241 and 242), but these provisions, which date back to Reconstruction days, contain technical deficiencies which make it very difficult for the Government to prove a case under them. Title V parallels but does not supplant these existing Federal criminal statutes, and undertakes to cure some of their deficiencies. The jury selection proposals of titles I and II also of course relate to the general problem of the administration of justice, which is most acute in, though it is not confined to, the South.

Title V was drafted in the light of the recent Supreme Court decisions in *United States* v. *Price*, and *United States* v. *Guest*. In those decisions the Court sustained the sufficiency of the indictments, but it pointed out that the requirements of proof under existing law are difficult to meet, and the Court suggested that Congress enact more specific provisions. Title V embodies such provisions, and we urge its enactment, but with some strengthening.

By way of concrete illustration, let us consider the existing statutes and the proposed title V as they would bear upon the recent regretable attacks upon James Meredith.

Under section 241 it would be necessary for the Government to prove that the defendant had a specific, wrongful, intent in two different respects. In the first place, the Government would have to prove, as in the case of nearly all criminal statutes, that the defendant intended to commit the prohibited act, as, for example, that the defendant intended to kill or injure the victim. This sort of intent is, as stated, a normal and proper prerequisite to conviction in criminal cases. Under section 241, however, the Government must also show a second type of specific intent, namely, that the defendant also intended to interfere with the victim's exercise of some right or privilege secured to him by the Constitution or laws of the United States, such as the right to travel interstate, or to vote. Proof as to this sort of additional motivation is often lacking, and one of the purposes of title V is to obviate the need for it.

Section 501(a) substitutes for the intent requirements we have been discussing the requirements that the defendant (1) injure the victim, "because of his race, color, religion or national origin," (2) while the victim is engaging or seeking to engage in the exercise of any of nine enumerated types of Federal rights, such as voting or attending a public school. Under this provision it would still be necessary to show that the defendant (1) willfully injured his victim and (2) that he did so because of his race, et cetera, (3) while the victim was engaged in the exercise of an enumerated right. In other words, the second intent requirement is changed from intent to prevent the victim from voting, for example, to intent to injure him because of his race while he is voting.

Evidence of racial animus is more likely to be available than evidence that the defendant intended to prevent the exercise of some particular Federal right. Even with the new provisions on the books, however, the task of the Federal prosecutor will still be a most difficult one. In a case like *Guest* it will still be necessary for the prosecutor to show not only that the defendants deliberately killed their victim, but that they did so because he was a Negro.

In general we think the Department of Justice has done a good job in drafting title V. We suggest, however, that section 501(a) be revised by adding on page 32, at the end of line 3, the words "or encouraging others to engage in." The attack on Meredith shows the need for this addition; for Meredith was not himself engaging in any of the nine categories of enumerated activities, but was rather encouraging others to do so.

We have one additional suggestion. The decisions handed down by the Supreme Court this June 20 make clear the need to revise and

clarify the statute dealing with the right of defendants to remove State court prosecutions to Federal court. No doubt the Attorney General will now submit specific proposals on this. We believe, in general, that a defendant should have the right to remove upon showing either (1) that the prosecution seeks to punish conduct, the right to engage in which was protected by the U.S. Constitution or by Federal statute, or (2) that he cannot obtain a fair trial in State court, as, for example, because of discrimination in the selection of jurors.

CONCLUSION

Let me conclude with a brief observation. This Congress and its predecessor are certain to go down in history for the trailblazing legislation passed in 1964 and 1965 in this field. All of us who played any role whatsoever in achieving the civil rights legislation have a right to be proud. But much remains to be done.

We have all read reports that this Congress is tired of the subject; that this Congress believes this is no time for another civil rights battle; that 1966 should be the year of stock taking, not action.

Well, we just don't believe those reports.

We believe this Congress will recognize—as did the President in the message in which he submitted this bill—that the unresolved problems are many and great but that they can be solved.

We in the AFL-CIO are dedicated to the belief that true and absolute equality of opportunity is possible in America and we intend to help achieve it. That, we are confident, is the mood of the American people and we believe it to be the intention of this Congress.

Senator ERVIN. Do you have any questions?

Mr. AUTRY. No. Perhaps just one question. On page 11 I believe you just mentioned the specific intent of racial motivations has to be shown in prosecution under title V. Would you be in favor of deleting motivation so that any crime in specific enumerated subsections be included?

Mr. BIEMILLER. Mr. Harris?

Mr. AUTRY. In other words, so that a man who is molested while in the act of voting could receive redress under this title even though he may not have been molested because he is a Negro.

Mr. HARRIS. No. We think that that would probably be too broad. For instance, if you made that change, then you would cover any crime against anyone using a common carrier. We don't see that there is any need to inject the Federal Government into all of these prosecutions where there is no racial motive involved.

The problem with which we are dealing has been the difficulty of getting convictions, in State or Federal courts in racial motivated crimes or crimes against civil rights workers. I don't think there is any problem of getting the criminal laws enforced generally.

Mr. AUTRY. Thank you, Mr. Chairman.

Senator ERVIN. Mr. Biemiller, I want to thank you and Mr. Harris for making your appearance and giving us the benefit of the views of the AFL-CIO on this very important legislative proposal.

Mr. BIEMILLER. Thank you, Senator.

Senator ERVIN. I am sorry we had so many interruptions, but those things are unavoidable sometimes.

Mr. BIEMILLER. I understand it perfectly.

Mr. AUTRY. Mr. Chairman, the next witness is Mr. Burton E. Smith, president of the California Real Estate Association, whose appearance was scheduled at the request of Senators Kuchel and Murphy. I believe Mr. Smith is accompanied by one or more officials of his organization.

Senator ERVIN. Mr. Smith, Senator Kuchel called me and said he had hoped to get over here, but he had a conflict which prevented him from doing so.

STATEMENT OF BURTON E. SMITH, PRESIDENT, CALIFORNIA REAL ESTATE ASSOCIATION, LOS ANGELES, CALIF.; ACCOMPANIED BY DONALD McCLURE, SPECIAL COUNSEL, FORMER ASSISTANT REAL ESTATE COMMISSIONER, AND H. JACKSON PONTIUS, EXECUTIVE VICE PRESIDENT, CALIFORNIA REAL ESTATE ASSOCIATION

Mr. SMITH. Thank you very much, Mr. Chairman.

Senator ERVIN. Thank you for making your appearance here to give us the benefit of your views on this very important proposal.

Mr. SMITH. Thank you very much. I have with me on my left Mr. Jackson Pontius, executive vice president of the California Real Estate Association, and Mr. Don McClure, who is special counsel to our association. I would like to read my statement, Mr. Chairman, if I could.

Honorable Chairman and distinguished members of this subcommittee:

I am Burton E. Smith, President of the California Real Estate Association.

I appreciate this opportunity to appear before you in opposition to title IV of S. 3296; since, if passed, this legislation will destroy the freedom of a property owner to sell, lease or rent residential real property to one of his own choosing. We believe this freedom to be among the basic freedoms of all Americans; and we in California have been fighting to preserve that freedom since it was threatened by action of the legislature in our State 3 years ago. It is our opinion that anyone who believes he can unsell an American in his desire to be free in his contractual relations regarding his residential real property, is making a grave mistake.

More than 4½ million people in California voted in the last general election in 1964 to secure to themselves their freedom of choice in the disposition of their residential property, by amending the constitution of California to nullify laws enacted by the State legislature destroying that freedom. Their indignation demands the filing of a petition for certiorari in the U.S. Supreme Court in an attempt to preserve this freedom and the issues of freedom of choice. This will be one of the gravest issues in the California campaign of 1966.

I have read the Attorney General's statement to this committee on June 6, 1966.

He spent considerable time trying to lay a foundation for title IV using the 14th amendment to the U.S. Constitution and the "commerce clause" as props. He makes a point of the fact that because materials being used in home construction come across State lines, the home into

which they go must be considered to be in interstate commerce. Isn't it stretching the "commerce clause" to an absurdity—even soliciting the prostitution of one's intelligence to say, that because a Californian uses a nail on his front door manufactured in Kalamazoo, Mich., his real property, located in California is in interstate commerce?

Senator ERVIN. Don't you think it would be as reasonable to say the Federal Government could regulate all the activities of an individual because at some time or other he crossed a State line?

Mr. SMITH. I would agree, sir.

Insofar as the application of the 14th amendment is concerned, a reading of that amendment does not support the Attorney General's reliance on the amendment in urging the constitutionality of S. 3296.

Senator ERVIN. I have to run over for a vote.

(Brief recess.)

Senator ERVIN. You may proceed.

Mr. SMITH. Thank you, Mr. Chairman.

The 14th amendment excludes discriminatory State action; but does not apply, as it should not, to the freedom of the individual.

Because during the last 3 years we have fought so many battles for an American's freedom of choice in the handling of his residential real property, we have become hardened in our approach to those who say Americans should forsake this freedom. We point to the fact that whenever in various areas throughout the country, this question has been submitted to the people for a vote, the people have voted to preserve their freedom of choice; we point to the fact that in California over 750,000 citizens signed petitions in the initiative campaign of 1964 which was conducted by volunteers in less than 60 days, and that at the polls 4,526,460 voters, or two-thirds, cast their vote for freedom out of a total vote of 6,922,204.

We have regretted to see those who expound the destruction of freedom of choice of all Americans in the disposition of their residential property pit race against race, as a weapon in their arsenal, to achieve an objective which, while injurious to all Americans alike, might serve some political purpose. We believe our Representatives in the Congress of the United States are above being manipulated by such false arguments that the sacrifice of individual freedom is necessary to satisfy the revolution of certain minorities because by the abandonment of this individual freedom, all Americans would suffer.

We have approached our championship for the freedom of all Americans on basis that the enactment of any law which would subordinate the freedom of the owner in possession of residential property to the will of one demanding possession would deprive all Americans of every race and creed of a basic American concept of freedom.

In this light, title IV would make it impossible for a Chinese, Japanese, Jew, Italian, Negro, Norwegian, Scotchman or one of any race of people, to select those of his own race for the sale to or rental of his property; and by the same token, anyone of a given religion could not choose to have others of his religion occupy his home or residential property. Whoever first presents himself to purchase or rent an owner's property would, under Title IV, be supported by the full power of the Federal Government in his demand to acquire it. The U.S. Attorney General is given sweeping powers which would enable him to crush any attempts to exercise an individual's freedom of choice.

In addition to those previously stated serious effects which would result from the enactment from title IV, the following can be stated:

1. It would prevent an individual from exercising freedom of choice in the rental of his home for a 6-month period during his absence. The law would compel him to rent his home under those circumstances to the first prospect.

2. It would deny to an individual his freedom to select those to whom he would lend his money for the purchase, construction, improvement, repair or maintenance of a dwelling.

3. In all of its manifestations, it is an attempt to invade the mind of an individual to determine what he is thinking about when he exercises freedom of choice. It is an attempt to exercise thought control.

4. It would destroy freedom of contract. In other words, the property owner would be compelled to act under legal compulsion in contracting with a purchaser regarding the sale, lease or rental of his home. Title IV would discriminate against the owner of a residential property in favor of one demanding destruction of the owner's freedom of choice in the selection of those with whom he wishes to be associated in his residential property.

5. It provides for the issuance of a preliminary injunction; and, on the basis of the pleadings and without the taking of testimony, the injunction could be issued. The seller would have to wait from 1 to 3 years in many jurisdictions for an opportunity to prove that his refusal to contract with the complainant was based on grounds other than racial or religious discrimination. During the interim, the house must remain off the market.

6. It would seriously impair the freedom of the seller of a home to advertise. Unless specifically worded so as to constitute an offer, an advertisement for sale of a piece of property, is merely an invitation to receive offers.

Senator ERVIN. If I may interject here without disturbing your train of thought.

Mr. SMITH. Yes.

Senator ERVIN. Don't you think if a man advertises property for sale or rent under title IV, he would be inviting any number of lawsuits?

Mr. SMITH. This is correct, absolutely correct.

The seller in this case, retains the right to reject any and all offers or to withdraw the property from sale for any reason whatsoever. Title IV would in effect convert an advertisement into a legally binding offer with respect to any person who alleges violation of section 403. The action by such person, however, would not be for breach of contract, but for violation of an entirely new right—that of the right to buy real property advertised for sale. Thus the placing of an ad incurs legal consequences hitherto unknown to the common law. It not only restricts the seller's freedom to bargain and negotiate with a number of offerors, but it also restricts his right to withdraw the property from sale.

The California Real Estate Association is unalterably opposed to any law, state or Federal, containing provisions analogous to those in title IV, which would strike down a cherished freedom of all Americans, that is, their freedom of choice in the disposition of their property.

It is our contention that the constitutional right to own and possess property includes the right to sell to one of the owner's own choice subject only to a valid exercise of the police power for the protection of all the people. It is our contention that there is nothing in the Federal Constitution which gives to one citizen the right to acquire property from another citizen who does not wish to sell it to him even if the refusal to sell is based on race or religion.

It is our further contention that every person regardless of his race, color, or religion, as an incident of the right to own, possses, and enjoy real property, has the right to sell or lease, or to decline to sell or lease his property to anyone regardless of the race, color, or religion of the person with whom he is dealing.

We contend that the passage of title IV would violate all of those fundamental and basic rights and freedoms heretofore enunciated, and for those reasons we respectfully request the honorable members of the Senate Judiciary Committee to take the necessary action to strike title IV from S. 3296.

Senator ERVIN. I want to commend you on the excellence of your statement, and to say that I agree with everything you have said. As you point out, the 14th amendment merely prohibits State action denying persons the privileges and immunities of Federal citizenship, due process of law and equal protection of laws. Can you see any way that a person of intellectual integrity can say that an amendment which merely prohibits State action can be used as a basis of legislation to prohibit individual action?

Mr. SMITH. No, sir; I cannot.

Senator ERVIN. And with reference to the commerce clause, can you imagine anything or any kind of property that is more local in nature than real estate?

Mr. SMITH. No, sir.

Senator ERVIN. Did you ever see any real estate moving across State lines?

Mr. SMITH. Not since I have been in the business, sir.

Senator ERVIN. Take this case. If a widow were to rent one room in her private dwelling house, a person that she didn't want to rent to could force her to let him occupy that room. Can you see any interstate commerce in compelling a widow to do that with respect to a private dwelling house?

Mr. SMITH. No, sir; we cannot.

Senator ERVIN. I think your statement points out this fact: In its practical operation this bill is designed to deny to any American of any race or any religion the right to sell his property or lease his property to a person of his race or his religion. Won't that be its practical operation?

Mr. SMITH. Yes, sir; it will, very clearly, sir.

Senator ERVIN. If he sells to a person of his race or religion at a time when somebody of another race or another religion wants to buy the property, it could be a basis for action against him for discrimination.

Mr. SMITH. Yes, sir.

Senator ERVIN. Don't you believe that, if people are to be truly free, that they must have the right to make their own decisions independent of government dictation?

Mr. SMITH. We feel that they should have absolute right; yes, sir.

Senator ERVIN. I read an editorial the other day that said you could not secure freedom for some people by taking freedom away from all people. Isn't that exactly what title IV would do?

Mr. SMITH. We feel it does just that, sir; yes, sir.

Senator ERVIN. Has the Supreme Court of the United States not decided in many cases that people have the right to associate together for any lawful purpose?

Mr. SMITH. Yes, it has.

Senator ERVIN. And do you not believe that people of a particular race or particular religion naturally prefer to associate together rather than with people of other races and other religions? Isn't that sort of a natural thing?

Mr. SMITH. Yes, it is.

Senator ERVIN. That you have observed.

Mr. SMITH. Very much so.

Senator ERVIN. And do you not believe that, under the right of freedom of association guaranteed to all Americans by the first amendment, people of any race have a right to associate together for the purpose of having a residential area inhabited by persons of their race?

Mr. SMITH. Yes, sir.

Senator ERVIN. We have in North Carolina, and I am sure that they have it in most every State, homes for elderly persons, and in some cases retired ministers, of particular faiths which have been erected by contributions made by people of those faiths. I ask you if, under this bill, a person of an entirely different religion couldn't compel those homes to receive him, in preference to a member of the religion which established that home, or suffer the consequences of a suit for unlimited damages?

Mr. SMITH. Yes, sir.

Senator ERVIN. I certainly agree with the observations you have made. I just cannot conceive of any freedom that could be taken away from Americans that would do them more injury than the right of freedom of property, and that involves the right to sell the property freely to people they choose, or to lease it to people they choose.

The Constitution covers the right of property along with the right to life and liberty. It says among the inalienable rights of men are the rights of life, liberty, and property, and the due process clause of the 5th amendment and the due process clause of the 14th amendment also cover life, liberty, and property together. If the Government can make this kind of an inroad on the ownership of private property, then it can make any inroad and absolutely abolish it as has been done in totalitarian states.

Mr. SMITH. Absolutely. We agree.

Senator ERVIN. So I commend your association for fighting for the preservation of the freedom of all Americans, including those Americans for whom this proposed piece of legislation is allegedly offered.

Mr. SMITH. Very true.

Senator ERVIN. Thank you very much.

Mr. SMITH. Thank you, Mr. Chairman.

Senator ERVIN. I think counsel had some questions he wanted to ask you.

Mr. SMITH. Thank you, Mr. Chairman.

Senator ERVIN. We will then recess the meeting to the call of the chairman.

Thank you very much.

Mr. SMITH. Thank you.

Mr. AUTRY. Gentlemen, I won't detain you but for a moment. It has been alleged that real estate brokers in this country practice discrimination both in their sales of homes and in their membership policies. Do you have any comment on that?

Mr. SMITH. Yes. We have a statement of policy and we have in our bylaws a restriction on this kind of practice, and I would like to read our bylaws to you if you would permit.

Mr. AUTRY. Thank you.

Mr. SMITH. Section 6 of our bylaws says:

> No member of the board shall enforce an arbitrary numerical or other inequitable limitation on its membership nor shall any member board impose any limit in its membership because of race, color, creed or national origin.

And we enforce these in California.

Mr. AUTRY. The statement is very clear and very emphatic. Does your association have any program in the field of equal rights or voluntary integration of neighborhoods or for increased racial cooperation?

Mr. SMITH. Yes. We have a State equal rights committee. This committee was in action prior to the Rumford Act in California. We have developed a handbook called "Equal Rights Handbook," and this particular policy and philosophy of equal rights has been adopted by all the 176 boards of our State association.

Mr. AUTRY. Do you have an extra copy of that handbook?

Mr. SMITH. Yes.

Mr. AUTRY. Pursuant to the request of the Chairman it will be placed in the record immediately following your remarks.

Did you have anything else that you thought might be relevant to this that you would like to have made part of the record?

Mr. SMITH. We might point out that we are further encouraging our people and this has been going on in excess of 3 years in the State of California, to establish themselves in relation to given relations activities in the State of California.

Realtors are very active in our State in participating in human relations groups. Also we have a very active group of people who are meeting weekly, particularly in the peninsula area, for example, and this is being broadened, where they are sitting down with people of various races, creeds, and colors, to talk about what can be done. And this is over and beyond our equal rights activities. We further have agreed to enter a joint request of the Ford Foundation for the sum of about $60,000 for purposes of a training film, in order that we can ultimately tour the State together with these human relations people to increase our understanding of the problem and through this understanding resolve the problem voluntarily, without legislation.

You might also be interested in knowing that some of our boys are including in their listing forms a statement which prohibits the taking of restrictive listings.

Mr. AUTRY. Do you have a copy of that form?

Mr. SMITH. Yes. We will provide that for you, sir. A typical statement on a multiple listing, for example, that is made a part of the agreement, reads as follows:

"It is hereby understood by all parties to this agreement that the Berkley Board"—for example, in this particular one—"of Realtors does not accept exclusive right listings to be serviced by the multiple listing service that would discriminate against a buyer because of race, color, creed or national origin." And that is a part of the contract's agreement.

Mr. AUTRY. The complete contract will be inserted at the conclusion of today's hearings. How long has the California board been engaged in voluntary activities of this sort?

Mr. SMITH. We have been involved in excess of 3 years with statewide activities in this regard.

Mr. AUTRY. Thank you, sir. You mentioned earlier the vote by which proposition 14 was agreed to in 1964. How many counties voted against proposition 14?

Mr. SMITH. Out of a total of 50 counties in the State of California, all voted in favor of the proposition except one, and that was Modoc County, and the vote there was 1,536 yes against 1,555 no. So there was only a 15 vote differential there. So for all practical purposes except that one case, all counties voted in favor.

Mr. AUTRY. I think you stated earlier that the vote was 2 to 1 in favor of the proposition.

Mr. SMITH. That is correct. The actual vote in favor of proposition 14 was 4,526,000, rounded, to 2,393,000 against, which is 65.4 percent in favor against 34.6 percent against, a 2 to 1 ratio.

Mr. AUTRY. Thank you very much.

Mr. SMITH. All 38 of California's congressional districts voted yes except the 21st Congressional District which includes Watts in our area. Incidentally, the 21st is Congressman Hawkins' district, and that went, no 91,000, yes 28,000, about a 3 to 1 loss in that congressional district.

Mr. AUTRY. Thank you, gentlemen.

(Whereupon, at 4:20 p.m. the subcommittee adjourned subject to the call of the Chair.)

(The documents referred to in Mr. Smith's testimony follow:)

EQUAL RIGHTS HANDBOOK FOR MEMBER REAL ESTATE BOARDS, CALIFORNIA REAL ESTATE ASSOCIATION, LOS ANGELES, CALIF., MAY 1965

(This handbook was approved for publication by the directors of the California Real Estate Association March 13, 1965. Prepared by the CREA Equal Rights Committee, Robert G. Adamson, Chairman.)

FOREWORD

The California Real Estate Association dedicates this handbook in the spirit of earnestly seeking equal opportunity for all in the acquisition and use of real estate in California.

The Equal Rights Committee of CREA has prepared this handbook for use by local boards to give them guidance in this field, and recommends implementation of the policies and guidelines contained herein, so that a unified, positive policy may prevail throughout the State among our Realtors and so that we may set a good example in this sensitive field.

CREA reaffirms its fundamental belief that deprivation of historic rights of real property owners by legislative acts would be stepping stones toward govern-

mental control of real estate and diminution of freedom in America, rather than steps toward progress. CREA reaffirms its belief that voluntary efforts to help resolve minority housing problems, such as set forth in this handbook, will genuinely lead the way toward more meaningful, harmonious and lasting progress that could ever be achieved through force of government action.

"Under all lies the land." Realtors are ever cognizant of the profoundness of that simple statement; also the significance of land use in America. Equal opportunity in its acquisition and use, parallel with continuance of American freedoms, is fundamental and consistent with CREA policies. Realtors will carry this banner forward, along with the torch of freedom and liberty.

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CREA EQUAL RIGHTS COMMITTEE FUNCTIONS

The California Real Estate Association believes that the only long term gains for equal housing opportunities will be through voluntary action of the housing industry and the public. It is to implement such belief that formation of Equal Rights Committees within member boards of CREA is recommended. This handbook is prepared as a guide for the use of local board Equal Rights Committees.

It is a basic premise of the committee in its work that mutual cooperation and voluntary acceptance of responsibility by the individual, the property owner, the Realtor, salesman and the community in solving current minority housing problems are the keys to any meaningful gains toward a permanent solution. The committee is organized to function for education, information, policy recommendations and guidelines. It is not organized to support or oppose any legislation. The committee is comprised of 50 members from all parts of the state, and with varying attitudes on minority housing issues, to give a good cross current of opinion, and an anticipated sound approach to resolving such issues.

It is suggested that each member board form an Equal Rights Committee designed similarly to the CREA committee; also that each CREA district do likewise, so that excellent communication lines may prevail between these levels of activity, and so that local boards and districts may be better advised and prepared to cope with minority housing problems.

Purposes of CREA Equal Rights Committee

1. Inform and assist members of the Association in their understanding and responsibilities in giving equal services to all clients.
2. Inform and assist member real estate boards in their understanding of CREA policy regarding their responsibility in evaluating applicants for Realtor membership without regard to race, color, religion, or national origin.
3. Inform and assist member boards in understanding how to meet with leaders of responsible groups or organizations for the purpose of establishing a cooperative and harmonious relationship in the fields of property rights and other individual human rights.

CREA standard committee structure should be used

The standard CREA committee structure provides for a chairman, two vice-chairmen and not more than 47 additional members, making a limit of 50 in all. A Steering committee of not more than 15 may be designated from these members. The total number of members appointed to the local board committee will probably vary according to the size of the board. In no case, however, do we recommend more than 50 members.

Operation

1. Policy for the State Committee shall be formulated by the Steering Committee, subject to approval of the full committee and the CREA Board of Directors.
2. State policy is recommended to local board committees.

3. The member board committee should meet and operate within its jurisdictional area, or upon meeting and agreement with other boards on particular matters may operate on a district or county or other unit level.
4. CREA committee will disseminate infomation to all levels about equal rights activities.
5. Member boards may submit recommendations on matters of policy and information to the CREA committee.

RECOMMENDATIONS AND SUGGESTIONS FOR POSSIBLE LOCAL BOARD ACTION

1. Form Equal Rights Committee.
   a. Meet with other Equal Rights Committees in the district for interchange of information.
2. Adapt information from CREA Equal Rights Committee for local use.
3. Make available CREA Equal Rights publications to individual members so that they might be apprised of CREA and NAREB minority housing policies.
4. Gain preparedness for meetings with responsible organizations wishing to discuss possible minority housing problems of the area:
   a. Make inquiries when asked for a meeting to determine if it is a responsible group and get the group's suggestions for an agenda before agreeing to a formal meeting. If only one local board is involved, have an Equal Rights Committee member make the inquiries. If an entire CREA District is an interested party, have the District representative make the inquiries.
5. Hold educational meetings at local boards covering the Code of Practices, CREA's counsel's legal opinions, and other phases of the Equal Rights Committee's work.
6. Prepare publicity releases for local board dissemination to local news media.
7. Report to CREA Equal Rights Committee, via district representative, local board problems, methods of resolving problems, and other activities in this field; also make suggestions to the State Committee for activity at that level, so that "grass roots" thinking may influence the State Committee's work.

EXAMPLE OF CODE OF PRACTICES

(Recommended Form for Adoption by Member Boards)

The _____ Board of Realtors subscribes to the policy that a favorable public attitude for equal opportunity in the acquisition of housing can best be accomplished through leadership, example, education and the mutual cooperation of the real estate industry and the public.

The following is hereby stated as the Code of Practices of the _____ Board of Realtors:

1. It is the responsibility of a Realtor to offer equal service to all clients without regard to race, color, religion, or national origin in the sale, purchase, exchange, rental, or lease of real property.
   a. A Realtor should stand ready to show property to any member of any racial, creedal, or ethnic group.
   b. A Realtor has a legal and ethical responsibility to receive all offers and to communicate them to the property owner. The Realtor being but an agent, the right of decision must be with the property owner.
   c. A Realtor should exert his best efforts to conclude the transaction.
2. Realtors, individually and collectively, in performing their agency functions have no right or responsibility to determine the racial, creedal, or ethnic composition of any neighborhood or any part thereof.
   a. A Realtor shall not advise property owners to incorporate in a listing of property an exclusion of sale to any such group.
   b. A Realtor may take a listing which insists upon such exclusion, but only if it is lawfully done at the property owner's instance without any influence whatsoever by the agent.
3. Any attempt by a Realtor to solicit or procure the sale or other disposition in residential areas by conduct intended to implant fears in property owners based upon the actual or anticipated introduction of a minority group into an area shall subject the Realtor to disciplinary action. Any technique that induces panic selling is a violation of ethics and must be strongly condemned.

4. Each Realtor should feel completely free to enter into a broker-client relationship with persons of any race, creed, or ethnic group.

a. Any conduct inhibiting said relationship is a specific violation of Article ____ of the rules and regulations of this board, and shall subject the violating Realtor to disciplinary action.

NAREB POLICY ON MINORITY HOUSING

(The following is the complete text of the statement of policy adopted by NAREB's board of directors on the rights and duties of members in real estate transactions—particularly those pertaining to the housing of racial, creedal, and ethnic groups. Italics added.)

The National Association of Real Estate Boards is cognizant of the fact that its members and member boards have been presented with many questions pertaining to the housing of racial, creedal, and ethnic groups, and, therefore, the Association adopts the following statement of policy and conduct concerning the Realtor-client relationship in our free market regardless of any racial, creedal, or ethnic group problems, whether existent or not:

1. Being agents, *Realtors* individually and collectively, in performing their agency functions, *have no right or responsibility to determine the racial, creedal, or ethnic composition of any area or neighborhood* or any part thereof.

2. No Realtor should assume to determine the suitability or eligibility on racial, creedal, or ethnic grounds of any prospective mortgagors, tenant, or purchaser, and *the Realtor should invariably submit to the client all written offers* made by any prospect in connection with the transaction at hand.

3. *A Realtor should* be free to *communicate to his client all factual data* which the Realtor believes to be germane to the formulation of an informed decision by his client.

4. The property owner whom the Realtor represents should have the right to specify in the contract of agency the terms and conditions thereof, and corresponding, the Realtor should have the right and duty to represent such owner by faithfully observing the terms and conditions of such agency free from penalty or sanction for so doing.

5. As to the receipt and handling of an offer in the typical broker-client relationship, wherein the decision to deal or not to deal rests with the client, *the Realtor may properly regard his responsibility to be discharged when he shall have transmitted such offer to his client for decision.*

6. *Upon acceptance* by the Realtor's client of any offer, *the Realtor should exert his best efforts to conclude the transaction irrespective of the race, creed, or nationality of the offeror.*

7. Each Realtor should feel completely free to enter into a broker-client relationship with persons of any race, creed, or ethnic group.

8. Realtors may properly oppose any attempt by force of law to withdraw from property owners the right freely to determine with whom they will deal with respect to their property, irrespective of the reason therefor, and any law or regulation which would operate to prevent a real estate broker from representing any property owner or faithfully abiding by the terms and conditions of any agency stipulated by the property owner.

9. *Realtors should* continue to *condemn any attempt* by persons, licensed or unlicensed, within or without the real estate business, *to solicit or procure the sale or other disposition of real estate in residential areas by conduct intended to implant fears in property owners based upon the actual or anticipated introduction of any racial, religious, or ethnic group into such areas.* In the event that a Realtor's counsel is sought by a client with respect to property situated in an area or neighborhood which is undergoing or which is about to undergo transition in terms of occupancy by members of racial, creedal, or ethnic groups, the Realtor should take particular care to render objective advice and to urge upon the client that the latter decide with respect to the disposition of his property without undue haste and only after sober reflection. On the other hand, Realtors may properly oppose any measures or efforts, which have, or may have, the effect of censoring or abridging the right of a broker fully to advise his client, in such matters, as to all factors which the broker in good faith believes to be relevant to an informed decision by his client.

10. *Realtors should endeavor to inform the public,* religious, and civic groups *that enhanced opportunity for the acquisition of private housing by minority groups must of necessity depend upon the attitudes of private property owners*

and not upon real estate brokers, who are the marketing media; that the right of property owners freely to determine with whom they will deal is a right fundamental in the American tradition; that the real estate broker cannot fairly be utilized in his agency function as a means for accomplishing the withdrawal of the right of free decision from the property owner; that the broker fully performs his legal and social responsibilities when he faithfully engages to find a purchaser acceptable to his principal; and that real estate brokers should not be expected to inhibit or promote "open occupancy" housing, this being a matter to be resolved between prospective buyers and sellers of private residential real property and not by real estate brokers functioning as the marketing intermediary.

PROPERTY OWNERS' BILL OF RIGHTS

In 1789, the people of America were fearful that Government might restrict their freedom. The first Congress of the United States, in that year, proposed a Bill of Rights:

The Bill of Rights, essentially, tells the Government what it cannot do. The statements comprise the first ten amendments to the United States Constitution.

The Bill of Rights has had a profound impact upon the history of the world.

Forty million immigrants gave up much to come to this land, seeking something promised here—and only here. Many countries have abundant natural resources, vast vacant lands and climate as good as America.

They came here for the promise of security—the promise of freedom—for the precious right to live as free men with equal opportunity for all.

In July of 1868, a new guarantee of freedom was ratified. Its purpose was to guard against human slavery. Its guarantees were for the equal protection of all.

This new guarantee of freedom is the 14th Amendment. It reads, in part, as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws."

The vital importance of these federal laws was re-emphasized in a recent statement of the Chief Justice of the United States in which he urged the retention of "Government of laws in preference to a Government of men."

Today, the rights and freedoms of the individual American property owner are being eroded. This endangers the rights and freedoms of all Americans. Therefore, a Bill of Rights to protect the American property owner is needed.

It is self-evident that the erosion of these freedoms will destroy the free enterprising individual American.

It is our solemn belief that the individual American property owner, regardless of race, color or creed, must be allowed, under law, to retain:

1. The right of privacy.
2. The right to choose his own friends.
3. The right to own and enjoy property according to his own dictates.
4. The right to occupy and dispose of property without governmental interference in accordance with the dictates of his conscience.
5. The right of all equally to enjoy property without interference by laws giving special privilege to any group or groups.
6. The right to maintain what, in his opinion, are congenial surroundings for tenants.
7. The right to contract with a real estate broker or other representative of his choice and to authorize him to act for him according to his instructions.
8. The right to determine the acceptability and desirability of any prospective buyer or tenant of his property.
9. The right of every American to choose who, in his opinion, are congenial tenants in any property he owns—to maintain the stability and security of his income.
10. The right to enjoy the freedom to accept, reject, negotiate or not negotiate with, others.

Loss of these rights diminishes personal Freedom and creates a springboard for further erosion of Liberty.

Original Copy Approved, March 16, 1963
California Real Estate Association
Approved, June 4, 1963
National Association of Real Estate Boards

SUGGESTED NEWS RELEASES

Activities of your Equal Rights Committee can be the basis for news stories for your local paper. Steps you take to try to resolve minority housing problems, either alone or with other community groups, are news. The public wants to be informed. The editor of your local newspaper, the local television and radio stations, all want to keep the public informed in this sensitive area.

Following is a news release that has been used successfully by local boards in California to announce adoption of the Code of Practices. Two typical printed stories based on this are reproduced following it.

Realtor Board Adopts Equal Opportunity Housing Policy

Members of the (*name of local board*) are pledged to a new Code of Practices promoting "equal opportunity" in housing, it was announced today by (*name of local board president*), the board's president.

The Code was drawn up by the California Real Estate Association and recommended to all CREA member local real estate boards for adoption, (*last name of board president*) said.

"Leaders of our association felt that such a Code will clarify the responsibilities and duties of the Realtor and real estate salesman, as CREA and our own Board sees them," he explained.

"It also stresses our belief that a voluntary approach can solve housing problems arising from the race, color, religion or national origin of the parties involved.

"We're going to do everything we can to make it work."

(The Code of Practices in full, as adopted by the local board, is then inserted as the remainder of the news release.)

[From the La Mirada-Santa Fe Springs & Artesia Zone, Feb. 18, 1965]

"'EQUAL RIGHTS' IN HOUSING PLEDGED BY REALTORS HERE

"Members of the Norwalk-La Mirada Board of Realtors are pledged to a new code of practices promoting 'equal opportunity' in housing.

"The code was drawn up by the California Real Estate Association and recommended to all CREA member local real estate boards for adoption, Jack D. Hastings, president of the local board, said.

"'Leaders of our association felt that such a code will clarify the responsibilities and duties of the Realtor and real estate salesmen, as CREA and our own board sees them,' he explained.

"'It also stresses our belief that a voluntary approach can solve housing problems arising from the race, color, religion or national origin of the parties involved.

"'We're going to do everything we can to make it work.'

"The code of practices, as adopted by the group provides:

"'The Norwalk-La Mirada Board of Realtors subscribes to the policy that a favorable public attitude for equal opportunity in the acquisition of housing can best be accomplished through leadership, example, education and the mutual cooperation of the real estate industry and the public.'

"This is the code adopted by the Norwalk-La Mirada Board of Realtors:

"1. It is the responsibility of a Realtor to offer equal service to all clients without regard to race, color, religion, or national origin in the sale, purchase, exchange, rental, or lease of real property.

"A realtor should stand read to show property to any member of any racial, creedal or ethnic group.

"A Realtor has a legal and ethical responsibility to receive all offers and to communicate them to the property owner. The Realtor being but an agent, the right of decision must be with the property owner.

"A Realtor should exert his best efforts to conclude the transaction.

"2. Realtors, individually and collectively, in performing their agency functions have no right or responsibility to determine the racial, creedal, or ethnic composition of any neighborhood or any part thereof.

"A Realtor shall not advise property owners to incorporate in a listing of property an exclusion of sale to any such group.

"A Realtor may take a listing which insists upon such exclusion, but only if it is lawfully done at the property owner's instance without any influence whatsoever by the agent.

"3. Any attempt by a Realtor to solicit or procure the sale or other disposition in residential areas by conduct intended to implant fears in property owners based upon the actual or anticipated introduction of a minority group into an area shall subject the Realtor to disciplinary action. Any technique that induces panic selling is a violation of ethics and must be strongly condemned.

"4. Each Realtor should feel completely free to enter into a broker-client relationship with persons of any race, creed or ethnic group.

"Any conduct inhibiting said relationship is a specific violation of article XVIII of the rules and regulations of this board, and shall subject the violating Realtor to disciplinary action."

[From the Bakersfield Californian, Feb. 18, 1965]

"REALTY BOARD BACKS 'EQUAL OPPORTUNITY'—VOLUNTARY APPROACH ON HOUSING PROBLEMS PLEDGED IN NEW CODE

"Members of the Bakersfield Realty Board are pledged to a new code of practices promoting 'equal opportunity' in housing, it was announced today by Board President Ralph P. Zellers.

"The code was drawn up by the California Real Estate Association and recommended to all CREA member local boards for adoption, Zellers said.

" 'Leaders of our association felt that such a code will clarify the responsibilities and duties of the Realtor and real estate salesman, as CREA and our own board sees them,' he explained.

" 'It also stresses our belief that a voluntary approach can solve housing problems arising from the race, color, religion or national origin of the parties involved.

" 'We are going to do everything we can to make it work,' Zellers added.

"The Bakersfield Realty Board subscribes to the policy that a favorable public attitude for equal opportunity in the acquisition of housing can best be accomplished through leadership, example, education and the mutual cooperation of the real estate industry and the public.

"Zellers said the following is the adopted Code of Practices of the Bakersfield Realty Board:

1. It is the responsibility of a Realtor to offer equal service to all clients without regard to race, color, religion or national origin in, the sale, purchase, exchange, rental or lease of real property.

"a. A realtor should stand ready to show property to any member of any racial, creedal or ethnic group.

"b. A realtor has a legal and ethical responsibility to receive all offers and to communicate them to the property owner. The Realtor being but an agent, the right of decision must be with the property owner.

"c. A realtor must exert his best efforts to conclude the transaction.

"2. Realtors, individually and collectively, in performing their agency duties, have no right or responsibility to determine the racial, creedal or ethnic composition of any neighborhood or any part thereof.

"a. A realtor shall not advise property owners to incorporate in a listing of property an exclusion of sale to any such group.

"b. A realtor may take a listing which insists upon such exclusion, but only if it is lawfully done at the property owner's instance without any influence whatsover by the agent.

"3. Any attempt by a Realtor to solicit or procure the sale or other disposition in residential areas by conduct intended to implant fears in property owners based upon the actual or anticipated introduction of a minority group into an area shall subject the realtor to disciplinary action. Any technique that induces panic selling is a violation of ethics and must be strongly condemned.

"4. Each realtor should feel completely free to enter into a broker-client relationship with persons of any race, creed or ethnic group.

"a. Any conduct inhibiting said relationship is a specific violation of the rules and regulations of the Bakersfield Realty Board and shall subject the violating Realtor to disciplinary action."

[From the Salinas Californian, Jan. 8, 1965]

BOARD OF REALTORS COMMENDED—CLERGYMEN ADOPT FAIR HOUSING VIEWS

"The clerical community of Salinas has adopted without dissenting vote or voice a statement of principles on fair housing and commendation for the Salinas Board of Realtors position on equal opportunity in the acquisition of housing.

"Both statements were adopted by the Salinas Ministerial Association, Roman Catholic clerics and the Rabbi Abraham Haselkorn who endorsed the action 'in principle.'

"In relation to the Board of Realtors, with whom many of the ministers were in disagreement during the recent campaign to repeal the Rumford Fair Housing Act, the ministers stated:

" 'The clergy of Salinas commends the action taken by the Salinas Board of Realtors which subscribes them to a policy which seeks to accomplish through leadership, example, education and mutual cooperation with the public a favorable attitude for equal opportunity in the acquisition of housing.

" 'The clergy also looks with favor upon the adoption of a consequent code of practices which seeks to effect that policy of the Board of Realtors.'

"In a separate action the ministers adopted a statement of principles on fair housing acquisition opportunities which marked the healing of a breach in their own ranks opened during the Proposition 14 fight.

"Core of the statement is contained in a paragraph stating, 'We believe that every person has the right to acquire a home in Salinas without restrictions which are based on race, religion or national origin.'

OTHER POINTS

"The statement says further:

" 'We believe there to be a high level of fair mindedness in Salinas equal housing opportunities and pledge ourselves to work toward total freedom in housing opportunities as the community grows.

" 'We believe it to be in the best interest of our community that all persons of good will actively seek to bring about this freedom of opportunity in housing.'

"The ministers did not confine themselves to statements of principles in this vital area of social justices, but also outlined a program of action to be implanted locally in carrying out the enunciated principles.

"Two Portions

"They indicated the plan of action would be carried out in cooperation with the Realtors. The action program is divided into two major portions, education and housing assistance.

"Under education, the ministers propose to develop a speakers bureau to discuss equal housing opportunities before meetings of civil groups; study experience of housing pattern 'in this community and others' and make results of these studies available to guide future local action; and maximum utilization of all news media.

"Direct Action

"The housing assistance portion of the program promises direct action in the field of housing opportunities. The ministers pledge themselves to 'maintain continued liaison with the Salinas Board of Realtors and seek to open additional doors of cooperation.'

"In addition, they propose a 'concentrated effort . . . in neighborhoods where persons of minority groups are moving in.' For these neighborhoods the ministers propose a three-point program.

"This program would be designed to: 'Find persons in that neighborhood who will welcome and assist the new arrival; inform such persons of pertinent experience elsewhere; and encourage such persons to share their feelings with neighbors.'

"The Christian ministers concluded their combined statements of principles and proposed action by saying: 'We would dedicate ourselves to continued study of housing patterns and relations and to seek cooperative solutions to problems which may arise. We so act unitedly mindful of Christ's high priestly prayer that we may all be one.' "

There will be occasions when members of your Equal Rights Committee are called upon to explain its purpose before local groups. This should be encouraged. Kiwanis, Lions, Optimists, Chambers of Commerce, PTA, and similar clubs and associations are constantly looking for timely topics for programs. Contact their program chairmen. Offer to speak before them. Such appearances are newsworthy and can be reported to local news media through a news release similar to the following:

For further information contact: (*name*) FOR RELEASE
Phone: (*phone number*) (date)

(*name of speaker*) spoke before the (*name of club or assn.*) today (yesterday) explaining the purpose of the (*name of local board's*) Equal Rights Committee.

"This new committee," he said, "was formed to try to help solve voluntarily problems that sometimes arise among minority groups seeking housing.

"We believe voluntary acceptance of responsibility by the individual, the property owner, the Realtor, and the community is the key to any solution over the long term. We are ready to meet with leaders of recognized and responsible church and civic groups at any time to discuss such solutions."

(*speaker's last name*) said the real estate board's "Code of Practices," adopted early this year, reaffirms that board members will "offer equal services to all clients without regard to race, color, religion, or national origin in the sale, purchase, exchange, rental or lease, of real property."

He also pointed out, however, that the ultimate decision as to whom a property owner will sell or rent rests with the property owner, not the real estate agent.

"There is a great deal of work to be done," he said, "to examine the problem if and when it exists. It's a process of education on both sides. We're ready to do our part among our members in bringing about a better understanding and solution."

Suggested Property Management Directive

(A sample of one form by a Realtor member given to his associates.)

BULLETIN to Staff of _____ Realty Company

With the addition of Section 26, Article 1 (Proposition 14) to the California Constitution, we feel it necessary to clarify certain matters in order to make sure there is no possible misunderstanding by any member of our Staff as to our responsibilities and duties in the management of property and service to our clients.

Consequently, each member of our Staff is directed to read this memo and to sign and return one copy for our file. Please read it carefully before signing.

1. As we understand the law, while most owners are relieved from jurisdiction, discrimination because of race, color, religion or national ancestry is still contrary to the public policy of the State of California and licensees of the State are obliged to give equal services to all.
2. Such discrimination is contrary to the policy of our company, and all Staff members are cautioned against any such discrimination in tenant selection. The *only* exception to this rule would be in such instances that you are advised in writing by management that an owner who may lawfully do so has given us a written instruction in the matter. To date, *no* owner of property we manage has given us such an instruction.
3. You are reminded that each tenant applicant is to be required to sign the same credit application form and each is to be processed in the same manner, exactly as per our present policy.
4. Nothing in this directive is to imply that minority tenants should be given *less* scrutiny than members of a minority race; *nor are they to be given more.*
5. Our obligation to owners is to continue to procure *good* tenants of whatever race, and this we must continue to do.
6. If you have any question about policy, contact your account executive immediately, or the undersigned.
7. Sign and return the enclosed copy for our record.

_____ _____

President

I have carefully read the above and will comply.

_____

LEGAL OPINIONS

Following are answers by Gibson, Dunn & Crutcher, attorneys to questions submitted to them with respect to the practice application of new Section 26, Article I of the California Constitution (Proposition 14). For convenience, all references to the term "real estate broker" or "broker" also apply to real estate salesmen, since the broker is responsible for his salesmen's conduct.

1. *What provisions of the Unruh, Hawkins and Rumford Acts still apply to California property owners and real estate brokers, and how can the real estate broker avoid violating any of such remaining provisions?*

Answer. Since the Rumford Act itself incorporated and thus supplanted the Hawkins Act, the above question will be deemed to refer only to the effect of the new initiative constitutional amendment upon the Rumford Act of 1963 and the Unruh Civil Rights Act as amended in 1961. So construed, the questions are answered by the opinion of this office dated December 1, 1964 and entitled "Effect of New Section 26, Article I of California Constitution on the Unruh Civil Rights and Rumford Acts." (See Appendix I)

Of prime importance to Realtors is the fact that carrying on the occupation of a real estate broker constitutes the carrying on of a "business" under the Unruh Act, and the new initiative constitutional amendment does not purport to change that fact. Accordingly, brokers must not themselves discriminate in affording their services on grounds of race, color, religion, ancestry or national origin. The right of refusal to sell or rent is that of the owner of residential real property and his authorized representatives acting on his instructions, and the broker should protect himself by limiting his activities to carrying out the instructions of that owner, whatever they may be.

2. *Are there any penalties for violations of any laws on the books not nullified by Proposition 14?*

Answer. The answer above recites the extent to which the Unruh and Rumford Acts are affected by the new constitutional amendment and the extent to which such statutes are yet operative. As indicated, neither of the statutes is entirely abrogated; and since each of such statutes provides penalties for violations, the answer to this question must be in the affirmative. There are still penalties for violations of the Unruh Act and Rumford Act insofar as such Acts have not been superseded by the new constitutional amendment.

3. *By reason of the passage of the constitutional amendment while some provisions of the Unruh and Rumford Acts remain in effect, is there a requirement that brokers follow any particular procedures in showing property to a minority client or presenting offers from a minority client?*

Answer. The only effect of the initiative constitutional amendment is to give the owner of residential real property the right to decline to sell, lease or rent such property to such person as he, in his absolute discretion, chooses: a right which has always been his except for limitations imposed by the Unruh, Hawkins and Rumford Acts. Accordingly, no special procedures would appear to be called for solely by reason of the enactment of the amendment. Naturally, if the property owner includes in his listing or communicates to the broker the fact that he will not sell to a particular group of persons, that fact should be communicated to all prospective participating brokers and to prospective buyers. Similarly, when such a preference is made known by the seller, he should be advised as to whether any offers being presented are by persons within the group to which he had indicated an unwillingness to sell. Where no such preference is made known by the seller to the broker, the only policy which should be necessary to follow is that of responding frankly to questions by the owner with respect to the prospective buyer.

4. *If a broker suggests a restrictive listing, is he violating any laws?*

Answer. As pointed out above, the initiative constitutional amendment does not entirely eliminate all aspects of the Unruh and Rumford Acts. For example, under the Unruh Act, it would be unlawful to engage in the business of renting space in an office building and to exclude tenants from such building on grounds of race, color, religion, ancestry or national origin. The constitutional amendment in no way changes this situation since it protects only the discretion of a seller of residential real property. Since both the Unruh and the Rumford Acts prohibit one from aiding, abetting or inciting another to violate the law, it would be unlawful to attempt to induce the professional seller or renter of non-residential property to place a discriminatory restriction on his listing with the broker.

The more difficult question is whether or not the broker may lawfully suggest a restrictive listing to an owner of residential real property who is lawfully entitled himself to insist upon such a listing. As noted above, the initiative constitutional amendment does not purport to change the fact that a broker is himself engaged in business within the meaning of the Unruh Act; and accordingly, he is obliged to engage in such business in a nondiscriminatory manner. We feel it likely that any action by a real estate broker in suggesting a restrictive listing, particularly pursuant to any real or alleged plan to segregate a neighborhood, might well itself be held to be carrying on the business of acting as a real estate broker in a discriminatory manner in violation of the Unruh Act. Although this argument is somewhat strained in view of the fact that such a suggestion by a broker does not amount to discriminatory conduct against prospective clients of the broker, nevertheless, especially considering the present propensity of the courts rigorously to enforce civil rights legislation, the activity in question would be unadvisable and dangerous.

5. *Can a broker avoid problems under the amendment and the statutes by not handling minority clients?*

Answer. No. As mentioned above, any discrimination against minority clients in conducting the business of acting as a real estate broker would constitute a violation of the Unruh Act.

6. *Does the standard CREA form of deposit receipt deny, limit or abridge the seller's right to refuse to sell?*

Answer. The deposit receipt in question constitutes an offer to purchase specific property. If the offer is accepted by the owner of that property, there comes into being a binding contract on the part of the seller to sell and on the part of the buyer to buy that property. The initiative constitutional amendment does not purport to change the legal incidents arising from the voluntary entry of such a contract. If after entering such a contract the seller refuses to sell the property, he is subject to all the usual civil sanctions for breach of contract. The initiative constitutional amendment only protects the right of the prospective seller not to accept the offer of the prospective buyer as set forth in the deposit receipt, not to refuse to abide by his contract once he has voluntarily entered it.

7. *Does the standard CREA form give the agent the legal right to demand and insist that the seller deliver (or pay a commission) even though the seller would choose not to sell to the buyer produced by the agent?*

Answer. Two standard CREA forms have been submitted for our consideration. The first is a deposit receipt which includes an offer of the buyer, an acceptance by the seller and a promise by the seller to pay a commission to the broker. (CREA form #D, revision approved 3-3-60) If the seller accepts and signs the receipt, he has voluntarily bound himself to sell the property to the buyer and to pay a commission to the broker. If the prospective seller refuses to accept the offer, whether or not the broker will be entitled to a commission will depend upon the terms of the listing between the broker and the property owner. If the listing requires the property owner to pay a commission upon the production of a ready, willing and able buyer without limitation or restriction, the broker will have earned his commission upon the presentation of such a ready, willing and able buyer and will be entitled to such a commission regardless of the seller's subsequent refusal to sell to such a buyer.

The other form submitted is entitled Exclusive Authorization and Right to Sell (CREA form No. A-14.) This form provides for the contract between the owner and the broker with respect to the authority of the broker and his right to a commission in the event of a sale. The agreement seems to provide for payment of a commission only in the event there is a sale or the property is withdrawn from sale, transferred or leased during the term of the agreement. Accordingly, unless this agreement were modified by the insertion of a provision requiring payment of a commission upon production of a buyer ready, willing and able to buy on the terms stated in the agreement, the refusal of the seller to sell to any particular buyer, provided this did not occur frequently enough to constitute a "withdrawal from the market," would not result in a commission to the broker.

8. *Should the listing agreement between the owner and his broker include a provision pertaining to whether or not the owner requests the right to restrict*

in any way his selection of a buyer otherwise ready, willing and able to meet the terms specified for the sale of the property; and if so, may such restrictions be included in a document separate from the listing contract itself.

Answer. The contract between a broker and his principal with respect to the sale of real property must be in writing in order to be enforceable as between the broker and his principal (in the absence of an applicable exception to the Statute of Frauds). Since the written contract between the broker and the principal must be in writing to be enforceable, and only the terms of that writing may be enforced, it would seem necessary to include all restrictions upon the payment of a commission in the written contract between the broker and his principal (and whether this is in the same document or in a separate document entered at the same time and making reference to the listing contract and purporting to state another term of such listing is immaterial). In other words, if the commission is only to be paid upon the production of a buyer entirely satisfactory to the seller for whatever reason, that should be so stated; or if the commission is to be payable only upon the presentation of a buyer from among a certain group, that fact also should be a part of the contract. This is not because of any effect of the new initiative constitutional amendment, but is rather solely a product of the normal contractual relations between a broker and his principal.

An exclusive agency agreement entered on the CREA form A-14 discussed above contains a section for the insertion of the terms of sale. If the seller does desire to restrict the class of prospective offerees, it would be appropriate to include this restriction among the other terms of sale.

9. When must a property owner exercise the decision on a restrictive sale—at the time of the listing or at the time an offer is presented? If the property owner can make the decision on restrictive sale when an offer is presented, how can the broker protect his rights to a commission in such situations?

Answer. This question illustrates the difficulties involved in failing to distinguish the contract existing between the broker and his principal (the listing) from the contract which may eventually exist between the property owner and the buyer. With regard to the buyer, the new initiative constitutional amendment protects the seller's right to refuse to sell the property for whatever reason until such time as he enters a binding contract to sell the property. Accordingly, with regard to the buyer, the owner of residential real property may refuse any offer presented by a prospective buyer for whatever reason and the prospective buyer cannot force a sale to him or recover damages by reason of the failure to sell. Until the buyer has a contract, the buyer has no rights regardless of what the listing may have been.

On the other hand, if the contract between the prospective seller and his broker specifies that the broker is to be paid a certain commission upon producing a buyer ready, willing and able to buy the property at the price listed and the terms stated, and the listing does not reserve any right in the seller to refuse to sell to a ready, willing and able buyer on grounds of the owner's personal taste or on grounds of race, religion, color, ancestry or national origin, the broker will have fulfilled his part of the bargain by producing a ready, willing and able buyer. Although the owner may refuse to sell to the ready, willing and able buyer on one of the grounds listed, he is nonetheless obligated by contract to pay the broker a commission. The initiative constitutional amendment does not purport to affect this contractual duty.

10. Are there any objectionable legal grounds to CREA adopting a policy asking its members to refrain from stating in their advertising or on their signs that a property is restricted in regard to race, religion, color or national origin?

Answer. No. However, it is the broker's duty to tell the prospective buyer if there is a restriction imposed upon the listing. Under Business and Professions Code Sections 10176(i) and 10177(j), a broker's licence may be suspended or revoked for any conduct constituting "fraud," and Civil Code Section 1710(3) declares that it is fraud to give information of other facts which are likely to mislead for want of communication of the fact not communicated. A failure to disclose to a prospective purchaser that the owner will not sell to him would be tantamount to a representation that there is no such restriction; if the prospective buyer should put himself out in reliance, there might be cause for complaint.

11. Are the conclusions of the opinion of other counsel dated May 27, 1960 (O'Melveny & Myers—which is not reproduced in this booklet since the answer to the question restates and amends conclusions from that opinion) with respect to the application of the Unruh Civil Rights Act pertinent at the present time in view of both the Rumford Act and the new initiative constitutional amendment?

Answer. The opinion in question sets forth certain conclusions with respect to the application of the Unruh Civil Rights Act to the activities of real estate brokers in accepting and handling restrictive listings from clients. Those conclusions, with certain exceptions based upon case decisions and statutes decided and passed after the date of the opinion, basically continue to be appropriate. Accordingly, for your convenience we will here restate those conclusions in substance with certain amendments based upon the intervening cases and statutes:

a. The acceptance by a real estate broker of a listing wherein the owner of residential real property (or the owner of other property not engaged in the business of selling or renting property) limits the prospective offerees on the basis of race, color, religion, ancestry or national origin is not a violation of the Act. Where the owner himself may impose restrictions upon the prospective offerees, the Act does not purport to regulate the terms of the agency between the owner and the broker.

b. A real estate broker who has accepted such a limited listing is not required to show the property to prospects excluded by the owner not to transmit to the owner any offer from an excluded offerer. The law does not compel a person to perform an idle act. If the broker has been given and has accepted a limited agency, he has a fiduciary duty to stay within those limits.

c. Exchange of information between brokers as to the various brokers' listings (similar to Multiple Listing Services) may lawfully mention limitations in respect of such listings made by the owners. The publication of such limitations, however, should not be used by brokers as a means to deny their services on account of race, color, religion, ancestry or national origin since such denial, or the aiding or inciting of such denial, might be a violation of the Act.

d. The Act in no way purports to affect a right to a commission. If a real estate broker submits an offer not within the terms of his agency, he is not thereby entitled to a commission; if another broker submits the non-complying offer, he is in no better position. According, if a broker may accept a limited listing, another broker must comply with that listing to be entitled to a commission.

e. At the present time there is no statutory provision which purports to give the Real Estate Commissioner the authority to force a broker to refuse a limited listing.

In summary, an owner of property, regardless of race, color, religion, ancestry or national origin is entitled to the full and equal services of a broker in selling or renting his property on any terms the owner lawfully may impose. Moreover, a broker cannot lawfully deny his business services upon the ground of race, color, religion, ancestry or national origin to a prospective buyer or seller who is a citizen. However, if the owner of real property employing the services of the broker is himself free to impose a restriction upon the class of acceptable offerees, the Act does not limit the right of the broker to accept such restrictions upon his authority; and the broker, if he accepts the agency, lawfully may and should carry out the terms and conditions of the agency even though a limitation exists thereon with respect to the race, color, religion, ancestry or national origin of the prospective offerees.

12. Are the conclusions set forth in the opinion of other counsel dated November 25, 1963 (Brobeck, Phleger & Harrison—not reproduced in this booklet since the answer restates the conclusions and amends them), with respect to the application of the Unruh and Rumford Acts upon the business of acting as a real estate broker affected by the enactment of the initiative constitutional amendment?

Answer. The opinion in question reconsidered the conclusions of the May 27, 1960 opinion referred to above in the light of the passage of the Rumford Act and intervening case decisions and set forth some seventeen conclusions on the basis of such reconsideration. For convenience, we will here restate those conclusions as amended to conform to the fact that the initiative constitutional amendment has rendered ineffectual those portions of the Unruh Act and Rum-

ford Act purporting to impose restrictions upon the discretion of the seller or renter of residential real property.

a. Real estate brokers and their salesmen are subject to the Unruh Act, and the broker is responsible for his salesmen's conduct.

b. A broker may not discriminate against any person in the sale or rental of real property because of race, color, religion, ancestry or national origin, factors which for convenience are hereafter referred to as "minority status."

c. A broker may not, because of a person's minority status, refuse to act for him in selling his property.

d. Nor may a broker refuse, because of a person's minority status, to act for him in finding property for purchase if requested or buying it for him.

e. This does not mean that a broker must act for a member of a minority group. It means only that he may not refuse to do so because of that person's minority status. For example, if a Negro were to seek to engage a broker's service to buy, to sell, or to rent property and was ready to pay the broker's usual fees, if any, for the service, and if the broker would accept the engagement were the person white, he cannot decline to act for the Negro.

f. If the listing is unrestricted—i.e., if the owner has not in the listing limited the persons to whom he will sell, the Unruh Act forbids the broker from discriminating against any person because of his minority status; he must show the property to the person and submit his offer to the owner on the same basis as for any other person. If the authority given the broker is broad enough to conclude a deal, he must conclude it without discrimination.

g. A broker may, of course, refuse to accept a restricted listing.

h. A broker may accept a restricted listing from any principal who could legally refuse to deal with persons of minority status if the principal were acting directly, without a broker.

i. A broker may accept a restricted listing from the owner of residential real property regardless of whether the premises include public-assisted housing or dwellings containing more than four units. However, a broker may not accept such a listing from one engaged in the business of selling or renting property and who desires to sell or rent nonresidential property. The Rumford Act, like the Unruh Act, declares it to be unlawful for any person to aid, abet, incite, counsel or coerce the doing of any of the acts or practices declared to be unlawful or to attempt to do so.

j. It is the broker's duty to tell the prospective buyer of any such restriction.

k. If the owner has specified that his broker may not show people of minority status through his property, the broker cannot take such persons through the property, for any act of going upon property not authorized by the owner would be trespass.

l. If the prospective buyer, although informed of the owner's limitations, should insist upon making an offer, it would not be necessary for the broker to perform the idle act of writing up the offer, accepting a deposit and transmitting the offer to the owner. However, considering the requirement that the broker not discriminate in the conduct of his own business, the broker may consider it prudent to present the offer if the buyer insists and obtain the express rejection of the offer by the owner.

m. The broker who receives a restricted listing from the owner and places it in a multiple listing service not only may but he must note for the benefit of other participants that the listing is restricted, as otherwise he would be concealing pertinent information and in effect representing that there was no restriction.

n. On the other hand, if it should wish to do so, a multiple listing service could lawfully adopt a rule that no listing restricted as to minority status may be placed with the service. We do not think such a rule would violate the State antitrust law, because restraints of trade are illegal only if unreasonable, and we feel that no court would hold that a restraint consistent with the public policy against discrimination was unreasonable.

13. *What is the effect of the Federal Civil Rights Act of 1964 on property owners and brokers in California?*

Answer. Of the many topics covered in the Civil Rights Act of 1964 (Public Law 88-352; 78 Stat. 241), only two would seem to have any pertinence to property owners and brokers in California. Title II of the Act deals with

discrimination in places of public accommodation; and Title VI pertains to discrimination in connection with federally assisted programs.

Title II provides, in essence, that all persons are entitled to the full and equal enjoyment of the facilities of any place of public accomomdation having an effect upon interstate commerce. Places of public accommodation are defined to include hotels, motels, restaurants, theaters, etc., and the Act includes detailed criteria as to when such place of public accommodation have an effect upon interstate commerce. This Title is of little pertinence to real estate brokers in California both because of this type of accommodations covered and the fact that the Unruh Civil Rights Act already covers the same establishments and provides more severe penalties for violations.

In Title VI, it is provided that each federal department and agency empowered to extend federal financal assistance to any program or activity, by way of grant, loan or contract "other than a contract of insurance or guarantee," is authorized and directed to promulgate regulations which prevent wrongful discrimination in connection with the use of federal funds. Pursuant to this Title, it is possible that federal agencies engaged in administering federal funds other than contracts of insurance or guarantees may promulgate regulations which will have an effect upon California property owners and brokers. The new initiative constitutional amendment does not purport to affect the application of any such federal statutes, rules or regulations.

14. *When a listing contains a ready, willing and able clause as opposed to the "when sold" clause for earning a commission, should the broker advise the seller at the time of the listing that seller will be liable for a commission in the event the seller declines to sell to any buyer who is ready, willing and able to buy on the terms of the listing?*

Answer. The broker should always advise the prospective seller of the meaning and effect of the listing agreement he is being asked to sign. If the listing agreement presented is one which provides for the payment of a commission upon the production of a ready, willing and able buyer, the seller should be advised that he will be obligated for a commission upon the production of such a buyer even if the seller, for any reason, should decline to consummate the transaction.

15. *May a real estate licensee refuse to sell or rent real property he personally owns, or in which he has part ownership, to persons to whom he would prefer to decline to sell or rent, or is he excluded from such privilege since he is in the real estate business?*

Answer. The effect of the initiative constitutional amendment is to give the owner of residential real property the right to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses. The initiative does not exclude from its coverage a real estate licensee in a transaction where the licensee is dealing with his own residential property.

16. *Broker A places a listing on a multiple listing service with no restrictive clause. Broker B sells to a client, as listed, but client is objectionable to seller, who refuses to sell to said client. Broker A does not want to join in a lawsuit against seller, although Broker B insists upon same for his commission. What is legal posture of Broker A? Broker B? Are all parties acting with good ethics, according to Code of Practices?*

Answer. In order to answer this question it is necessary to assume that the listing with Broker A provided that a commission would be payable if the broker should procure a ready, willing and able buyer. If this were the case then a commission would be due and owing upon the procurement of such a buyer even if the residential owner could legally refuse to sell to the buyer. As stated previously, in that case the question of commissions is governed by the contract law and not the initiative measure. (See answers 7, 8 and 9.)

We see no ethical problem that is raised by such action on the part of Broker A with respect to anything contained in the recommended Code of Practices of the California Real Estate Association. (See page 7.)

Section 3 and section 3.1 of "The Suggested By-Laws of a Local Real Estate Board for the Operation of a Multiple Listing Service within the Board," however, provide that the selling and listing brokers should decide between themselves what further action should be taken in accordance with their legal rights and customary practices to collect their commissions. The By-Laws also

provide that the listing broker shall be "charged with the full amount of the fee regularly due upon the sale, payable upon collection of the commission due." If this provision governed the rights of the local Realtors, Broker B in question would not be entitled to his share of the commission until and unless Broker A collected his entire commission from the seller. Obviously this problem can best be avoided if Broker A requires the seller to specify at the outset all restrictions, in which event the seller could not properly thereafter impose further restrictions.

17. *Some Realtors feel we should advise property owners about our Code of Practices when listing property. Would the following be consistent with the wording now in our Code of Practices? "A Realtor may, when obtaining a listing, present a copy of the Code of Practices to the prospective seller so that he may be advised of that Realtor's position and his board's support of the Code."*

Answer. As we pointed out in our answer to question No. 7, it would be inadvisable for a broker to suggest a restrictive listing even to an owner of residential property who is lawfully entitled himself to insist upon such a listing. The reason for this is that such action might be construed as carrying on the business of acting as a real estate broker in a discriminatory manner in violation of the Unruh Act.

The recommended Code of Practices of the California Real Estate Association does not advise or suggest a restrictive listing, and therefore could be given to a client. No special or set statement such as that above is necessary, other than to say very generally that we want our clients to be advised of our position with regard to these matters.

APPENDIX I

Opinion of Gibson, Dunn & Crutcher dated December 1, 1964 with respect to the effect of new Section 26, Article I of the California Constitution on the Unruh Civil Rights and Rumford Acts:

The new Section 26 of Article I will prohibit the State and its agencies from denying, limiting, or abridging the right of the owner of any interest in residential real property to decline to sell or rent such property interest to such person as he may choose in his absolute discretion. The provision does not apply to the State or its agencies with respect to the sale or rental of property owned by it, to the acquisition of property by eminent domain, or to public lodging accommodations.

Inasmuch as this provision is a part of the California Constitution, it will supersede and invalidate any provisions of California statutes in conflict with its provisions.

Certain provisions of the Unruh and Rumford Acts are in conflict with the new constitutional provision, and certain other provisions of those acts will not be affected. We turn now to an examination of the effects of Proposition 14 on these two Acts.

THE UNRUH CIVIL RIGHTS ACT

This Act (Cal. Civ. Code § 51) provides that all person are free and equal and no matter what their race, color, religion, ancestry, or national origin "are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Section 52 of the California Civil Code imposes liability, enforced through court proceedings, for actual damages plus $250 upon any person who discriminates in violation of Section 51.

Prior to the adoption of Proposition 14, the courts have held that the Unruh Act applies both to the sale and to the rental of real property and to real estate brokers.

The new constitutional provisions will make the Unruh Act and court decisions construing it inapplicable to two situations only:

(a) Where the refusal to sell or rent an interest in real property is the act of the owner with respect to his interest in the real property, or

(b) Where the refusal to sell or rent an interest in real property is the act of a real estate broker or other agent of the owner with respect to the owner's interest in the real property *and* the conduct of the broker or other agent is pursuant to the instructions of the owner.

Or to put it conversely, the Unruh Act and the decisions construing it will still be applicable to the conduct of all persons engaged in the business of selling, renting or financing real property or providing services in connection with the sale or rental of real property unless it can be shown that the conduct involved was that of an owner of an interest in real property, or his duly authorized agent, exercising an independent decision of the owner with respect to the sale or rental of his interest in the real property.

THE RUMFORD ACT

This Act (Cal. Health & Safety Code, § 35720, et seq.) generally speaking, prohibits discrimination with respect to the sale or rental of publicly assisted and certain other housing accommodations on the basis of race, color, religion, national origin or ancestry. The prohibitions of this Act extend not only to the owners of the housing accommodations covered but also to all persons subject to the provisions of the Unruh Civil Rights Act (Cal. Civ. Code § 51), to persons or firms to whom application is made for financial assistance for the purchase or construction of any housing accommodation who discriminate on the grounds of race, color, religion, national origin, or ancestry of such applicants or of prospective occupants or tenants in the terms, conditions or privileges relating to the obtaining or use of any such financial assistance and to any person who aids, abets, or incites the doing of any of the prohibited practices.

The State Fair Employment Practices Commission is empowered to enforce the Act though injunctions and actions for damages in behalf of the aggrieved person. The Commission is also empowered to attempt to eliminate alleged discrimination in violation of the Act through conference, conciliation, and persuasion and to create advisory agencies and conciliation councils to study problems of discrimination in all or specific fields of human relationships and to foster through community effort or otherwise goodwill, cooperation, and conciliation among all elements or groups of the population.

The new constitutional provision will, in our opinion, nullify those provisions of the Rumford Act empowering the FPEC to seek, and the courts to grant, either injunctive relief or damages against the owner of an interest in residential real property who has allegedly discriminated against a person because of his race, color, religion, national origin or ancestry in refusing to sell or rent such property interest.

Likewise invalid will be those same enforcement provisions of the Rumford Act as against (i) persons covered by the Unruh Act, including real estate brokers (ii) persons or firms providing financial assistance and (iii) other persons aiding or abetting the violation of the other provisions of the Rumford Act if and to the extent that such other persons or firms are acting pursuant to the instructions of an owner of an interest in residential real property in declining to sell or rent such property interest. As is the case under the Unruh Act, all the provisions of the Rumford Act will still be in full force and effect as to all persons engaged in the business of selling, renting or financing residential real property or providing services in connection with such sales or rentals unless it can be shown that the conduct involved was that of an owner of an interest in such property, or his duly authorized agent, exercising an independent decision of such property owner with respect to the sale or rental of his property interest.

We are also of the opinion that the conciliation powers of the FEPC may no longer be valid insofar as they are directed at those property owners or their duly authorized agents no longer subject to the enforcement powers of the FEPC. This is because the use of such conciliation powers ordinarily would involve either a direct or indirect effort to eliminate or abridge the right of such property owner to choose his prospective buyer or tenant without governmental interference, and the new Section 26 of Article I will prohibit indirect as well as direct abridgement of that right by the State or its agencies.

Berkeley Board of Realtors

1553 GROVE STREET
BERKELEY 9, CALIFORNIA

EXCLUSIVE RIGHT LISTING until .....196.... .**Subject to conditions hereinafter set forth**

NO LISTING ACCEPTED FOR LESS THAN 90 DAYS

This Listing Must Be Turned Into the Realtor's MLS Office by the Listing Office Within 2 Days After Being Signed by the Owner.

HOME

Location .....
Owners ..... Phone.....
Address .....
Occupied by ..... Phone .....
Listing Office ..... Phone.....
HOW SHOWN .....
Reason for Selling .....
Possession Date .....
Total Taxes (Before Vets Exemp.): .....
Present Loan ..... (Amount) (Whom) (Part. incl. T. & I.) (Int.)
.....
Loans Available .....
.....
Terms of Sale .....
.....
Exchange for .....
Schools .....
Remarks .....
.....
.....

Price $ .....
Levels .....
Rooms .....
Bdrms. { Up ..... Main ..... Down .....
Liv. Rm. Size .....
Dining Rm. .....
Baths .....
Shower .....
Floors .....
Fireplace .....
B'kfast Rm. .....
Heat .....
Elec. { 110V ..... 220W .....
Basement .....
Garage .....
Roof .....
Exterior .....
Style .....
Age .....
Sq. Ft. .....
Lot Size .....

Location	Rms.	BR.	Baths	Garage	Heat	Age	Price

In consideration of services to be performed by....., hereinafter called Broker, I hereby employ Broker as my sole and exclusive agent to sell for me that certain real property situated in the City of ....., County of....., California as above described. I hereby grant said Broker the exclusive and irrevocable right to sell the same, and to accept a deposit thereon, for the price of $....., on the following terms: $..... ..... cash; balance payable $ .....
.....
This authority shall continue irrevocably from date until ....., 196.....

I agree to pay Broker .....per cent of the selling price in the event that during the period of this contract:
Broker secures a purchaser ready, able and willing to purchase said property on the above terms, or at any other price or terms acceptable to me, or said property is sold or exchanged or leased by said Broker or any other person, including myself. I agree to pay Broker said per cent of the listing price if I withdraw said property from sale or exchange or otherwise prevent performance hereunder by Broker.

I agree to pay Broker .....per cent of the selling price if said property be sold or exchanged within three months after the termination of this contract to any person with whom Broker has negotiated or to whose attention he has called said property and whose name and address has, during the life hereof, been submitted to me in writing personally or by mail to me at my address given below in which cases Broker shall be conclusively deemed the procuring cause of such sale or lease or exchange to such person.

It is understood Broker is a broker member of Berkeley Realty Board Mart. Members of said Mart may act in association with Broker in procuring or attempting to procure a purchaser. This shall not be construed as making the Mart my agent for any purpose, or as making any members sub-agents of the Mart or of Broker. In the event a sale or exchange shall be made or a purchaser procured by a member of the Mart other than Broker, all of the terms of this agreement shall apply to the transaction, subject to the rights of Broker. Payment for commission or compensation hereunder shall be made by me only to Broker.

Evidence of merchantable title shall be in form of policy of title insurance by a responsible title company, same to be paid for by purchaser.

Interest, insurance, taxes, expenses and rent shall be pro-rated through escrow as of date of recording of deed, unless otherwise herein designated.

In case deposit is forfeited, one-half of same shall be retained by or paid to Broker as his compensation, and one-half to me, provided Broker's portion of any forfeiture shall not exceed the amount of the above named commission.

It is hereby understood by all parties to this agreement that the Berkeley Board of Realtors does not accept Exclusive Right Listings to be serviced by the Multiple Listing Service that would discriminate against a buyer because of race, color, creed, or national origin.

RECEIPT OF A COPY OF THIS LISTING IS HEREBY ACKNOWLEDGED

.....Address....., Owner

Dated)..... ....., Owner

IN CONSIDERATION OF THE ABOVE EMPLOYMENT, BROKER AGREES TO USE DILIGENCE IN PROCURING A PURCHASER.

Broker.....Address.....

By.....Home Phone.....Office Phone.....