THE UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 20

SPRING 1953

NUMBER 3

CIVIL RIGHTS LEGISLATION AND THE FIGHT FOR EQUALITY, 1862-1952

WILL MASLOW AND JOSEPH B. ROBISON†

I. INTRODUCTION

BEGINNING IMPERCEPTIBLY IN THE 1930's, gaining momentum during the war years, its demands articulated by the President's Committee on Civil Rights in 1947, the nationwide drive for civil rights¹ has at length received the ultimate accolade: it has become a key issue in two successive presidential campaigns. In that drive, which has three main targets, discrimination and segregation, disenfranchisement, and mob lawlessness, it has been inevitable that the choice of weapons should be debated. The issue has often been put in terms of law versus education, but this dichotomy is a forced and unnatural one; law itself is a form of education and education is the prerequisite to an effective use of law.

Fortunately, the number of those who disparage legislation in the sensitive area of group relations is constantly dwindling. More often the questions are between federal or state laws and between laws with sanctions and those without. It seems inevitable that legislation will be increasingly sought in the age-old struggle for equality.

That is not to say that we believe that legislation is the only technique for coping with discrimination and bigotry. Undoubtedly, our courts have played as significant a role in the last fifteen years as our legislatures, and litigation in the courts and before administrative agencies will be increasingly necessary to invoke basic constitutional guarantees and to make real the pledge of equality in recent statutes.

† Members of the New York and United States Supreme Court Bars. Will Maslow is Director and Joseph B. Robison, senior staff counsel, of the Commission on Law and Social Action of the American Jewish Congress.

¹ By civil rights, we mean those rights commonly denied because of race, color, religion, national origin, or ancestry, as distinguished from civil liberties. Within the latter term are comprehended the other rights protected by the Constitution and particularly the first ten amendments. See Schlesinger, *The Vital Center* 189 (1949).

Apart from law, changes in both patterns of thought and patterns of behavior have been achieved in countless other ways. The industrialization and unionization of the South, to cite but one example, promise vast upheavals in traditional ways of thinking and acting toward the Negro. The voluntary efforts of schools, churches and synagogues, trade unions, and our mass media of entertainment and instruction are elevating our social norms, lessening stereotype thinking, and promoting a social climate in which civil rights laws can flourish.

Nevertheless, we must look to legislation as the clearest expression of the people's will for equality. As the President's Commission on Higher Education said (in recommending fair educational practices legislation):

When assurance of good conduct in other fields of public concern has not been forthcoming from citizen groups, the passage of laws to enforce good conduct has been the corrective method of a democratic society.²

Indeed, in some areas only legislation can be effective. The right to vote is based on legislation and its deprivation is facilitated by other legislation. One may debate whether a poll tax should be outlawed by state or federal action but one can hardly rely on appeals to brotherhood to protect suffrage. Similarly, every individual is entitled to more substantial protection from lawless mobs than exhortations to tolerance.³

We should be less than frank, however, if we concealed our conviction that the ever increasing interest in civil rights legislation in the last decade is the inevitable reaction to the failure of gradualist, laissez faire techniques to change deeply embedded behavior patterns. This reaction has been accompanied by a growing realization that well conceived and adequately enforced legislation works. We do not attempt here to analyze the manner in which law shapes group relations, although contemporary sociologists and psychologists have thrown much light on that question in recent years. But it seems reasonably clear that legislation not only affects patterns of behavior but, by changing the situations in which we live, may also change beliefs and attitudes.⁴

² President's Commission on Higher Education, *Higher Education for American Democracy* 27 (1947).

³ For critical accounts of such propaganda efforts, see Rose, *The Use of Propaganda to Reduce Prejudice*, 2 *Internat'l J. Opinion and Attitude Research* 221 (1948); Lazarsfeld, *Some Remarks on the Role of the Mass Media in So-called Tolerance Propaganda*, 3 *J. Social Issues*, No. 3, at 17 (1947); Flowerman, *Mass Propaganda in the War Against Bigotry*, 42 *J. Abn. & Soc. Psychology* 429 (1947); Cooper and Jahoda, *The Evasion of Propaganda: How Prejudiced People Respond to Anti-Prejudice Propaganda*, 23 *J. Psychology* 15 (1947).

⁴ Recent studies are summarized in Berger, *Equality By Statute, Legal Controls Over Group Discrimination*, c. 5 (1952); Maslow, *Prejudice, Discrimination and the Law*, 275 *Annals* 9 (1951). See also McWilliams, *Race Discrimination and the Law*, 9 *Science and Society* 1 (1945). For analytical and bibliographical summaries of recent research on the nature and treatment of prejudice, see Watson, *Action for Unity* (1947); Rose, *Studies in the Reduction of Prejudice*, American Council on Race Relations (mimeo., 1947); Williams, *The Reduction of Intergroup Tensions, A Survey of Research on Problems of Ethnic, Racial and Religious Group Relations* (1947); U.N. Comm'n on Human Rights, *The Main Types and Causes of Discrimination* 10-25 (E/C.N. 4/Sub. 2/40/Rev. 1, 1949); Van Til and Denmark,

As we shall show in the following section, legislation was first used as a matter of course by opponents of equality to preserve inequality and segregation and to buttress and reinforce prejudices that otherwise might have withered away. Our earliest civil rights legislation, of the Reconstruction Period, was nothing more than an effort to undo the harm done by pre-Civil War legislation and by Black Codes enacted in the southern states immediately after the Civil War. Even today, legislation to preserve racial *apartheid* occupies greater space in the nation's statute books than the small number of laws which the civil rights forces have succeeded in enacting. To understand the struggle of the last fifty years for equality by law, it is necessary to know the context in which it began.

In the remaining sections, we shall discuss specific areas of legislation and legislative problems. Since our concern here is legislation, we shall discuss court decisions only as they have affected or shaped the legislative battle. Similarly, we can discuss the thorny problem of enforcement only insofar as it affects a determination of appropriate legislative goals or the choice of competing legislative techniques.

II. THE BACKGROUND

From the earliest days of our history, inequality of the races before the law was taken for granted. Congress itself provided in 1790 that only a "free white person" could be naturalized.⁵ Absent the equalitarian provisions of the Fourteenth Amendment, there was no restraint on frankly discriminatory legislation by the states. Inferior status, of course, was inherent for those Negroes who were held in legally recognized slavery. The "free" Negroes, of whom there was a great number in all parts of the country, could be and were subjected to all sorts of measures limiting their civil rights.⁶ Their position was epitomized in the famous Supreme Court dictum that the descendants of Negroes brought to this country as slaves were not citizens and that, when the Constitution was adopted, they were viewed as having "no rights which the white man was bound to respect."⁷

Prior to the Civil War, therefore, laws discriminating against Negroes were widespread in both the North and South. Their entry into many states was prohibited or limited; restrictions were placed on their right to work, to buy and sell liquor, and to bear arms; they were excluded from juries and their testimony was inadmissible against whites. Several northern states operated segregated public schools and some southern states flatly prohibited the education

Intercultural Education, Rev. of Educ. Research 277-80 (October, 1950); Allport, *The Resolution of Group Tensions, A Critical Appraisal of Methods* (Nat'l Conf. of Christians and Jews, 1952).

⁵ 1 Stat. 103 (1790).

⁶ Of the 757,181 Negroes in the country in 1790, 59,557 were free, as were 448,070 of the 4,441,830 Negroes in 1860. U.S. Census Bureau, *Negro Population in the United States 1790-1915* (1918).

⁷ *Dred Scott v. Sandford*, 19 How. (U.S.) 393, 407 (1857).

of Negroes. Perhaps most important, a majority of the states limited the suffrage to white persons.⁸ In sum, "the free Negro constituted a distinct class between the slave and the master, his condition being more nearly that of a slave."⁹ Thus, when the Civil War resulted in the reconsideration and alteration of relations between the races, it was plain that resort to the legislative process was necessary.

Emancipation and the Black Codes

The first step to be taken was to free the slaves. It is by no means clear that emancipation was favored by majority sentiment in the North at the time of Lincoln's election or the assault on Fort Sumter. By 1862, however, the dynamics of war had made some such action inevitable. In April 1862, Congress began the process in the nation's capital, declaring in language foreshadowing the Thirteenth Amendment that "neither slavery nor involuntary servitude, except for crime . . . shall hereafter exist" in the District of Columbia.¹⁰ Lincoln's Emancipation Proclamation was issued on September 22, 1862, and proclaimed to be in effect January 1, 1863.¹¹ It applied, however, only to those states and parts of states in rebellion. Finally, on February 1, 1865, Congress adopted and submitted to the states the Thirteenth Amendment which declared simply that slavery should not exist in the United States and gave Congress power to enforce that prohibition. Ratification of this amendment was completed December 18, 1865.

Although chattel slavery was thus outlawed, efforts nevertheless continued in the South to keep the Negro in subjection. The discriminatory legislation of the pre-Civil War period remained on the statute books. It was supplemented by laws enacted in the South between 1865 and 1867, the so-called Black Codes,

⁸ A complete compilation and digest of these laws, as of 1862, may be found in 2 Hurd, *The Law of Freedom and Bondage in the United States* 1-218 (1862). See also Stephenson, *Race Distinctions in American Law* 36-38 (1910). Prior to the Civil War only five states, Maine, New Hampshire, Vermont, Massachusetts, and Rhode Island, allowed Negro rights of suffrage equal to those of whites.

⁹ Stephenson, *op. cit. supra* note 8, at 38. A particularly transparent use of the legislative process to control the relationship between the races may be seen in a Louisiana statute that provided: "Free persons of color ought never to insult or strike white people, nor presume to conceive themselves equal to the whites; but on the contrary they ought to yield to them on every occasion, and never speak or answer them but with respect, under the penalty of imprisonment according to the nature of the offense." 2 Hurd, *op. cit. supra* note 8, at 157.

¹⁰ 12 Stat. 376 (1862). Limited provision was made for reimbursing slave owners who had not committed any action of rebellion. In the same year, Congress provided for the establishment of schools for Negroes, 12 Stat. 394, 402 (1862), a step which, it has been argued, implied approval of the practice of racial segregation. *Carr v. Corning*, 182 F. 2d 14, 17-18 (App. D.C., 1950). It has not been shown, however, that in providing this schooling Congress considered the question of segregation itself. The following year, Congress granted a franchise to a railroad on the condition that "no persons shall be excluded from the cars on account of color." 12 Stat. 805 (1863). The Supreme Court later held that this provision prohibited segregation. *Railroad Co. v. Brown*, 17 Wall. (U.S.) 445 (1873).

¹¹ 12 Stat. 1267-69 (1862), also in 6 Messages and Papers of the Presidents 96-98, 157-59 (1897).

designed to deny as completely as possible the reality of freedom for the liberated race.

The Black Codes included laws prohibiting entry into the state of free Negroes, forbidding Negroes to own saloons or distilleries, and barring them from keeping taverns or more generally from any art, trade or business except that of "husbandry," without obtaining a special license. There were laws forbidding Negroes to rent or lease land except in towns and cities and special provisions affecting Negroes in the laws concerning apprentices, vagrants and paupers. Elaborate statutes were adopted governing contracts for labor of Negroes and subjecting those who failed to adhere to the terms of such contracts to severe penalties.¹²

The First Federal Civil Rights Act

It was too soon after the Civil War, however, for the North to allow the verdict of that conflict to be so easily reversed. On April 9, 1866, Congress passed over President Johnson's veto the first of several civil rights statutes.¹³ Although these statutes have been widely described as both vindictive and ineffective,¹⁴ it is plain that they were designed to meet a pressing problem.

The 1866 act extended citizenship to all persons born in the United States, without regard to color, and assured to all persons the same rights as those held by white citizens, to make contracts, to hold and enjoy property and to enjoy the equal benefit of all laws. It declared that all citizens should be subject to like punishments. A denial of any of the described rights was made a crime. The federal courts were given jurisdiction of suits based on violations of the act and federal officials were empowered to enforce its terms. The President was even authorized to use the nation's military force to enforce compliance with the law.

The dispute between President Johnson and Congress over this and subsequent civil rights legislation is familiar to every high school student. That dispute was not a mere disagreement over the best means of attaining a commonly desired end. President Johnson simply did not believe in equality for the freed slave. His veto message made this plain.¹⁵

¹² Stephenson, *op. cit.* supra note 8, at 40-63.

¹³ 14 Stat. 27 (1866). The full text of the various Reconstruction civil rights laws appears in Carr, *Federal Protection of Civil Rights: Quest For a Sword*, App. I (1947).

¹⁴ This view has found its way into recent Supreme Court opinions construing those provisions of the Reconstruction legislation that survive today. *Collins v. Hardyman*, 341 U.S. 651, 656-57 (1951); dissenting opinion of three Justices in *Screws v. United States*, 325 U.S. 91, 140 (1945). Compare the 1873 view of the Court expressed in the *Slaughter-House Cases*, 16 Wall. (U.S.) 36, 70 (1873), where, after noting that the rebel states had "imposed upon the colored race onerous disabilities and burdens," it found that they had "forced upon" federal government officials "the conviction that something more [than the Thirteenth Amendment] was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the Fourteenth Amendment."

¹⁵ Messages and Papers of the Presidents, *op. cit.* supra note 11, at 405-13. Johnson said in the message that he did not believe that the newly freed slaves were entitled "to all the privi-

By passing the bill over President Johnson's veto, Congress insisted on its plan to promote actual equality. It is difficult to find vindictiveness in that attitude. A recent student of the period has said of this and the subsequent civil rights statutes:

The civil rights statutes enacted by Congress in the decade after the close of the Civil War may not have been motivated entirely by the highest ideals. Moreover, as a consistent, comprehensive program of legislation, they left much to be desired. Nonetheless, these acts represent the most substantial attempt in our history up to 1939 to use the power of the national government to safeguard fundamental rights.¹⁶

Even the Beards, who tend to adopt the traditional condemnation of the Reconstruction Period, concede:

Indeed some action of this nature was rendered imperative by events. Soon after slavery was legally abolished the former masters, working through State legislatures, restored a kind of servitude by means of apprentice, vagrancy and poor laws. This strategical movement the radical Republicans in Congress answered by passing the Civil Rights Bill of 1866 designed to insure American citizenship and the legal rights to all freedmen.¹⁷

The Fourteenth and Fifteenth Amendments

Doubtful of the constitutionality of the act just passed and desiring in any event to embed it in the Constitution, Congress, on June 16, 1866, adopted and submitted to the states the Fourteenth Amendment which was ratified on July 21, 1868. The familiar provisions of its first section guaranteed citizenship to all persons born or naturalized in the United States (thus abrogating the *Dred Scott* decision) and declared that no state might abridge the privileges or immunities of United States citizens, deprive any person of life, liberty or property without due process of law or deny to any person the equal protection of the laws. The fifth section gave Congress the power to enact implementing legislation.¹⁸

Within a year after ratification of the Fourteenth Amendment, Congress found it necessary to act against an additional abuse. Equality for the freedmen could not become a reality as long as they were excluded from participating in their government. As early as 1867, Congress had made the re-establishment of governments in rebel states conditional on the adoption of new constitutions

leges and immunities of citizens of the United States." He objected to the grant of "perfect equality of the white and colored races" and to the fact that, under the bill, no state could ever "exercise any power of discrimination between the different races." He warned that if Congress could grant civil rights to the Negro, it might also repeal "all State laws discriminating between the two races on the subjects of suffrage and office." He urged that labor, represented by the former slaves, and capital, represented by the former masters, should be left to work out their own adjustment.

¹⁶ Carr, *op. cit.* supra note 13, at 40-41.

¹⁷ Beard and Beard, 2 *The Rise of American Civilization* 117 (rev. ed., 1936). For a Negro view of the Reconstruction Period, see Du Bois, *Black Reconstruction* (1935).

¹⁸ An exhaustive study of the development of the concepts embodied in the Fourteenth Amendment appears in Graham, *The Early Anti-Slavery Backgrounds of the Fourteenth Amendment*, [1950] *Wis. L. Rev.* 479, 610.

prepared by delegates elected by citizens "of whatever race, color, or previous condition."¹⁹ On February 26, 1869, it adopted and submitted to the states the Fifteenth Amendment which provided, quite simply, that the right to vote should not be denied to anyone on the ground of "race, color or previous condition of servitude" (the only reference in the Constitution to race or color). The amendment was ratified on March 30, 1870.²⁰

Legislative Implementation of the Amendments

Under each of the Amendments, Congress found it necessary to enact implementing legislation. To guard against a return to slavery in new guises, despite the Thirteenth Amendment, it passed two acts in 1867, one "to prevent and punish kidnapping" and the other "to abolish and forever prohibit the system of peonage." Both are still law.²¹

The Enforcement Act of May 31, 1870 (amended on February 28, 1871) was a comprehensive statute designed to bring the full force of the federal government to bear against any effort to flout or circumvent the Fourteenth and Fifteenth Amendments.²² It provided both civil and criminal sanctions for interference with the right to vote because of race or color, as well as for fraud and other malpractices in federal elections.²³ Other sections repeated provisions of the 1866 Civil Rights Act and made it a felony for two or more persons to conspire to interfere with the free exercise by any citizen of any right guaranteed by the Constitution or laws of the United States.

By 1871 it had become clear that further action was required against the Ku Klux Klan. The outrages of that organization led President Grant to recommend to Congress more comprehensive legislation²⁴ and on April 20, 1871, the Anti-Ku Klux Klan Act became law.²⁵ This act forbade conspiracies to obstruct justice, to interfere with elections or to deny any person equal privileges and

¹⁹ 14 Stat. 428 (1867).

²⁰ It is ironic that efforts to enfranchise Negroes in the northern states during and immediately after the war were defeated in one state after another. Only the adoption of the Fourteenth and Fifteenth Amendments compelled the northern states to change their rules on suffrage. As Myrdal puts it: "If the North had not been so bent upon reforming the South it is doubtful whether and when some of the Northern states would have reformed themselves." Myrdal, *An American Dilemma* 438-39 (1944).

²¹ 14 Stat. 50 (1866), 18 U.S.C.A. § 1583 (1950); 14 Stat. 546 (1867), 8 U.S.C.A. § 56 (1942). See Brodie, *The Federally-Secured Right To Be Free From Bondage*, 40 Geo. L.J. 367 (1952).

²² 16 Stat. 140 (1870), amended, 16 Stat. 433 (1871).

²³ The Act was applicable to every type of election, including even school districts, and covered registration, voting, counting of ballots and certification. It authorized an increase in the number of United States Commissioners to expedite prosecutions and allowed them to call upon the militia or the armed forces of the United States to perform their duties. It forbade interference with peace officers and the harboring or concealing of offenders. Finally, it enabled defeated candidates for certain offices to bring suit in the federal courts when their defeat was caused by a denial of suffrage to Negroes.

²⁴ Message of March 23, 1871, 44 Cong. Globe 244 (1871). A Joint Congressional Committee of Inquiry had also investigated conditions in the South. See Sen. Rep. No. 41, 42d Cong. 1st Sess. (1871).

²⁵ 17 Stat. 13 (1871).

immunities. It empowered the President to call out the militia or the armed forces whenever such conspiracies deprived "any portion or class of the people" of their rights. Most striking was a provision making conspiracies between state authorities and Klan mobs "a rebellion against the Government of the United States."

The seventh and last civil rights act became law on March 1, 1875.²⁶ Entering an entirely new field, Congress here prohibited discrimination on the ground of race or color in "inns, public conveyances on land or water, theaters, and other places of amusement."²⁷ Such discrimination was made a misdemeanor and injured parties were allowed to sue for damages in the federal courts. A further provision prohibited discrimination because of race or color in the selection of juries.

Nullification of the Civil Rights Laws

The civil rights laws did not succeed in obtaining actual as well as legal equality for the freedmen. For a brief period vigorous enforcement was attempted in the hope that the Ku Klux Klan and its allies could be defeated in their uncompromising effort to nullify the new amendments.²⁸ A study of the administration of the laws shows that 7,372 criminal prosecutions were brought under the civil rights laws between 1870 and 1897, of which 5,172 were in the South. About twenty percent of the prosecutions resulted in convictions.²⁹ In the end, however, the Klan forces won. "The very extent of the litigation under the Enforcement Acts soon overtaxed the capacity of the twenty-four district courts in the South."³⁰ At the same time, other factors were at work to deprive the civil rights laws of the public support without which they could not be effective.

The disputed presidential election of 1876, from which Hayes emerged the victor over Tilden only two days before the inaugural deadline in 1877, was settled by a deal among elements in the two rival camps. The racial problem was not the only issue which figured in that understanding, but there was little

²⁶ 18 Stat. 335 (1875).

²⁷ Discrimination in such places of public accommodation had already been prohibited in the District of Columbia. See note 220 *infra*.

²⁸ Guy B. Johnson, a southern scholar, has described the Reconstruction Period as "in a sense a prolonged race riot" in which the Ku Klux Klan and a dozen similar organizations "flogged, intimidated, maimed, hanged, murdered," the purpose being "the restoration of absolute white supremacy." Johnson, *Patterns of Race Conflict*, in Thompson, *Race Relations and the Race Problem* 137-38 (1939).

²⁹ Davis, *The Federal Enforcement Acts*, *Studies in Southern History and Politics* 223-26 (1914); Berger, *op. cit. supra* note 4, at 9. There were 314 criminal prosecutions in 1871, 856 in 1872, 1,304 in 1873, 966 in 1874, and 234 in 1875. In the South, the figures were 263 in 1871, 832 in 1872, 1,271 in 1873, 954 in 1874, 221 in 1875, and 25 in 1878. The cases caused a marked increase in the cost of maintaining the federal courts in the South. *Ibid.* See also Cummings and McFarland, *Federal Justice* 234-49 (1937).

³⁰ Davis, *op. cit. supra* note 29, at 225.

question at the time that it played a prominent part.³¹ The compromise meant not only the withdrawal of federal troops from the southern states where they still remained but the end of the Reconstruction effort itself.³² It was plain that the North had abandoned the fight and turned its attention to other matters.³³

While the wave of northern sentiment for equality was receding and perhaps because of that recession, the Supreme Court was issuing a series of decisions which, in effect, incorporated into law the victory of white supremacy. The decisions limiting the scope of the Reconstruction amendments and invalidating much of the legislation enacted to implement them have been searchingly analyzed.³⁴ It will be sufficient here to discuss briefly the chief principles laid down and the way they affected the civil rights laws.

First, the Court held that the Thirteenth Amendment abolished only the legal institution of chattel slavery and gave Congress no broad powers to legislate against what it might regard as the badges of slavery.³⁵ It thereby rejected the theory, held by the sponsors of the 1866 Civil Rights Act, that the Thirteenth Amendment alone justified congressional action to insure equality.

Second, the Court held that the guaranty in the Fourteenth Amendment against infringement of the privileges and immunities of the United States citizens created no new federal rights. The right to be protected in person and property against the misconduct of private individuals was viewed as a purely state right which had acquired no new dignity or sanction by adoption of the Fourteenth Amendment.³⁶

³¹ For a brilliant account of the economic factors that led to the resolution of the Hayes-Tilden conflict and the reconciliation of the North and South, see Woodward, *Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction* (1951).

³² See Dunning, *Reconstruction, Political and Economic, 1865-1877*, 338-41 (1907): "To the reflecting spirit of the North the whole dispute confirmed the conviction, which had been created by the panic of 1873 and the maladministration and corruption later revealed, that other problems than those of the South were in pressing need of solution. Though the Wormley agreement was not generally known when Hayes was inaugurated, the substance of it was in the thoughts of many men. Generalized, this famous bargain meant: Let the reforming Republicans direct the national government and the southern whites may rule the Negroes. Such were the terms on which the new administration took up its task. They precisely and consciously reversed the principles of reconstruction as followed under Grant, and hence they ended an era." See also Buck, *The Road to Reunion, 1865-1900* (1937).

³³ Myrdal, *op. cit. supra* note 20, at 226.

³⁴ See, in addition to the authorities on specific phases referred to below, Emerson and Haber, *Political and Civil Rights in the United States* 12-86 (1952); Carr, *op. cit. supra* note 13, at 35-84; Konvitz, *The Constitution and Civil Rights* 8-28 (1947); Boudin, *Government by Judiciary* 53-151 (1932); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323 (1952); Watt and Orlikoff, *The Coming Vindication of Mr. Justice Harlan*, 44 Ill. L. Rev. 13 (1949); Waite, *The Negro in the Supreme Court*, 30 Minn. L. Rev. 219 (1946).

³⁵ *Slaughter-House Cases*, 16 Wall. (U.S.) 36 (1873); *Civil Rights Cases*, 109 U.S. 3 (1883); *Hodges v. United States*, 203 U.S. 1 (1906).

³⁶ *Slaughter-House Cases*, 16 Wall. (U.S.) 36 (1873); *United States v. Cruikshank*, 92 U.S. 542 (1876).

Third, the Court held that the Fourteenth and Fifteenth Amendments protected persons only from acts of the states and their agencies. They did not reach the acts of private individuals.³⁷ This holding undermined the prohibition of discrimination in places of public accommodation in the 1875 Civil Rights Act and all those provisions of the various acts condemning mob action and private interference with the right to vote.

Finally, the Court combined these principles with an extremely narrow attitude toward severability to invalidate whole sections of the statutes. In cases where the misconduct charged was within the scope of even the Court's narrow view of congressional power, indictments were dismissed on the ground that the statute was invalid because it also condemned conduct which Congress could not regulate.³⁸

The Democratic Congress of 1877 voted to repeal most of the Reconstruction civil rights legislation, but the repealer was vetoed by President Hayes.³⁹ In 1890, with the Republicans back in power, there was a renewed effort to protect Negro suffrage. Aroused by continued reports of Negro disfranchisement, the Republicans, under the leadership of Henry Cabot Lodge, introduced a federal elections bill which was passed by the House. In the Senate, however, the Southerners dubbed the measure the "Force Bill" and conducted a filibuster against it for thirty-three days. In the end, this last flicker of the flame of resistance to the South's intransigence died and the bill was defeated.⁴⁰

When the Democrats came back in the second Cleveland administration, they repealed most of the laws affecting elections and in 1909, during Taft's administration, the evisceration was completed.⁴¹ The provisions of the Civil Rights Acts that survive today fail to cover even the limited area which the Supreme Court left open to congressional action.⁴²

³⁷ Civil Rights Cases, 109 U.S. 3 (1883); *Hodges v. United States*, 203 U.S. 1 (1906); *Hale, Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 *Lawyers Guild Rev.* 627 (1946); *Barnett, What Is "State" Action Under The Fourteenth, Fifteenth, and Nineteenth Amendments of The Constitution?*, 24 *Ore. L. Rev.* 227 (1945).

³⁸ *James v. Bowman*, 190 U.S. 127 (1903); *Baldwin v. Franks*, 120 U.S. 678 (1887); *United States v. Reese*, 92 U.S. 214 (1876). For example, in the *Reese* case, the Court dismissed the indictment of two Kentucky election inspectors charged with refusing to allow Negro citizens to vote in a municipal election. It held that the applicable provisions of the 1870 Act were not limited to wrongful discrimination because of race and so were beyond the powers of Congress, although the offense charged was one that could be forbidden by the federal government. The Court refused to limit the sections to discrimination because of race, although such limitations were contained in other provisions of the Act.

³⁹ Carr, *op. cit. supra* note 13, at 46.

⁴⁰ *Burdette, Filibustering in the Senate* 52-57 (1940).

⁴¹ Carr, *op. cit. supra* note 13, at 46.

⁴² The surviving provisions of the Civil Rights Acts are: 8 U.S.C.A. §§ 31-32, 41-56 (1942); 18 U.S.C.A. §§ 241-42, 372, 592-94, 1581, 1583 (1950), 50 U.S.C.A. §§ 203-4 (1946). The text of these provisions is given in Carr, *op. cit. supra* note 13, at 252-68. An analysis of the more important provisions and the decisions interpreting them appears in Emerson and Haber, *op. cit. supra* note 34, at 70-77. The provisions apply both penal and civil remedies.

Having been given a free hand to "rule the Negroes,"⁴³ the South settled down to the job with thoroughness, making full use of the legislative powers of the states. Various devices were used to limit the franchise to whites and an elaborate code of conduct was established by law to maintain segregation of the races.⁴⁴ The Negroes were gradually forced out of the skilled trades they had learned as slaves.⁴⁵ Finally, the crude weapon of violence which had proved so effective during the Reconstruction period was kept in reserve at all times.

The history of the twentieth-century effort to restore equality by statute is largely one of undoing earlier setbacks. We shall discuss it in the following pages under the major headings of the right to vote, security of the person, segregation, fair employment legislation, the filibuster, and other state laws.

III. THE RIGHT TO VOTE

When the South was left to its own devices in 1877, its first task was to disfranchise the Negro. The violence and intimidation of the Ku Klux Klan were no longer necessary; it was "easier to buy, steal, or fail to count the Negro vote."⁴⁶ A series of statutory disfranchising devices was enacted during the next two decades. But these devices proved insufficient in the 1890's when rival white factions solicited the Negro's support.⁴⁷ White solidarity was imperiled by the rise of the Populist movement, when both Populists and Bourbons competed for the Negro vote. Each side, in the states in which it was dominant, sought to prevent the Negro from aiding its rival.⁴⁸ Ultimately, a new series of state constitutional amendments were adopted which held Negro voting down to a point at which it presented no danger.

Various contrivances were utilized. The Mississippi Constitution of 1890 imposed a cumulative poll tax and a requirement that every voter read or understand any section of the Constitution, it being tacitly understood that the second of these requirements would be enforced only against Negroes. The South Carolina Constitution of 1895 imposed a literacy test or the payment of taxes on \$300 of property. The Louisiana Constitution of 1898 enacted the so-called "grandfather's clause" literacy test, which exempted the grandchildren of those entitled to vote before 1867.⁴⁹

⁴³ See note 32 *supra*.

⁴⁴ Many of the laws affecting Negroes enacted up to 1918 are digested in Johnson, *The Development of State Legislation Concerning the Free Negro* (1918).

⁴⁵ Weaver, *Negro Labor, A National Problem* 3-6 (1946).

⁴⁶ Myrdal, *op. cit. supra* note 20, at 450.

⁴⁷ Lewinson, *Race, Class and Party, A Story of Negro Suffrage and White Politics in the South* 61 (1932).

⁴⁸ Key, *Southern Politics in State and Nation* 548-50 (1949).

⁴⁹ For other state constitutional provisions enacted during this period see Key, *op. cit. supra* note 48, at 539; McGovney, *The American Suffrage Medley* 60, 119-40 (1949); Stephenson, *op. cit. supra* note 8, at 294-96, 305-10.

The White Primary

The most effective scheme was the "white primary." The disappearance of the Republican party, which claimed the allegiance of the Negro voters, resulted in a one-party system, in which the general election became a formality and the struggle for power shifted to the primary. It then became a simple matter to adopt party regulations expressly barring Negroes from the primary. Thus a fool-proof method came into being in the eleven states of the deep South to disfranchise the Negro, without at the same time keeping some whites from the ballot.⁵⁰ It was viewed as constitutional because the racial barrier was not imposed by the state but by the party, a private organization.

Unable to turn to Congress for help, the Negro and his northern friends began to organize defensive associations and to invoke the Constitution in his struggle for the ballot.⁵¹ The National Association for the Advancement of Colored People, organized in 1909, almost as its first order of business challenged the notorious grandfather's clause in the Oklahoma Constitution of 1910.⁵² The Supreme Court struck down this transparent subterfuge, as a violation of the Fifteenth Amendment.⁵³

The NAACP then began a fight in the courts against the Texas white primary which lasted twenty-five years and was not to be won until the issue came before the Supreme Court on four separate occasions. In 1927, the Supreme Court struck down a Texas statute that expressly barred Negroes from the Democratic primary in that state.⁵⁴ When Texas amended its law to empower the party executive committee to determine eligibility, the Court condemned the committee's exclusion of Negroes on the ground that the committee derived its power from the state.⁵⁵ However, a second effort at evasion, in which the exclusion of Negroes was effected by the party convention without the aid of any state legislation, was at first upheld.⁵⁶ In 1944, however, the Court reversed itself and held broadly that the Democratic party primary was so integral a

⁵⁰ Myrdal, *op. cit.* supra note 20, at 1,072.

⁵¹ For an account of some of the early litigation, see Mangum, *The Legal Status of the Negro* 411-22 (1940).

⁵² *White, A Man Called White* 85 (1948).

⁵³ *Guinn v. United States*, 238 U.S. 347 (1915). This was a criminal proceeding brought under what is now Section 241 of the Federal Criminal Code, 62 Stat. 696 (1948), 18 U.S.C.A. § 241 (1950), derived from the Enforcement Act of 1870. Oklahoma thereupon amended its constitution to require new voters to qualify within twelve days, a period deliberately made brief to disfranchise those who would have benefited by the Guinn case. This second device was likewise challenged in the Supreme Court by the NAACP and there stricken down, but not until 1939, twenty-four years after the first victory. *Lane v. Wilson*, 307 U.S. 268 (1939). At one time, grandfather's clauses existed in seven states.

⁵⁴ *Nixon v. Herndon*, 273 U.S. 536 (1927). The statute was invalidated on the ground that it was a "direct and obvious infringement" of the equal protection clause of the Fourteenth Amendment. The issue of its validity under the Fifteenth Amendment was not reached.

⁵⁵ *Nixon v. Condon*, 286 U.S. 73 (1932).

⁵⁶ *Grovey v. Townsend*, 295 U.S. 45 (1935), a unanimous decision by a court which included Brandeis, Stone, and Cardozo.

part of the Texas election machinery that Negroes could not be excluded without violating the Fifteenth Amendment.⁵⁷

The reaction of the South to this white primary decision was mixed, dependent largely upon the percentage of Negroes in each state and the consequent "politics of color."⁵⁸ There was no resistance to the decision in North Carolina, Tennessee, Texas, and Virginia.⁵⁹ In the remaining southern states, however, new statutory devices were utilized.

South Carolina, where Negroes were 42.9 per cent of the population in 1940 (exceeded only by Mississippi's 49.2 per cent), tried repealing all its statutes affecting primaries, but this maneuver was held ineffective by the lower federal courts.⁶⁰ Finally, in 1950 the state adopted a new electoral law establishing literacy qualifications.⁶¹ As noted below,⁶² statutes of this nature are designed to facilitate discrimination by local registrars.

In Alabama, the first device used was the so-called Boswell Amendment to the state constitution. It required voters to be of "good character" and to "understand and explain" any article of the United States Constitution. This was condemned as conferring uncontrolled and arbitrary powers on state registration officials.⁶³ Thereafter, a second constitutional amendment was proposed to achieve the same end by giving county registrars more narrowly defined powers to determine the fitness of prospective voters. Passed in a 1951 referendum by a close margin, it has so far not been subjected to judicial scrutiny.⁶⁴

⁵⁷ *Smith v. Allwright*, 321 U.S. 649 (1944). These decisions have been analyzed in Carr, *op. cit. supra* note 13, at 94-97. See also Mangum, *op. cit. supra* note 51, at 410-24; Cushman, *The Texas "White Primary" Case*, *Smith v. Allwright*, 30 Cornell L.Q. 66 (1944).

⁵⁸ Cf. Moon, *Balance of Power: The Negro Vote 174-96* (1949).

⁵⁹ Weeks, *The White Primary: 1944-1948*, 42 Am. Pol. Sci. Rev. 500 (1948); Key, *op. cit. supra* note 48, at 625-43. In Texas, where Negroes then constituted only 14% of the population, "the surprising fact seems to be that there have been no serious organized efforts to circumvent the Supreme Court, and Negro voting appears to be on its way toward full acceptance." Strong, *The Rise of Negro Voting in Texas*, 42 Am. Pol. Sci. Rev. 510, at 512 (1948). Strong attributed this result in part to a bitter factional struggle inside the state Democratic party, as a result of which each side distrusted the other too much to risk removing all legal controls over the conduct of the primaries.

⁶⁰ After the statutes were repealed, the party nevertheless retained its color bar. This bar was held ineffective in *Rice v. Elmore*, 165 F. 2d 387 (C.A. 4th, 1947). The party then adopted a new set of rules discriminating against Negroes and requiring all voters to take a loyalty oath worded in a manner which, it was hoped, Negroes could not accept. These new devices were condemned in *Baskin v. Brown*, 174 F. 2d 391 (C.A. 4th, 1949). The District Court opinions in both cases were written by Judge J. Waties Waring who ultimately ended the litigation by threatening contempt proceedings and jail sentences if further evasions were attempted.

⁶¹ Acts of S.C. (1950) No. 858, § 3-B.

⁶² See *Extra-legal Restraints*, *infra*.

⁶³ *Davis v. Schnell*, 81 F. Supp. 872 (D.C. Ala., 1949), *aff'd*, per curiam, 336 U.S. 933 (1949). See *Validity of Electoral Qualifications Under 14th and 15th Amendments*, 49 Col. L. Rev. 1144 (1949).

⁶⁴ Ala. Code (Cum. Supp., 1951) Const. Amend. 91; American Jewish Congress and NAACP, *Civil Rights in the United States in 1951: A Balance Sheet of Group Relations*

Georgia attempted the herculean task of requiring all voters to register anew and to answer at least ten questions out of a series of thirty listed in the statute along with the approved answer. This law survived challenge in the courts.⁶⁵

The Poll Tax

Soon after the white primary litigation began, the fight for the ballot was broadened by an attack on the poll tax. The poll or per capita tax, originally imposed in colonial times, had been giving way slowly to more advanced forms of taxation.⁶⁶ When the southern states looked about, however, toward the turn of the century for legal devices to curb Negro voting, the imposition of the poll tax as a qualification for voting seemed a find. The tax might also prevent or discourage suffrage by poor whites, but that served only to enhance its attractiveness to its sponsors. That the tax was not designed as a revenue measure is indicated by the following accompanying features of the state poll tax laws:

1. Payment of the poll tax by others was made a crime.
2. Payment was required from six to ten months in advance of voting, when election interest was at its lowest point.
3. No special efforts were made in the states to collect the taxes; indeed the Alabama Constitution specifically forbade the use of any legal process to compel payment of the tax.

When the tax was in addition made cumulative (Mississippi, two years; Virginia, three years; and Alabama, twenty-four years) its effectiveness as a vote-reducing stratagem was enhanced considerably.⁶⁷

In 1939 when Representative Lee Geyer of California, at the request of the Southern Conference for Human Welfare, introduced the first federal bill to abolish the poll tax as a prerequisite for the election of Senators or Representatives,⁶⁸ eight southern states still imposed such a tax.⁶⁹ The anti-poll tax agitation gained momentum with the organization of a National Committee To

18-19. (This series of annual reports is hereinafter cited as "Balance Sheet," followed by the appropriate year.)

⁶⁵ *Franklin v. Harper*, 205 Ga. 779, 55 S.E. 2d 221 (1949). Ga. Code Ann. (1936) § 34-101, (Cum. Supp., 1951), § 34-152.

⁶⁶ *McGovney*, op. cit. supra note 49, at 113-20.

⁶⁷ *Key*, op. cit. supra note 48, at 589-98.

⁶⁸ A 1937 court test of the constitutionality of the poll tax by a white man had been unsuccessful. *Breedlove v. Suttles*, 302 U.S. 277 (1937). See also *Pirtle v. Brown*, 118 F. 2d 218 (C.A. 6th, 1941); *Butler v. Thompson*, 97 F. Supp. 17 (D.C. Va., 1951), aff'd, per curiam, 341 U.S. 937 (1951).

⁶⁹ Alabama, Arkansas, Georgia, Mississippi, South Carolina, Tennessee, Texas, and Virginia. North Carolina abolished the tax in 1920, Louisiana in 1934, and Florida in 1937. *McGovney*, op. cit. supra note 49, at 142. Since then Georgia (1945), South Carolina (1951), and Tennessee (1951) have either repealed their poll tax laws or deprived them of all effectiveness. For the dates of original enactment, see *ibid.*, at 110. For the present voting rules in each state, see Council of State Governments, *Book of the States* 96-102 (1952-53).

Abolish The Poll Tax. In 1942, the Geyer bill passed the House of Representatives by an overwhelming vote, only to collide with the inevitable filibuster in the Senate. In 1943, a bipartisan coalition pushed the Marcantonio bill through the House but again it was killed in 1944 by a Senate filibuster. In 1945, the Marcantonio bill passed the House for the third time but, a cloture petition to limit debate in the Senate failing by a narrow margin, the bill was dropped in 1946. In 1947, the Bender bill passed the House but died in a filibuster the next year. In 1949, the Norton bill passed the House for the fifth time but died in committee in the Senate. Apparently discouraged by these successive rebuffs, neither the Senate nor the House Committees of the 82d Congress reported out a bill.⁷⁰

The poll tax bills sought to achieve their objective by (1) declaring that the requirement for a poll tax should not be deemed a "qualification" of voters within the meaning of the Constitution; (2) making it unlawful to prevent a person from registering or voting because of nonpayment of such a tax; (3) making it unlawful to require a poll tax as a prerequisite to registering or voting. No sanctions of any kind were to be imposed or enforcement machinery established.

From the outset the constitutionality of the poll tax bill has been in dispute.⁷¹ Hence, some opponents of the tax have proposed a constitutional amendment rather than legislative action to deal with the problem.⁷² This proposal, however, has been denounced as a dilatory device to head off passage of a federal law.⁷³

The effect of the poll tax as a deterrent to Negro suffrage has probably been exaggerated.⁷⁴ Negro voting has been low in southern states even where the poll tax has been repealed, as in Florida and Louisiana. In South Carolina, where

⁷⁰ McGovney, *op. cit.* supra note 49, at 159. In 1942, however, in providing for votes for servicemen in federal elections, Congress abolished the requirement for payment of poll taxes in wartime. 56 Stat. 753 (1942), 50 U.S.C.A. § 302 (1951). A detailed chronology of the legislative history also appears in Hearings Before The Senate Committee on Rules and Administration on H.R. 29, 80th Cong. 1st Sess., at 250-52 (1947).

⁷¹ McGovney, *op. cit.* supra note 49, at 158-80; Christensen, *The Constitutionality of National Anti-Poll Tax Bills*, 33 Minn. L. Rev. 217 (1949); Kallenbach, *Constitutional Aspects of Federal Anti-Poll Tax Legislation*, 45 Mich. L. Rev. 717 (1947); Looney, *Constitutionality of Anti-Poll Tax Measures*, 7 Tex. Bar J. 70 (1944); Boudin, *State Poll Taxes and the Federal Constitution*, 28 Va. L. Rev. 1 (1941); *Negro Disenfranchisement—A Challenge To The Constitution*, 47 Col. L. Rev. 76 (1947).

⁷² E.g., S.J. Res. No. 92, 79th Cong. 1st Sess. (1945), introduced Sept. 11, 1945; H.J. Res. 157, introduced Feb. 8, 1951. Southern opposition to the poll tax bills has relied almost exclusively on the alleged unconstitutionality of the measure. See, for example, *Minority Views on H.R. 3,199*, H.R. Rep. No. 912, 81st Cong. 1st Sess. 4 (1949).

⁷³ See Sen. Rep. No. 912, 81st Cong. 1st Sess. 2 (1949). During the 79th Congress, the Senate Judiciary Committee, on October 3, 1945, recommended the adoption of a constitutional amendment forbidding denials of vote in both federal and state elections because of a failure to pay any tax or any property qualifications. Sen. Rep. No. 614, 79th Cong. 1st Sess. (1945). Two days later, the same Committee recommended passage of a federal poll tax bill. Sen. Rep. No. 625, 79th Cong. 1st Sess. (1945).

⁷⁴ The best analysis of the effect of the poll tax in reducing voting is found in *Key*, *op. cit.* supra note 48, at 599.

the only election that counts is the primary, the poll tax was imposed only on voting in the general election. The poll tax is only one of a battery of methods used to exclude Negroes and is far from being solely or even chiefly responsible for the great difference in the percentage of voters in poll tax and non-poll tax states.

The fact is that there is no real incentive to pay a poll tax in any state with a one-party system. Repealing the poll tax while that system remains will do little to increase Negro suffrage in the South. As Professor Key puts it, "The poll tax has little or no bearing on Negro disenfranchisement, the object for which it is supposedly designed. On the contrary, those kept from voting have been whites. Negro disenfranchisement has been accomplished by extra-legal restraints and the white primary."⁷⁵

Extra-legal Restraints

The "extra-legal restraints" to which Key refers are the reserve force which remains available when legal restraints are nullified or repealed. They may take the form of discriminatory conduct by registration and other state officials or they may simply be acts of intimidation to keep Negroes from the polls.

The Southern Regional Council has listed nine tactics currently used by election officials to discourage Negro suffrage, including requiring Negro registrants to furnish white character witnesses, delays, evasions and deliberate insults or threats.⁷⁶ Perhaps most important is the enforcement of property, literacy and other statutory qualifications against Negroes but not whites.⁷⁷ The literacy test, in particular, has been described as "a fraud and nothing more" which is administered fairly only in exceptional cases.⁷⁸ The recent legislation in Alabama, Georgia and South Carolina described above is designed to open the door to such abuse by giving wide discretion to local officials.⁷⁹ Abuse of such discretion is difficult to prove in the courts.

Outright intimidation has also been reported in recent years.⁸⁰ The 1946 election, in which Senator Theodore Bilbo of Mississippi was returned to the Senate, was an outstanding example. The outrages that took place during the primary election in that year were so notorious that Bilbo was not seated when the Senate convened in 1947, pending a hearing on the charges made against him.⁸¹

⁷⁵ Key, *op. cit.* supra note 48, at 618.

⁷⁶ Southern Regional Council, *The Condition of Our Rights* 14-15 (1948).

⁷⁷ Jackson, *Race and Suffrage in the South Since 1940*, *The New South* 9 (June-July, 1948). For instances of such discrimination see Balance Sheet, *op. cit.* supra note 64, at 18, 20 (1951); *ibid.*, at 18 (1950); *ibid.*, at 19 (1949).

⁷⁸ Key, *op. cit.* supra note 48, at 576.

⁷⁹ Balance Sheet, *op. cit.* supra note 64, at 18-19 (1950); *ibid.*, at 18-19 (1949); *ibid.*, at 48 (1948).

⁸⁰ Balance Sheet, *op. cit.* supra note 64, at 20 (1951); *ibid.*, at 18, 20 (1950); *ibid.*, at 11 (1948). See also listing of recent instances of discrimination and violence in *The Battle for the Ballot*, 175 *Nation* 250-51 (Sept. 27, 1952).

⁸¹ Sen. Rep. No. 1, 80th Cong. 1st Sess. (1947). Bilbo died before the Senate took final action.

The federal government has the constitutional authority to restrain and punish these illegal practices.⁸² Efforts have accordingly been made to strengthen the existing civil rights laws to curb these abuses. The President's Committee on Civil Rights, in addition to recommending federal action, "either by act of Congress or by constitutional amendment," to bar the poll tax as a voting prerequisite, also urged a comprehensive federal statute "protecting the right of qualified persons to participate in federal primaries and elections against interference by public officers and private persons" and barring discriminatory action by state officers in all elections.⁸³

This recital should not blind us to the huge increases in Negro voting in the South since 1940.⁸⁴ The outlawry of the white primary, the shrinking of the poll tax area, the organized efforts made by Negro groups to get their members to vote, all have contributed to the enfranchisement. A study in 1947 by the Southern Regional Council showed that 610,000 Negro voters had qualified in twelve southern states, about twelve per cent of the total number of Negroes of voting age.⁸⁵ By 1950 the number of registered Negro voters in the South had climbed to 1,000,000, and it was estimated that in 1952 about 1,500,000, or twenty-five per cent of the estimated 6,000,000 eligible, would vote.⁸⁶

In 1944, Myrdal, surveying "the Southern franchise situation" (before *Smith v. Allwright*⁸⁷), described it as "highly unstable" and characterized the southern position on suffrage as "politically untenable."⁸⁸ Events have amply fulfilled his prophecy. The major battles for Negro enfranchisement have been won. What remains are skirmishes with registration boards, the resistance to back-

⁸² Discriminatory conduct by registration officials, being state action, is a violation of the Fifteenth Amendment. See authorities cited note 37 *supra*. Violence of private individuals does not fall within the Reconstruction amendments but, when it interferes with the right to vote in federal elections, it is a violation of the rights of the United States citizens to vote, protected by Art. 1, § 4, of the Constitution. *Ex parte Yarborough*, 110 U.S. 651 (1884); *Ex parte Siebold*, 100 U.S. 371 (1879). Hence congressional power reaches interference with any election, except those where no federal office is to be filled.

⁸³ President's Committee on Civil Rights, *To Secure These Rights* 160-61 (1947). Illustrative of a bill to effectuate this recommendation is Sen. 1,738, 82d Cong. 1st Sess. (1951). The Hatch Act, 62 Stat. 720 (1948), 18 U.S.C.A. § 594 (1950), which forbids intimidation of voters, applies only to federal elections and even there not to primaries. The 1952 Republican platform called for federal action "toward" elimination of the poll tax voting requirement. The Democratic platform supported federal legislation to secure to everyone "full and equal participation in the Nation's *political life, free from arbitrary restraints*." (Emphasis added.)

⁸⁴ Balance Sheet, *op. cit. supra* note 64, at 18 (1951); *ibid.*, at 16 (1950); *ibid.*, at 10 (1948); and see the table in Emerson and Haber, *op. cit. supra* note 34, at 326; Moon, *The Negro Vote in the South*, 175 *Nation* 245-47 (Sept. 27, 1952).

⁸⁵ Jackson, *op. cit. supra* note 77, at 3. The advances were uneven, ranging from 29.6% in Oklahoma and 25.8% in Tennessee to less than 3% in Alabama, Louisiana, and Mississippi.

⁸⁶ Moon, *op. cit. supra* note 84, at 245. Only one other minority group has had difficulty in exercising the right to vote: the American Indian. See Christman, *The American Indians Win the Vote*, 4 *The American Indian* 6 (1948); McWilliams, *Brothers Under the Skin* 84 (1951).

⁸⁷ 325 U.S. 649 (1944).

⁸⁸ Myrdal, *op. cit. supra* note 20, at 518.

woods intimidation and, often equally important, efforts to make the value of the ballot known to the many Negroes to whom it has only recently become available.

But the process will be speeded up if the federal government joins the NAACP and other private groups in carrying on the necessary mopping up operations in federal and state courts. In that campaign a federal statute implementing the Fifteenth Amendment and specifically authorizing injunctive relief would be a useful weapon. The responsibility for the enforcement of that statute should be placed in a greatly expanded and invigorated Civil Rights Division of the Federal Department of Justice. This proposal is discussed in the following section.

IV. SECURITY OF THE PERSON

The issue of federal protection against mob rule was supposed to have been buried by the compromise of 1877. Yet only a few years had passed before it again came to the fore.

Anti-lynching Bills

In 1891, eleven Italians awaiting trial in New Orleans were taken from jail by a vengeful mob and lynched. The angry protest from Italy and the ensuing international scandal prompted President Benjamin Harrison in 1891 to urge Congress to enact legislation protecting *aliens* from mob violence. In 1892, he broadened his recommendation to include Negroes. But Congress did nothing.⁸⁹ In 1900, a Negro Representative introduced the first comprehensive federal anti-lynching bill. It got nowhere, as did similar bills introduced in subsequent years.⁹⁰

In 1920, a bill was reported favorably in the House for the first time. In 1922, after a two-year campaign by the NAACP, the House passed the Dyer anti-lynching bill, but it was killed by a Senate filibuster. In 1934, following a brutal lynching in San Jose, California, a new bill, drafted and sponsored by the NAACP, was introduced. A seven-week filibuster in 1935 kept it from the Senate floor. In 1937, the Gavegan bill passed the House, only to die again in a Senate filibuster the next year. The mere threat of a filibuster was sufficient

⁸⁹ Konvitz, *op. cit.* supra note 34, at 74-76. Although the great majority of the victims of lynch mobs have been Negroes, some have been members of other minority groups. Between 1882 and 1903, 45 Indians, 28 Italians, 20 Mexicans, 12 Chinese, 1 Japanese, 1 Swiss, and 1 Bohemian were lynched. Young, *Minority Peoples, A Study in Racial and Cultural Conflicts in the United States* 252 (1932); Watson, *Need of Federal Legislation in Respect to Mob Violence in Cases of Lynching of Aliens*, 25 *Yale L.J.* 561 (1916).

⁹⁰ As early as 1918, expression was given to the familiar argument that the United States should protect civil rights because our own shortcomings supply our enemies with propaganda which may be used against us. During World War I, 102 lynchings took place, Coleman, *Freedom from Fear on the Home Front*, 29 *Iowa L. Rev.* 415 (1944), and on July 26, 1918, President Wilson was forced to call upon the governors and law enforcement officials of the states to take effective action. He said, "Every mob contributes to German lies about the United States what her most gifted liars cannot improve upon by the way of calumny." 5 *Public Papers of Woodrow Wilson* 239 (1927).

in 1940 to prevent Senate consideration of the bill, which had again passed the House. Neither house has passed an anti-lynching bill since then.⁹¹

Most of the federal anti-lynching bills follow the same general pattern. They define lynching, punish those who aid in the commission of the act, make local officers criminally liable for wilful or negligent failure to prevent lynching or apprehend lynchers, and make local governmental units civilly liable for the misconduct or negligence of their officials.

The bills have raised thorny constitutional problems, arising out of the limited powers of the federal government over intrastate crime.⁹² As already noted, the right not to be murdered by a private individual is not one which the federal government can (in ordinary circumstances) protect.⁹³ Accordingly, congressional committees have moved circumspectly in reporting out anti-lynching bills. In 1948, the Senate Judiciary Committee reported the Ferguson bill,⁹⁴ which defined lynching as an unlawful attempt by a group of two or more persons to attempt to exercise any power of correction or punishment over any person suspected of or charged with crime. The bill, however, only punished government officials or members of lynching mobs who conspired with them. Sanctions against private individuals were not imposed because the committee believed that Congress lacked the authority to do so under the *Cruikshank*, *Harris*, and other post-Civil War opinions of the Supreme Court.⁹⁵

The Case bill,⁹⁶ reported by the House Judiciary Committee during the same Congress, was much broader in scope. The definition of lynching, for example, included attempts to commit violence upon any citizen because of his race, religion, or ancestry.⁹⁷ The bill also sought to reach every member of the lynching mob and every person who incited or aided in the lynching, including state and local officials. The House Judiciary Committee argued that lynching could

⁹¹ A list of all anti-lynching bills from 1900 to 1947 and their disposition, prepared by the Library of Congress, appears in Hearings Before Subcommittee No. 4 of the House Judiciary Committee on various anti-lynching bills, 80th Cong. 2d Sess. 185-88 (1948). Brief descriptions of the Senate filibusters are found in White, op. cit. supra note 52, at 166-73 and Ovington, *The Walls Came Tumbling Down* 257-66 (1947). For a list of the various committee reports and hearings on anti-lynching bills, see Hearings Before a Subcommittee of the Senate Judiciary Committee on Sen. 42, Sen. 1,352 and Sen. 1,465, 80th Cong. 2d Sess. 181-82 (1948).

⁹² See *Constitutionality of Proposed Federal Anti-Lynching Legislation*, 34 Va. L. Rev. 944 (1948); *The Federal Anti-Lynching Bill*, 38 Col. L. Rev. 199 (1938); *Federal Power to Prosecute Violence against Minority Groups*, 57 Yale L.J. 855 (1948); Sloan, *Federal Civil Rights Legislation and the Constitution*, 1 S.C. L.Q. 245 (1949); *Constitutional Basis for Federal Anti-Lynching Legislation*, 6 Lawyers' Guild Rev. 643 (1946); Mangum, op. cit. supra note 51, at 290-307.

⁹³ See Rotnem, *The Federal Civil Right "Not To Be Lynched"*, 28 Wash. U.L.Q. 57 (1943).

⁹⁴ Sen. 2,860, 80th Cong. 1st Sess. (1947).

⁹⁵ Sen. Rep. No. 1,625, 80th Cong. 2d Sess. 2 (1948).

⁹⁶ H.R. 5,673, 80th Cong. 2d Sess. (1948).

⁹⁷ The definition used by the Tuskegee Institute includes the criterion that the mob "must have acted under pretext of service to justice, race or tradition." See Tuskegee Inst., *Negro Year Book* 303 (1947).

not exist except with the acquiescence and condonation of the state concerned and that accordingly lynch law and mob violence constituted state action. In addition, the committee relied upon the constitutional obligation to guarantee each state a republican form of government and the congressional power to punish offenses against the law of nations, including the United Nations Charter.⁹⁸

Opposition to anti-lynching bills in Congress from the southern bloc has been maintained consistently from the Dyer bill of 1922 to the Ferguson bill of 1949. The bills have been denounced as unnecessary, unwarranted invasions of states' rights, ineffective, hypocritical and unconstitutional.

Originally, the southern bloc reflected southern attitudes.⁹⁹ But as agitation continued throughout the country, southern attitudes began to change.¹⁰⁰ A 1947 Gallup poll of southern voters showed that fifty-six percent (as compared to the national total of sixty-nine percent) believed that the United States should "step in and deal with the crime [of lynching] if the State Government doesn't deal with it justly."¹⁰¹ Southern political opinion, however, still lagged behind. Even the 1948 United Nations Genocide Convention, in whose formulation the United States had taken a leading role and which has now been ratified by forty countries, has not yet been able to obtain a favorable report by the Senate Foreign Relations Committee because of the fear that the Convention might enlarge federal power to deal with lynchings.¹⁰²

⁹⁸ H. Rep. No. 1,597, 80th Cong. 2d Sess. (1948). Despite the shift in control of the Senate Judiciary Committee from Republican to Democratic in 1949, the anti-lynching bill reported out in 1949 was almost identical with that of the prior Congress. Sen. Rep. No. 1,462, 81st Cong. 1st Sess. (1949).

⁹⁹ A survey in 1932 of southern legal and legislative opinion undertaken for the Southern Commission on the Study of Lynching by the University of North Carolina revealed only 14 unqualified favorable responses to a federal bill as against 194 expressing emphatic disapproval. Chadbourn, *Lynching and the Law* 118-19 (1933). Because of this opposition, Chadbourn did not even trouble to discuss federal legislation in his treatise.

¹⁰⁰ The Republican Platform of 1948, in a plank unusual in its explicitness, announced that the party favored "prompt enactment" of legislation to end lynching. The Democratic Platform of 1948 was almost as explicit: "We call upon the Congress to support our President in guaranteeing . . . the right of security of persons. . . ." The year before, the President's Committee on Civil Rights had called for a federal anti-lynching law (op. cit. supra note 83, at 157-58), a recommendation which President Truman had adopted and placed high in his ten-point civil rights program transmitted to Congress on February 2, 1948. 94 Cong. Rec. 927-29 (1948). The 1952 party planks followed the 1948 models.

¹⁰¹ *Washington Post*, p. 15, col. 2 (July 2, 1947), reprinted in *Hearings Before the Senate Judiciary Committee on Sen. 42, Sen. 1,352, and Sen. 1,465, 80th Cong. 2d Sess. 47* (1948). Rep. Brooks Hays of Arkansas has himself introduced an anti-lynching bill, H.R. 2,710, 82d Cong. 2d Sess. (1951) but it would authorize federal intervention only if state law enforcement officers lacked authority or were lax.

¹⁰² Genocide is the killing of members of a "national, ethnical, racial or religious group" with the intent to destroy the group "as such" in whole or in part. On April 12, 1950, a subcommittee of the Foreign Relations Committee recommended that the Convention be ratified with "understandings" among them being the understanding that genocide contemplated the commission of an act "in such manner as to affect a substantial portion of the group concerned." *N.Y. Times*, p. 5, col. 1 (Apr. 13, 1950). This understanding was designed, accord-

While this long-drawn effort was continuing in Washington, state legislatures addressed themselves to this problem. By 1940, twenty states, including seven in the South, had enacted anti-lynching laws.¹⁰³ These statutes make mob violence a statutory crime, fine counties and cities in which lynchings occur, and provide for the removal of delinquent peace officers. What Chadbourn describes as "prophylactic" legislation has also been enacted—laws which authorize declarations of martial law, permit additional guards for threatened prisoners, and allow changes of venue or special terms of court in trials of inflammatory crimes.¹⁰⁴

All observers are agreed, however, that these state laws have resulted in few prosecutions and fewer convictions. Between 1882 (when Tuskegee Institute first began to collect its lynching statistics, which are generally accepted as authoritative) and 1950, 4,729 lynchings took place in the United States, 3,436 of the victims being Negroes.¹⁰⁵ Chadbourn, who made a survey for the Southern Commission on the Study of Lynching, estimated that about eight-tenths of one percent of the lynchings in the United States had been followed by convictions.¹⁰⁶ Tuskegee Institute reports that although 1,973 persons were lynched since 1900, only eighty-two convictions have been obtained, sixty-seven in southern states. No convicted lyncher has ever been sentenced to death.¹⁰⁷

The explanations for this official indifference are not obscure. Southerners, much as they may abhor lynchings, are not prepared to take a white life to pay for a black one. Accordingly, local prosecutors (generally elected to office) are loath to prosecute, witnesses to testify against, grand juries to indict, and petit juries to convict their white neighbors, who, according to southern mores, acted from misguided zeal at worst.

Nevertheless, there is reason to believe that the wide publicity which the lynching problem has received has had some effect. In 1921 when the NAACP started its agitation for an anti-lynching law, sixty-four lynchings took place in the United States. In 1922 there were sixty-one. In the next year, following House passage of a federal bill, the number declined to twenty-eight. There-

ing to Senator Brien McMahon, chairman of the subcommittee, to overcome objections that lynchings might be classified as genocidal acts. Despite this "understanding," the Convention made no further progress in the Foreign Relations Committee. *Legislative History of Senate Committee on Foreign Relations*, Sen. Doc. No. 247, 81st Cong. 2d Sess. 27-29 (1950).

¹⁰³ Mangum, *op. cit. supra* note 51, at 290-94. For a summary of the various state laws, see Chadbourn, *op. cit. supra* note 99, at App. C; American Jewish Congress, *Checklist of State Anti-Discrimination and Anti-Bias Laws* (1948). Recently there has been a revival of interest in state anti-lynching laws, with the result that Texas enacted such a law in 1949 and South Carolina in 1951. *Tex. Stat. Ann.* (Vernon, 1948) Tit. 15, Art. 1260A (Supp., 1952); *S.C. Acts* (1951) No. 166.

¹⁰⁴ Chadbourn, *op. cit. supra* note 99, at 85-111.

¹⁰⁵ Tuskegee Institute, *op. cit. supra* note 97, at 306, brought up to date by the Institute in a mimeographed supplement.

¹⁰⁶ Chadbourn, *op. cit. supra* note 99, at 13.

¹⁰⁷ Southern Regional Council, *The Condition of Our Rights* 2 (1948).

after the number dropped steadily until no lynchings were reported in 1950, the first time since 1889.¹⁰⁸

That this decline is not attributable to a complete change in southern attitudes toward the Negro is demonstrated by the number of lynchings averted by police action. From 1937 to 1946 there were 273 such averted lynchings,¹⁰⁹ as compared with a total of forty-three lynchings during this period. In 1944, Myrdal was still able to write:

In the South the Negro's person and property are practically subject to the whim of any white person who wishes to take advantage of him or to punish him for any real or fancied wrongdoing or "insult." A white man can steal from or maltreat a Negro in almost any way without fear of reprisal, because the Negro cannot claim the protection of the police or courts, and personal vengeance on the part of the offended Negro usually results in organized retaliation.¹¹⁰

The New Violence

Lynching mobs no longer constitute the chief threat to the Negro's security. In their place are the sadistic police officer¹¹¹ and the small lawless conspiratorial group. In 1951 at least thirty-three Negroes were killed while in police custody and many instances of bombings and other clandestine violence were reported.¹¹²

All such acts are obviously in violation of state law; yet many of them go unpunished.¹¹³ They may also be federal crimes under the present residue of the Reconstruction legislation; police brutality and other acts "under color of law" may be punished under Section 242 of the Federal Criminal Code,¹¹⁴ although that statute has been narrowly construed by the Supreme Court.¹¹⁵ Acts of private citizens may be reached under Section 241 of the Code,¹¹⁶ but only if there is a conspiracy and if the conspiracy is aimed at interfering with a federal right. The number of such rights, at least as they affect group relations, is quite

¹⁰⁸ See H. Rep. No. 1,597, 80th Cong. 2d Sess. (1948). These figures, based upon NAACP records, vary slightly from those of the Tuskegee Institute. See Balance Sheet, *op. cit. supra* note 64, at 24 (1951); *ibid.*, at 21 (1950); *ibid.*, at 10 (1949); *ibid.*, at 12 (1948); Tuskegee Institute, *op. cit. supra* note 97, at 307.

¹⁰⁹ Tuskegee Institute, *op. cit. supra* note 97, at 309.

¹¹⁰ Myrdal, *op. cit. supra* note 20, at 530.

¹¹¹ For accounts of judicially reported police brutality against Negro prisoners, see *Screws v. United States*, 325 U.S. 91 (1945); *Apodaca v. United States*, 188 F. 2d 932 (C.A. 10th, 1951); *Crews v. United States*, 160 F. 2d 746 (C.A. 5th, 1947); *Culp v. United States*, 131 F. 2d 93 (C.A. 8th, 1942); *United States v. Sutherland*, 37 F. Supp. 344 (D.C. Ga., 1940).

¹¹² Balance Sheet, *op. cit. supra* note 64, at 26-29, 30-32, 80-83 (1951); Comm'n on Interracial Cooperation, Atlanta, *The Changing Character of Lynching* (1942).

¹¹³ Balance Sheet, *op. cit. supra* note 64, at 32-33, 80-82 (1951); *ibid.*, at 26-27, 60-62 (1950); *ibid.*, at 12-13, 40-41 (1949); *ibid.*, at 13-14 (1948).

¹¹⁴ 62 Stat. 696 (1948), 18 U.S.C.A. § 241 (1950).

¹¹⁵ *Screws v. United States*, 325 U.S. 91 (1945). For a discussion of the effect of this decision, see Carr, *op. cit. supra* note 13, at 106-15; Clark, *A Federal Prosecutor Looks at the Civil Rights Statutes*, 41 Col. L. Rev. 175 (1947); Carr, *Screws v. United States*, 31 Cornell L.Q. 48 (1945).

¹¹⁶ 62 Stat. 696 (1948), 18 U.S.C.A. § 241 (1950).

limited.¹¹⁷ Hence, the President's Committee on Civil Rights recommended not only enactment of an anti-lynching act but also revision of the existing civil rights laws,¹¹⁸ and appropriate bills have been introduced in Congress to that end.¹¹⁹ However, they have made no progress to date.

The Enforcement Problem

Even a complete code of federal statutes would be insufficient without a substantial change in the existing enforcement machinery of the federal government. The President's Committee on Civil Rights recognized this when it devoted a large part of its report to a discussion of the need for strengthening the Civil Rights Section of the Criminal Division of the Federal Department of Justice, which enforces the few federal rights laws still in effect,¹²⁰ a recommendation which President Truman endorsed in his Civil Rights Message of February 2, 1948.¹²¹ Despite the introduction of bills to achieve this object,¹²² this less dramatic, but in the long run more significant, effort to insure federal participation in the drive against anti-Negro violence has attracted little public attention. The Civil Rights Section still consists of seven lawyers,¹²³ without regional offices or independent facilities for investigation, compelled to rely upon the grudging cooperation of United States Attorneys and always conscious that its activities may jeopardize the budgetary appropriations of the vast Department of Justice.¹²⁴

Civil rights groups would be well-advised to soft-pedal their demand for a federal anti-lynching law, which no longer promises important gains, and concentrate on strengthening the Civil Rights Section of the Department of Justice. The campaign has served a useful purpose in the past by focusing attention on the evil of violence as a weapon in race conflict and on the need for action by the federal government. With the change from lynching to other forms of assault, the role of the federal government changes. It has ample powers to deal with police brutality, although better statutes and better organization in the Department of Justice would make its work more effective. Bombings are

¹¹⁷ Carr, *op. cit.* supra note 13, at 61-63.

¹¹⁸ President's Committee on Civil Rights, *op. cit.* supra note 83, at 156-58.

¹¹⁹ See, e.g., H.R. 29 and Sen. 1,735, 82d Cong. 1st Sess. (1951).

¹²⁰ President's Committee on Civil Rights, *op. cit.* supra note 83, at 119-25. For the text of these laws, see Carr, *op. cit.* supra note 13, at 252-68.

¹²¹ 94 Cong. Rec. 927-29 (1948).

¹²² See, e.g., Sen. 1,737, 82d Cong. 1st Sess. (1951).

¹²³ Putzel, *Federal Civil Rights Enforcement: A Current Appraisal*, 99 U. of Pa. L. Rev. 439, 441 (1951).

¹²⁴ President's Committee on Civil Rights, *op. cit.* supra note 83, at 114-32; Carr, *op. cit.* supra note 13, at 121-210. For other accounts of the work of the Section, see Schweinhaut, *The Civil Liberties Section of the Department of Justice*, 1 Bill of Rights Rev. 206 (1941); Coleman, *op. cit.* supra note 90; Testimony of Tom C. Clark (then Attorney General) before the House Judiciary Committee, Hearings on H.R. 115, et al., Series No. 18, at 67-80 (1949); Clark, *op. cit.* supra note 115, at 181; Maslow and Robison, *Civil Rights, A Program for the President's Committee*, 7 Lawyers Guild Rev. 112 (1947).

another matter for they are primarily within the jurisdiction of the states. Ordinarily, the most the federal government can do is to conduct FBI or federal grand jury investigations to see whether federal laws have been violated. Such investigations can at least disrupt the conspiracies of silence that often surround acts of lawlessness and thereby compel action by local officials.

The very recourse to bombings or conspiratorial actions and the abandonment of public lynchings in which whole towns participated indicates how far we have advanced in the last two decades. The KKK is no longer respectable in the South and southern governors consider lynchings poor advertisements for states seeking to overcome northern "Tobacco Road" stereotypes. The bomb thrower hurls his bomb in the dead of night because he cannot muster popular support. What remains to be done is to convince southern police chiefs that bombing and police brutality reflect discredit upon themselves and through federal agitation and intervention to arouse local sentiment to compel local action.

V. SEGREGATION

As important as the disfranchisement of the Negro in maintaining "white supremacy" in the South is the all-embracing pattern of segregation. Maintained by law and custom, segregation serves as a device to maintain social distance between white and black and to crush any aspirations toward social equality that may arise in the group kept apart. Segregation follows the Negro from cradle to the grave and insures that contacts on a plane of equality between white and black are kept to a minimum. By and large, in education, housing, transportation, recreation and places of public accommodation; on the job, in trade unions and even in the churches; one set of institutions exists to serve the dominant group and another, markedly inferior, the subordinate group.¹²⁵

The Segregation Statutes

An elaborate network of state laws serves as a system of fences to enforce the dominant group's policy of segregation.¹²⁶ Although these laws are most common in the eleven states of the deep South¹²⁷ and the six border states,¹²⁸ they are also found in such nonsouthern areas as Arizona, Indiana, Kansas, New Mexico and the District of Columbia.

¹²⁵ For accounts of the extent of segregation see Johnson, *Patterns of Negro Segregation* (1943); Wright, *Uncle Tom's Children* (1946); President's Committee on Civil Rights, *op. cit.* supra note 83, at 79-87. The January, 1947, issue of *Survey Graphic* is devoted entirely to the problem of segregation. A detailed study of segregation in one city is found in Landis, *Segregation in Washington*, a Report of the National Committee on Segregation in the Nation's Capital (1948). See also Indritz, *Racism in the Nation's Capital*, 175 *Nation* 355-57 (1951).

¹²⁶ These laws are collected in Murray, *States' Laws on Race and Color* (1950), and Konvitz, *op. cit.* supra note 34.

¹²⁷ The states of the Confederacy: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia.

¹²⁸ Delaware, Kentucky, Maryland, Missouri, Oklahoma, and West Virginia. The first four of these were the nonseceding slave states. Myrdal, *op. cit.* supra note 20, at 1,072.

Segregation as a policy enforced by law had its beginnings immediately after the Civil War.¹²⁹ When the southern states enacted their Black Codes designed to continue the subjugation of the Negro, they included the first Jim Crow laws.¹³⁰ Thereafter, like a cancer, these laws metastasized, until almost every relationship was regulated.¹³¹

These statutes were supplemented by a rigid system of racial etiquette, governing such matters as salutations, removal of hats, entrance through the back doors of houses, and other ceremonial forms designed to keep the Negro in his place.¹³²

While not as common in the South, officially enforced segregation also appears in the North, principally in public schools and public housing.¹³³ It is not confined to Negroes but applies to other races.¹³⁴

¹²⁹ However, miscegenation laws, which may be regarded as a form of segregation statute, were widespread in both North and South prior to the Civil War, many of them dating back to colonial times. Stephenson, *op. cit. supra* note 8, at 7. See also Johnson, *op. cit. supra* note 44, at 51. Thirty states still forbid marriages between whites and Negroes. Murray, *op. cit. supra* note 126, at 18.

¹³⁰ A Tennessee law in 1865 forbade Negroes and whites to attend the same school. That same year, Florida required segregation in "religious assemblies" and South Carolina barred Negroes from the state militia. Johnson, *op. cit. supra* note 125, at 158-61.

¹³¹ The basic purpose of these statutes is to prevent contact on a plane of equality. Pekelis, *Law and Social Action* 161-71 (1950). In some respects, this can be seen in the segregation laws themselves. Three southern states expressly exempt "colored" attendants from the laws requiring segregation on railroads. Fla. Stat. (1941) § 353.03; Ga. Code Ann. (1935) § 18-209; N.C. Gen. Stat. (1950) § 60-94. Alabama does not permit white nurses to attend Negro men. Ala. Code (1940) Tit. 46, § 188. See also Miss. Code (1942) § 6974. South Carolina prohibits placing white children in the custody of a Negro. S.C. Code (1942) § 1146. On the other hand, some of these laws can only be explained by pathological fear, e.g., a Florida statute requiring text books used by Negro pupils to be stored separately, Fla. Stat. (1941) § 233.43; a Texas law requiring separate bedding for Negro train passengers, Tex. Stat. Ann. (1947) Art. 4477, Rule 71; and an Oklahoma law authorizing separate telephone booths for Negroes, Okla. Stat. (1941) Tit. 17, § 135. New Orleans in 1900 even required separate districts for Negro and white prostitutes. See Johnson, *op. cit. supra* note 125, at 170.

¹³² See Doyle, *The Etiquette of Race Relations in the South, A Study in Social Control* (1937), and Johnson, *op. cit. supra* note 125, at 117-47.

¹³³ Segregation in public schools exists today in Arizona, Kansas, New Mexico and, until recently, in California, Indiana, and New Jersey. Murray, *op. cit. supra* note 126. It has been continued by local authorities in defiance of state law in parts of southern Illinois. See Ming, *The Elimination of Segregation in Public Schools of the North and West*, 21 *J. of Negro Ed.* 265 (1952). In public housing, until recently at least, segregation has been the rule rather than the exception throughout the country, though many notable examples of completely integrated housing exist. Nat'l Community Relations Advisory Council, *Equality of Opportunity in Housing* 21-24 (1952). A trend the other way may be revealed by a statement of HHFA Deputy Assistant McGraw on August 29, 1952, that 97, or 42%, of the 230 low-rent projects under the 1949 Housing Act are planned for "unrestricted occupancy open to all races." Two courts have held segregation in public housing illegal. *Seawell v. MacWithey*, 2 N.J. 563, 67 A. 2d 309 (1949); *Banks v. San Francisco Housing Authority* (San Francisco Sup. Ct., October 1, 1952) (not reported). *Contra: Favors v. Randall*, 40 F. Supp. 743 (D.C. Pa., 1941); *Denard v. Housing Authority*, 203 Ark. 1050, 159 S.W. 2d 764 (1942); *Housing Authority v. Higginbottom*, 143 S.W. 2d 95 (Tex. Civ. App., 1950).

¹³⁴ This is particularly true of the miscegenation laws which display a crazy-quilt pattern of prohibitions. Konvitz, *The Alien and the Asiatic in American Law* 231-32 (1946); Constitu-

The "Separate but Equal" Doctrine

The segregation laws were the South's answer to the command of equality in the Reconstruction amendments. Unable to enact frankly discriminatory legislation, the South evolved the "separate but equal" doctrine under which it was argued that equality was not denied by statutes that merely decreed the separation of the races.

The doctrine was immediately challenged. During debate on the bill which later became the Civil Rights Act of 1875, Senator Sumner of Massachusetts condemned what he called the "excuse, which finds Equality in separation."¹³⁵ The validity of the theory, however, did not come before the Supreme Court until 1896. Then, in the leading case of *Plessy v. Ferguson*,¹³⁶ the Court upheld a Louisiana statute requiring railways to segregate their passengers. The Court denied that "the enforced separation of the two races stamps the colored races with the badge of inferiority" and deprecated legislation designed to "eradicate racial institutions." It concluded, "if one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane."¹³⁷

The *Plessy* decision has been under vigorous attack in a series of cases, most of them prosecuted by the NAACP. As a result the Supreme Court has delimited its scope and tightened the requirement of equality to the point where, in some areas, segregation has become impossible.¹³⁸ The doctrine, however,

tionality of Anti-Miscegenation Statutes, 58 Yale L.J. 472 (1949). Segregation of Latin-American school children has been practiced in Arizona, California, and New Mexico. See Sanchez, Concerning Segregation of Spanish-Speaking Children in the Public School (1951). See also Westminster School District v. Mendez, 161 F. 2d 774 (C.A. 9th, 1947); Gonzales v. Sheely, 96 F. Supp. 1004 (D.C. Ariz., 1951). Three-way segregation in public housing exists in San Francisco, with separate projects for Negroes, Chinese, and whites, and in some Texas cities, with separate projects for Negroes, Mexican-Americans, and "Anglos."

¹³⁵ Cong. Globe, 42d Cong. 2d Sess. 382-83 (1871). Sumner said, "Separate hotels, separate conveyances, separate theaters, separate schools, separate institutions of learning and science, separate churches, and separate cemeteries—these are the artificial substitutes for Equality; . . . It is Slavery in its last appearance."

¹³⁶ 163 U.S. 537 (1896).

¹³⁷ Whether the Court was right in concluding that "in the nature of things it [the Fourteenth Amendment] could not have been intended to abolish distinctions based upon color" (ibid., at 544) has been hotly debated. See Frank and Munro, The Original Understanding of "Equal Protection of the Laws," 50 Col. L. Rev. 131, 152 (1950); Emerson et al., Segregation and the Equal Protection Clause, 34 Minn. L. Rev. 289 (1950); Is Racial Segregation Consistent with "Equal Protection of the Laws"? 49 Col. L. Rev. 629 (1949); Watt and Orlikoff, op. cit. supra note 34 and authorities there cited.

¹³⁸ *Henderson v. United States*, 339 U.S. 816 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Morgan v. Virginia*, 328 U.S. 373 (1946); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Buchanan v. Warley*, 245 U.S. 60 (1917); *McCabe v. Atchison, T. & S.F. R. Co.*, 235 U.S. 151 (1914). See also Reppy, Civil Rights in the United States 127-46 (1951); Ransmeier, The Fourteenth Amendment and the "Separate But Equal" Doctrine, 50 Mich. L. Rev. 203 (1951); Berger, The Supreme Court and Group Discrimination, 49 Col. L. Rev. 201 (1949). As a result of the university decisions

has not yet been overruled, although the Court has avoided, since one dictum in 1938,¹³⁹ any language reaffirming its principles. A series of five cases challenging segregation in public elementary and high schools is now before the Court and may provide the opportunity for the long awaited full reconsideration of the *Plessy* doctrine.¹⁴⁰

Federal Action against Segregation

Faced with the *Plessy* decision, civil rights forces have made no effort to obtain federal legislation¹⁴¹ invalidating state segregation laws.¹⁴² If the Court was correct in holding that the Fourteenth Amendment does not prohibit segregation, Congress apparently has no power to take such action. Within the sphere of federal jurisdiction, however, a limited fight against segregation can be carried on. Accordingly, the President's Committee on Civil Rights recommended that Congress condition all federal grants-in-aid and other forms of federal assistance on the absence of racial or religious segregation.¹⁴³ It also urged federal legislation to prohibit segregation in all government facilities in the District of Columbia, completely in the Panama Canal Zone, in all branches of the armed services, in interstate transportation and in the rendering of all services by the national government.¹⁴⁴

alone, hundreds of Negro students have been admitted to southern public colleges and universities without incident. See Balance Sheet, *op. cit.* supra note 64, at 60-62 (1951); *ibid.*, at 43-46 (1950).

¹³⁹ *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 344 (1938).

¹⁴⁰ *Grade School Segregation: The Latest Attack on Racial Discrimination*, 61 *Yale L.J.* 730 (1952). See also Roche, *Education, Segregation, and the Supreme Court—A Political Analysis*, 99 *U. of Pa. L. Rev.* 949 (1951).

¹⁴¹ The FEPC bills reported favorably by Senate committees in 1947 and 1949 contained a provision forbidding any labor union to "segregate, or classify its membership in any way which would deprive or tend to deprive such individuals of employment opportunities. . . ." See Sen. 984, 80th Cong. 1st Sess. (1947) and Sen. 1,728, 81st Cong. 1st Sess. (1949). The bill reported by the same committee in 1952, however, omitted the reference to segregation. Sen. 3,386, Sen. Rep. No. 2,080, 82d Cong. 2d Sess. (1952).

The Taft-Hartley law forbids an employer to discharge an employee for nonmembership in a labor organization if such membership was not available to the employee on the same terms and conditions generally applicable to other members, National Labor Relations Act of 1935, at § 8(a)(3), as amended, 61 Stat. 140 (1947), 29 U.S.C.A. § 158(a)(3) (Supp., 1951). This provision probably restrains discrimination by unions holding contracts with union security provisions. The legislative history of the Act, however, indicates that it cannot be used to break down segregated union arrangements. See Conference Report on the bill by the managers on the part of the House. H. Rep. No. 510, 80th Cong. 1st Sess. 41 (1947).

¹⁴² Efforts to obtain repeal of state laws have met with little success. Only one law has ever been repealed, an obsolescent Maryland statute requiring segregation on interstate steamboats and railways. Balance Sheet, *op. cit.* supra note 64, at 85 (1950).

¹⁴³ President's Committee on Civil Rights, *op. cit.* supra note 83, at 66.

¹⁴⁴ *Ibid.*, at 166-72. Bills to effectuate some of these recommendations have been introduced, e.g., Sen. 1,736, 82d Cong. 1st Sess. (1951), barring segregation in interstate commerce; H.R. 7,384, 82d Cong. 2d Sess. (1952), prohibiting segregation in the public schools of the District of Columbia; H.R. 547, 82d Cong. 1st Sess. (1951), forbidding segregation in the armed services. There have been only two references to segregation in major party platforms.

It is significant that President Truman who had endorsed so many of the recommendations of his Civil Rights Committee made only a brief passing reference to segregation in his Civil Rights Message to the Congress, urging the prohibition of "discrimination and segregation" in interstate transportation.¹⁴⁵

Foes of segregation may not have been able to make any headway in Washington but they could at least prevent backward steps. On April 12, 1951, the House of Representatives struck out a provision in the universal military training bill that would have expressly permitted segregation by giving every draftee the privilege of serving in units manned by his race only.¹⁴⁶

The recommendation of the President's Committee that federal grants contain nondiscrimination clauses split liberal groups. Its first application came up during the consideration by Congress in 1949 of a public housing act. In order to defeat the bill by alienating its southern supporters, Senators Harry Cain and John Bricker (who opposed the entire concept of public housing) sought to amend the bill by inserting a nonsegregation clause. Adoption of the amendment would have meant rejection of the bill. The NAACP supported the amendment. But Senator Paul Douglas (Dem., Ill.), a friend of civil rights, led the fight against the amendment. It was defeated and the bill was passed.¹⁴⁷

The NAACP position was absolute. It opposed any form of housing that perpetuated segregation patterns, contending that approval of segregated housing projects would create Jim Crow structures lasting for a hundred years.

In 1944, the Republican party urged corrective legislation against the harmful effects of segregation in the armed forces. In 1952, the same party pledged "appropriate action to end segregation in the District of Columbia."

¹⁴⁵ See 94 Cong. Rec. 927 et seq. (1948). That this omission was not an oversight is apparent from President Truman's message explaining his pocket veto of a bill, H.R. 5,411, 82d Cong. 1st Sess. (1951), to grant federal aid to federally operated schools in defense areas but which would have compelled them to conform to local law. The President described this provision as a "step backward" because it would have required segregation in some schools "which are now operating successfully on an integrated basis." He then went on to state: "It is never our purpose to insist on integration without considering pertinent local factors; but it is the duty of the federal government to move forward in such conditions. . . ." 97 Cong. Rec. 13,787 (Nov. 2, 1951). See Balance Sheet, op. cit. supra note 64, at 64 (1951). Moreover the President's Executive Order 9,981, 13 Fed. Reg. 4,313 (1948), establishing a committee (headed by Federal Circuit Judge Charles Fahy) to seek to eliminate discrimination in the armed services did not mention segregation. Nevertheless, the Fahy Committee in two years induced the Air Force to eliminate virtually every trace of segregation in its ranks. Great progress has also been made in the Navy. The rate of progress in the Army has been considerably slower, although there too significant gains have been achieved. Freedom To Serve, Report of the President's Committee on Equality of Treatment and Opportunity in the Armed Services (1950); Conn, Military Civil Rights: A Report, New Republic 23-24 (Oct. 20, 1952).

¹⁴⁶ The vote was 178 to 126. 97 Cong. Rec. 3,768 (1951). See also Balance Sheet, op. cit. supra note 64, at 97 (1951). Similar action was taken on June 21 and June 22, 1950 in defeating proposals that would have authorized the segregation of troops. Balance Sheet, op. cit. supra note 64, at 72 (1950). Rep. Rankin's attempt to establish a segregated hospital for Negro veterans was also defeated. 97 Cong. Rec. 6,201 (1951).

¹⁴⁷ 95 Cong. Rec. 4,849-60 (1949). See Leuchtenberg, *The Politics of Segregation*, New Leader, Jan. 14, 1950 and Jan. 21, 1950.

Senator Douglas and the groups whose viewpoint he defended argued that merely blocking federal grants for housing would not change southern attitudes or aid appreciably in the struggle against segregation; on the contrary, eliminating Negro and other slums would reduce conflict between the races over scarce housing, lessen the Negro's political apathy and enable the fight against housing segregation to continue in the courts and on various state fronts.

The same issue is likely to arise during the debate on the federal aid to education bill. The Thomas bill, which passed the Senate on May 5, 1949, required states "where separate public schools are maintained for minority races" to provide "just and equitable apportionment" of such funds for the segregated schools¹⁴⁸ but the bill died in the House because of a conflict over the grant of funds to parochial schools. In the 82d Congress, the Barden bill backed by education groups avoided explicit recognition of segregated schools and the dangers of unfair apportionment of school funds to such schools by a provision that funds should first be used to bring the expenditures per pupil to a stated minimum,¹⁴⁹ the undisclosed intent being that Negro schools should first be brought to the level of white schools before federal funds were spent on the latter. Again, however, the conflict over exclusion of parochial schools from the benefits of the bill resulted in its being pocketed in committee.

State Laws against Segregation

While segregation was being attacked in the courts, here and there state laws were being passed in the North to invoke the power of government against segregation. In Connecticut, the 1947 fair employment practice act defined the term discrimination to include "segregation and separation."¹⁵⁰ In New York, a 1950 law forbidding discrimination in public and publicly-assisted housing projects likewise defined discrimination to include segregation.¹⁵¹ When New Jersey adopted a new constitution in November 1947, it specifically forbade segregation in its public schools and its militia.¹⁵² In 1949, segregation in the National Guard was prohibited by statute in California, Connecticut, Illinois, Massachusetts and Wisconsin.¹⁵³ That same year, three states, Illinois, Indiana and Wisconsin, enacted laws forbidding segregation in public schools.¹⁵⁴ And

¹⁴⁸ Sen. 246, § 7, 81st Cong. 1st Sess. (1949).

¹⁴⁹ H.R. 4,468, § 5, 82d Cong. 1st Sess. (1951).

¹⁵⁰ Conn. Pub. Act No. 171 (1947) § 1360i, Conn. Gen. Stat. (1949) § 1359i.

¹⁵¹ N.Y. Civil Rights Law (McKinney, 1951) Art. 2A, § 18b(5).

¹⁵² N.J. Const. Art. 1, § 5.

¹⁵³ Murray, *op. cit. supra* note 126, at 12; Balance Sheet, *op. cit. supra* note 64, at 51 (1949). New York and Pennsylvania also passed statutes on the subject but they did not unequivocally bar segregation. Executive action against such segregation has been taken in Michigan, Minnesota, Oregon, and Washington. Balance Sheet, *op. cit. supra* note 64, at 72 (1950); *ibid.*, at 51 (1949).

¹⁵⁴ Murray, *op. cit. supra* note 126, at 145, 514; Balance Sheet, *op. cit. supra* note 64, at 30-31 (1950).

in 1951, Arizona amended its school segregation law to make the practice optional rather than mandatory.¹⁵⁵

The struggle against segregation has been waged principally in the United States Supreme Court and will undoubtedly be centered in that forum. Legislative activity in this area is defensive or limited to side issues. A Supreme Court decision reversing or undermining the *Plessy* doctrine would make all further legislative activity unnecessary. Already, decisions of that Court have brought powerful economic forces into play. Rigid enforcement of the requirement of equality in segregated facilities has made Jim Crow expensive. It has been estimated that equalizing the Negro schools of the South would cost close to one billion dollars, a sum which the states plainly cannot afford. To this may be added the expense of constructing parks, playgrounds and public beaches for Negroes where none now exist and improving those which do. In addition, many cities are beginning to feel the loss of convention trade from those organizations that have recently resolved not to hold meetings in cities where Negro members will be humiliated.¹⁵⁶ Ultimately, even ardent exponents of segregation will have to realize that the game is not worth the candle.

VI. FAIR EMPLOYMENT LEGISLATION

The proposition that the coercive powers of the government might be invoked to prevent racial or religious discrimination in employment—the FEPC idea—is a comparatively recent one. No such law was enacted during the Reconstruction period, although Congress attacked problems much less basic.¹⁵⁷ Nor until a few years ago did state legislatures believe that job discrimination was sufficiently important to require statutory amelioration, although they too enacted a variety of civil rights laws, principally directed at hotels, restaurants and other places of public accommodation.¹⁵⁸ Religious discrimination, on the other hand, did receive legislative recognition by many states resulting in prohibitions, for example, against religious qualifications for public school teachers (Arizona, 1912) and against dismissals from civil service because of religious beliefs (Maryland, 1920).

Early Legislation

It was not until the depression of 1929, when Negroes were particularly hard hit by the practice of "last hired, first fired," that the first tentative efforts were made to prevent racial as well as religious discrimination in employment. State statutes were enacted in 1933 and succeeding years forbidding racial and

¹⁵⁵ Balance Sheet, *op. cit. supra* note 64, at 46 (1951).

¹⁵⁶ *Ibid.*, at 107 (1951).

¹⁵⁷ An opera company was prosecuted under the 1875 Civil Rights Act for refusing admission to Negroes. Civil Rights Cases, 109 U.S. 3, 4 (1883).

¹⁵⁸ The state statutes mentioned below are cited and digested in American Jewish Congress Checklist, *op. cit. supra* note 103. The text of most of these laws is given in Murray, *op. cit. supra* note 126, and Konvitz, *op. cit. supra* note 34.

religious discrimination in employment on public works (New Jersey, 1933), by public utilities (New York, 1933), by labor unions (Pennsylvania, 1937), and against public school teachers (Wisconsin, 1933).¹⁵⁹ The federal government likewise began to address itself at this time to the problem of equalizing employment opportunities. Both by administrative action and by specific Congressional prohibition, discrimination in employment because of race, creed or color was barred in relief, housing and public works programs.¹⁶⁰

Political considerations may have been one of the reasons that legislation against discrimination in places of public accommodation was enacted so long before similar legislation against discrimination in employment and that, even as to employment, laws of general scope were not attempted. But there was also a constitutional reason. Inns, railroads and similar institutions had long been regarded as being "affected with a public interest" and hence subject to regulation. Until the 1930's, it was the prevailing view that neither the states nor the federal government had power to regulate hiring, discharge and other sensitive aspects of management prerogative. The power of the federal government was additionally limited by a narrow view of the extent of its delegated powers.

The Supreme Court decisions of the 1930's, however, destroyed both these restrictions and opened dazzling new vistas for state and federal legislation.¹⁶¹ Nevertheless, several years were to pass before the possibilities of these decisions were realized in the area of employment discrimination. As late as 1939, a New York state commission cautiously limited its recommendation for legislation outlawing discrimination to the practices of government officers, public contractors, public utilities and labor unions.¹⁶²

¹⁵⁹ Duffy, *State Organization for Fair Employment Practices* (U. of Cal. Bureau of Public Administration, 1944); Murray, *op. cit. supra* note 126, at 9-10.

¹⁶⁰ Administrative orders against discrimination were issued under the Public Works Administration established by the National Industrial Recovery Act and the slum clearance and defense housing programs established in 1937 and 1940. Trent, *Federal Sanctions Directed Against Racial Discrimination*, 3 *Phylon* 171 (1942). The 1933 Act for the relief of unemployment provided that "in employing citizens for the purposes of this Act no discrimination shall be made on account of race, color or creed." 48 Stat. 22, 23 (1933), 16 U.S.C.A. §§ 585, 586 (1941). There were similar provisions in subsequent relief acts from 1937 to 1943. The Civilian Conservation Corps Act of 1937 provided that "no persons shall be excluded on account of race, color or creed." 50 Stat. 320 (1937), 16 U.S.C.A. § 584(g) (1941). Anti-discrimination provisions were also included in various acts providing appropriations for the National Youth Administration, e.g., 54 Stat. 593 (1940), 15 U.S.C.A. §§ 721-28 (1948) and the training of defense workers, e.g., 54 Stat. 1035 (1940), 15 U.S.C.A. §§ 721-28 (1948).

¹⁶¹ Particularly, *Nebbia v. New York*, 291 U.S. 502 (1934), which opened the way to general regulation of industry, and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), which sustained federal regulation of labor relations in industries whose operations affected interstate commerce.

¹⁶² Second Report of the New York Temporary Commission on the Condition of the Urban Colored Population, Leg. Doc. No. 69, at 160 (1939). See also the limited nature of the proposals for state legislation described in *Legislative Attempts to Eliminate Racial and Religious Discrimination*, 39 *Col. L. Rev.* 986 (1939).

The Federal FEPC

It was not until the emergency created by Nazi aggression had resulted in a national defense program and a heightened interest among Negroes in "defense jobs" that the nation's attention was focused on job bias.¹⁶³ When Negro leaders became convinced that even the increased need for labor was not affecting deeply rooted stereotypes of "appropriate" jobs for Negroes, they announced in the spring of 1941 that Negroes would "March on Washington" unless the federal government took action. In response to this pressure,¹⁶⁴ President Roosevelt, on June 25, 1941, issued his historic Executive Order No. 8802, which forbade discriminatory employment practices because of race, color, creed or national origin in government service, in defense industries and by trade unions and created a Fair Employment Practice Committee to administer the Order.¹⁶⁵

Operating without statutory power or effective sanctions and handicapped by a miniscule budget, the wartime FEPC served at least to demonstrate the need for an effective agency.¹⁶⁶ A National Council for a Permanent FEPC was created by A. Philip Randolph, Negro trade union leader, and on January 18, 1944, Federal FEPC bills were introduced in the House.¹⁶⁷ Since these bills

¹⁶³ For evidence as to the extent of racial and religious discrimination in employment, see Fair Employment Practice Committee, First Report, July 1943–December 1944, at 85–101 (1945); Final Report, June 28, 1946, at 41–97 (1947); Weaver, *op. cit. supra* note 45, at 16–97 (1946); Sen. Rep. No. 2,080, 82d Cong. 2d Sess. 3–4 (1952); H. Rep. No. 1,165, 81st Cong. 1st Sess. 2–8 (1949); H. Rep. No. 951, 80th Cong. 2d Sess. 2–6 (1948); Sen. Rep. No. 290, 79th Cong. 1st Sess. 3 (1945); Sen. Rep. No. 1,109, 79th Cong. 1st Sess. 2–3 (1945). Recent local surveys corroborate these findings. Report to the Common Council, Detroit Mayor's Interracial Committee (Dec. 7, 1951); Report of the Kansas Commission Against Discrimination in Employment (Mar., 1951); Report of the Nebraska Legislative Council Committee on Unfair Employment Practices (Sept., 1950); Report of the Missouri Equal Rights Committee, Missouri House Journal 199–205 (Mar. 2, 1949); Fourth Report, Ill. Interracial Commission (March, 1951); The Negro Worker's Progress in Minnesota, Governor's Interracial Commission of Minnesota (June, 1949); Minneapolis Community Self-Survey, Mayor's Committee on Human Relations (1949); Analysis of Discriminatory Job Orders, California State Employment Service (Feb. 16, 1951); see also Balance Sheet, *op. cit. supra* note 64, at 43–48 (1951); American Jewish Yearbook 94 (1952). On discrimination by labor unions, see Weaver, *op. cit. supra* note 45; Cayton and Mitchell, *Black Workers and the New Unions* (1939); Northrup, *Organized Labor and the Negro* (1944).

¹⁶⁴ Brown, *American Negroes and the War*, 185 *Harper's Magazine* 545–52 (1942); Maslow, *FEPC—A Case History in Parliamentary Maneuver*, 13 *Univ. Chi. L. Rev.* 407, 409 (1946); Logan, *What the Negro Wants* 16, 45 (1944).

¹⁶⁵ Exec. Order No. 8,802, 6 *Fed. Reg.* 3,109 (1941).

¹⁶⁶ The best account of the operations of the wartime FEPC appears in its two reports, July, 1942–Dec., 1944 and June 28, 1946. Malcolm Ross, chairman of the committee from 1943 to 1946, has also written a popular description of its activities in *Ross, All Manner of Men* (1948).

¹⁶⁷ H.R. 3,986, 78th Cong. 2d Sess. (1944) by Scanlon (Dem., Pa.); H.R. 4,004, 78th Cong. 2d Sess. (1944) by Dawson (Dem., Ill.); H.R. 4,005, 78th Cong. 2d Sess. (1944) by LaFollette (Rep., Ind.). On June 21, 1944, Sen. Dennis Chavez (Dem., N.M.) introduced an identical bill on behalf of six Senators, Sen. 2,048, 78th Cong. 2d Sess. (1944). The bills were reported favorably in each house, H. Rep. No. 2,016, 78th Cong. 2d Sess. (1944), Sen. Rep. No. 1,109, 78th Cong. 2d Sess. (1944), but never reached the floor for debate.

have been reintroduced with but slight changes and reported favorably by committees in each succeeding Congress,¹⁶⁸ they deserve our attention.

Patterned upon the National Labor Relations Act, these FEPC bills forbade racial or religious discrimination by employers engaged in interstate commerce or under contract with any United States agency and by any labor union with a minimum number of members in the employ of one or more employers subject to the Act. A federal commission was created to receive and investigate complaints, hold public hearings thereon and issue cease-and-desist orders enforceable in the courts. The only sanction was the possibility of a contempt order by a federal Court of Appeals for violation of a court decree (a conventional sanction in the federal administrative practice which has proved its effectiveness, for example, under the Taft-Hartley Act). The bills forbade any discrimination by employers in hiring, promotion, discharge or any other terms or conditions of employment and discrimination by trade unions against members or applicants for membership. The bills were also applicable to agencies of the federal government but to avoid the unseemly spectacle of one government agency suing another, enforcement of the commission's orders was entrusted to the Attorney General and not to the federal courts. The administrative procedure outlined for the Fair Employment Practice Commission again paralleled that of the National Labor Relations Board—complaint, investigation, formal hearing and order, culminating in a petition to a federal Court of Appeals for review or enforcement.

Surprisingly few changes were made in the salient features of the bill after its first introduction eight years ago. The latest FEPC bill, introduced by a bipartisan bloc of seventeen Senators and reported favorably on July 3, 1952,¹⁶⁹ is entitled the "Federal Equality of Opportunity in Employment Act," a caption supposedly less provocative than FEPC. It applies to employers of fifty or more individuals, exempts "religious, charitable, fraternal, social, educational or sectarian" associations, instructs the "Equality of Opportunity in Employment Commission" to attempt initially to eliminate unlawful practices by "informal methods of conference, conciliation and persuasion," prescribes a one year statute of limitations, provides that the Commission's findings must be "supported by substantial evidence on the record considered as a whole" and

¹⁶⁸ 79th Cong.: H.R. 2,232 by Norton (Dem., N.J.), reported favorably; H. Rep. No. 187 (1945); Sen. 101 by Chavez (Dem., N.M.) and six other Senators, reported favorably, Sen. Rep. No. 290 (1945). 80th Cong.: Sen. 984 by Ives (Rep., N.Y.) reported favorably, Sen. Rep. No. 951 (1948); eight FEPC bills were introduced in the House during this Congress but died in committee. 81st Cong.: Sen. 1,728 by McGrath (Dem., R.I.) reported without recommendation (Oct. 17, 1949); H.R. 4,453 by Powell (Dem., N.Y.) passed House with amendments on Feb. 23, 1950. 82d Cong.: Sen. 3,368 by Humphrey (Dem., Minn.), Ives (Rep., N.Y.), and fifteen other Senators, reported favorably, Sen. Rep. No. 2,080 (1952); four House bills died in committee during this Congress. For an account of the early legislative battles waged around FEPC, see Maslow, *op. cit. supra* note 164; Kesselman, *The Social Politics of FEPC* (1948).

¹⁶⁹ Sen. 3,368, Sen. Rep. No. 2,080, 82d Cong. 2d Sess. (1952).

gives both houses of Congress a veto power over regulations promulgated by the Commission.

The FEPC bills were from the outset bitterly criticized, principally by southern Congressmen.¹⁷⁰ Later as the FEPC movement gained support,¹⁷¹ opposition to FEPC concentrated on the crucial issue of enforcement. Rep. Brooks Hays of Arkansas and Senator Robert A. Taft each introduced bills which created so-called "educational" FEPC agencies without enforcement powers.¹⁷² The Taft bill created a commission to receive and investigate complaints and to investigate suspected discrimination in the absence of complaint, conduct hearings and make "specific and detailed recommendations" to the parties involved but these "recommendations" were not enforceable either by judicial or executive power. The Commission could also make studies of discrimination throughout the country and formulate "comprehensive plans" to eliminate such discrimination. The Hays bill, a weaker measure, followed the Taft plan but substituted a "Minorities Employment Bureau" in the Department of Labor as the administering agency and failed to give it subpoena powers or even to authorize hearings.¹⁷³

This "educational" point of view prevailed in the House of Representatives which on February 23, 1950 adopted the McConnell substitute for a conventional FEPC bill.¹⁷⁴ The McConnell substitute followed closely the principles of the Taft bill. Its fear of government control over employment was indicated by two clauses, one providing that the Act must not be construed to mean that a person lacking qualifications for a job must be employed despite such lack, the other providing that the absence of individuals of a particular race or religion in the employ of any person should not be "evidence of discrimination" against such individuals. This diluted measure was never considered in the Senate which, instead, took up a bill containing full enforcement provisions. A

¹⁷⁰ See Hunt, *The Proposed Fair Employment Practice Act: Facts and Fallacies*, 32 Va. L. Rev. 1 (1945).

¹⁷¹ In 1945, a national poll conducted by The American Institute of Public Opinion showed that 44% of those questioned opposed and 43% favored a state FEPC law. National Opinion Research Center Opinion News (Feb. 15, 1948). In 1950, another poll conducted by the Institute showed that 34% of all respondents believed the federal government should go "all the way" in forbidding job bias, 14% "part of the way," and 41% opposed any action. *Look Magazine* (April 25, 1950). A nation-wide 1949 poll by the magazine "Factory" of factory workers' opinion showed that 67% of such workers approved and 27% disapproved of a federal FEPC act. The comparable figures for southern workers were 48% and 34% respectively. See *Hearings Before The Senate Committee on Labor and Public Welfare on Sen. 1,732 and Sen. 551*, 82 Cong. 2d Sess. 211-14 (1952).

¹⁷² Sen. 459, 79th Cong. 1st Sess. (1945), Sen. 2,594, 81st Cong. 1st Sess. (1949); H.R. 6,668, 81st Cong. 2d Sess. (1950), H.R. 2,709, 82d Cong. 1st Sess. (1951).

¹⁷³ For a vigorous and plausible defense of a federal FEPC bill without enforcement powers as a compromise measure, see Northrup, *Progress Without Federal Compulsion*, 14 *Commentary* 206 (1952).

¹⁷⁴ H.R. 4,453, 81st Cong. 2d Sess. (1950). Prior thereto, the FEPC bill had foundered in an 18-day Senate filibuster in January, 1946.

filibuster forestalled a vote on this measure.¹⁷⁵ No FEPC bill came to the floor during the 82d Congress.¹⁷⁶

State FEPC Legislation

While the long-drawn out battle for a federal FEPC law was being waged in Congress, civil rights agencies turned to both the courts¹⁷⁷ and the state legislatures.¹⁷⁸ Beginning with New York in 1945, effective FEPC laws were adopted in New Jersey (1945), Massachusetts (1946), Connecticut (1947), Rhode Island (1949), Washington (1949), Oregon (1949), and New Mexico (1949).¹⁷⁹ These laws, all patterned on the New York model, were substantially similar to the federal FEPC bills. In three states, however, weak FEPC measures were enacted to head off effective laws. Indiana and Wisconsin in 1945 adopted laws that gave existing state agencies power to investigate complaints but no power to issue cease-and-desist orders. Colorado enacted a similar law in 1951, but with enforcement provisions applicable to public employment only. It contained one section that thumbed its nose at the entire concept of fair employment practices by declaring that "under the American system it is equally discriminatory of the right of the private employer to require [him] to employ one who . . . would not fit into his business."¹⁸⁰

Since 1945, vigorous but unsuccessful FEPC campaigns have been waged in many northern states. Passage of FEPC laws during this period failed by

¹⁷⁵ See note 201 *infra*.

¹⁷⁶ While the campaign for a federal FEPC law was in progress, advances were made in the limited area in which executive action against employment discrimination is possible. In 1948, President Truman issued Exec. Order 9,980, 13 Fed. Reg. 4,311 (1948), establishing a fair employment board in the Civil Service Commission to eliminate discrimination in federal employment. In 1951, he issued Exec. Order 10,308, 16 Fed. Reg. 12,303 (1951), establishing the Committee on Government Contract Compliance, charged with the responsibility of strengthening compliance with the standard anti-discrimination clause in government contracts.

¹⁷⁷ See Murray, *The Right to Equal Opportunity of Employment*, 33 Calif. L. Rev. 388, 424-31 (1945); Emerson and Haber, *op. cit. supra* note 34, at 1144-53.

¹⁷⁸ Legislative commissions in a few key states had meanwhile studied the problem of job discrimination affecting Negroes and had recommended legislative solutions ranging from an FEPC bill in New York to the creation of an advisory board within the state labor department in Rhode Island. See Report of the New York State Temporary Comm'n Against Discrimination, Leg. Doc. No. 6 (1945); Report of the Massachusetts Comm'n on the Employment Problems of Negroes (1942); Michigan State Conference on Employment Problems of the Negro, Michigan Unemployment Compensation Comm'n (1940); Report of the Maryland Governor's Comm'n on Problems Affecting the Negro Population (1943); Report of the Rhode Island Governor's Comm'n on the Employment Problems of the Negro (1943); New Jersey Good Will Comm'n Conference on Racial and Religious Tensions (1943).

¹⁷⁹ For an analysis of these various state laws, see Berger, *Fair Employment Practices Legislation*, 275 Annals 999 (1951); Graves, *Fair Employment Practice Legislation in the United States, Federal—State—Municipal* (Lib. Cong., 1951); Sen. Rep. 2,080, 82d Cong. 1st Sess. 23-33. The constitutionality of these laws has not been seriously challenged, *ibid.*, at 9-13; *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1944).

¹⁸⁰ Colo. Sess. Laws (1951) c. 217.

narrow margins in Illinois, Kansas, Michigan, Minnesota, Ohio, Pennsylvania and Wisconsin. Almost always, a strong FEPC bill was passed by the more representative lower house but died in the upper house where slow-moving rural constituencies were over-represented.¹⁸¹

Balked by state legislative bodies, FEPC advocates turned to the municipalities; by 1952 a score of cities had enacted FEPC ordinances of varying degrees of effectiveness, depending upon the extent of the municipality's home-rule powers and the strength of the civil rights forces.¹⁸² The most effective of such municipal ordinances have been those in Philadelphia, Minneapolis, and Cleveland, where local laws are enforced by administrative commissions with adequate appropriations and staffs.

Despite prevailing attitudes of timidity and extreme unwillingness to antagonize employers, the FEPC commissions have achieved real gains in reducing discriminatory practices and have succeeded in opening doors hitherto barred to Negro workers. Considerably less successful in achieving similar gains for Jewish workers, the commissions can nevertheless justifiably point to the greater difficulties involved.¹⁸³ One not entirely unanticipated result of these FEPC laws has been increased community interest in other forms of discrimination and increased willingness to invoke legislation as a means of reducing such discrimination.

Despite the failure of the FEPC forces to achieve their chief goal—an effective federal law—the movement has not lost its impetus. Fortified by the endorsement of the President's Committee on Civil Rights¹⁸⁴ and of President Truman,¹⁸⁵ FEPC has become a political issue. The country has been sensitized to the concept of legislation against discriminatory employment practices.¹⁸⁶

¹⁸¹ For an analysis of state FEPC campaigns, see University of Chicago Committee on Education, Training, and Research in Race Relations, *The Dynamics of State Campaigns for Fair Employment Practices Legislation* (1950).

¹⁸² *A Study of State and Local Legislative and Administrative Acts Designed to Meet Problems of Human Rights* 41 (Wis. Legis. Ref. Lib., 1952). For a discussion of some of the statutory problems involved in such ordinances, see Elson and Schanfield, *Local Regulation of Discriminatory Employment Practices*, 56 *Yale L.J.* 431 (1947). For a description of the ordinances, as well as a discussion of other anti-discrimination ordinances, see Rice and Greenberg, *Municipal Protection of Human Rights*, [1952] *Wis. L. Rev.* 679.

¹⁸³ The most comprehensive and searching analysis of the operations of a state FEPC commission may be found in Berger, *The New York State Law Against Discrimination: Operation and Administration*, 35 *Cornell L.Q.* 747-96 (1950). See also Mather, *Report of the Experience of the Urban League, NAACP, and A. J. Congress with the State Commission Against Discrimination* (Mimeographed, 1948); MacIver, *The More Perfect Union* 150-68 (1948); *The New York State Commission Against Discrimination: A New Technique for an Old Problem*, 56 *Yale L.J.* 837-63 (1947). A perceptive account of the problems involved in proving discrimination appears in *An American Legal Dilemma—Proof of Discrimination*, 17 *Univ. Chi. L. Rev.* 107 (1949).

¹⁸⁴ President's Committee on Civil Rights, *op. cit.* supra note 83, at 53-62.

¹⁸⁵ 94 *Cong. Rec.* 927-29 (1948).

¹⁸⁶ The FEPC concept originated in this country and has not made much headway abroad. An FEPC law has, however, been adopted in Ontario, Canada, *Ont. Stat.* (1951) § 24, and

One cannot predict the effect of the realignment of forces following the November election. The chances of obtaining a federal FEPC bill with full sanctions still seem small but a Taft-type bill of some effectiveness, although without sanctions, is entirely possible. In any event, campaigns will undoubtedly continue for state and local legislation with the outlook promising in half a dozen states.

VII. THE FILIBUSTER

No discussion of federal civil rights can be complete without an examination of the chief obstacle to such legislation: the Senate filibuster.¹⁸⁷ No civil rights law has been approved by the Senate since 1875 nor is there any prospect of enacting any such law in the near future unless the Senate rules are amended to make filibusters impossible.

History of the Cloture Rule

When the Senate was first organized in 1789, it adopted a set of rules including one that authorized the previous question, by means of which debate could be cut off and a vote ordered on any question.¹⁸⁸ The first Senate manual of procedure (drafted by Thomas Jefferson when, as Vice-President, he presided over its deliberations) went further and forbade anyone "to speak impertinently or beside the question, superfluously, or tediously."¹⁸⁹

By 1807, however, the previous question had been dropped, Jefferson's salutary rule became dead letter, and a tradition of unlimited debate began to develop in the Senate. A Senator was thereafter allowed to speak as long as he was physically able and no vote could be taken or business transacted as long as he wished to talk. The rules did not even require Senatorial remarks to be germane to the question under discussion.

one is under consideration in Cuba. The 1940 constitution of the latter country provides that "it shall be obligatory that opportunities for labor be distributed without distinctions on the basis of race or color." The Universal Declaration of Human Rights, proclaimed Dec. 10, 1948, and the Draft Covenant on Civil and Political Rights contain ambiguous references to employment discrimination. Declaration, Art. 2, Art. 23, §§ 1, 2; Draft Covenant, Art. 2, Art. 19. For the present text of the Draft Covenant, see Simsarian, *Progress Toward Completion of Human Rights Covenants*, Dep't State Bull. 20-31 (July 7, 1952). See also Gilbert, *Racial Discrimination and Governmental Policy in Foreign Countries* (Lib. of Cong. Legis. Ref. Service, 1945).

¹⁸⁷ The House rules not only authorize shutting off debate by a majority vote but contain ample safeguards against obstruction. Lewis Deschler, parliamentarian of the House, has stated that "a majority [of the House] may work its will at all times in the face of the most determined and vigorous opposition of a minority." Deschler, *Rules of the House of Representatives*, Doc. No. 766, 80th Cong. 1st Sess. 6 (1949).

¹⁸⁸ Galloway, *Limitation of Debate in the United States Senate* 6 (Lib. of Cong. Legis. Ref. Service, 1951). Other scholars, however, do not believe that the 1789 previous question rule had this effect. See Haynes, *The Senate of the United States* 397 (1938).

¹⁸⁹ Rule XVII; Jefferson's Manual is reprinted in the current "Senate Manual Containing The Standing Rules, Orders, Laws, and Resolutions Affecting the Business of the United States Senate," Sen. Doc. No. 5, 82d Cong. 1st Sess. 299-411 (1951), hereinafter referred to as Senate Manual.

In 1917, on the eve of World War I, a Senate filibuster prevented the enactment of vital defense measures. Under the whiplash of President Wilson, the Senate then for the first time adopted a cloture rule.¹⁹⁰ The rule proved to be ineffective, however, because it required the concurrence of two-thirds of the Senators present, a number usually difficult to obtain.¹⁹¹ Despite the cloture rule, the filibuster or even the threat of one, was responsible for the failure of the Senate to adopt anti-lynching bills in 1922, 1935, and 1940; anti-poll tax bills in 1942, 1944, 1946, and 1948; and FEPC bills in 1946 and 1950.

But even this sandy barrier against a torrent of talk was weakened still further by an interpretation of the rule handed down on August 2, 1948 by the late Senator Arthur Vandenberg, then presiding officer of the Senate.¹⁹² It was a favorite device of filibusterers to attempt by limitless debate to block a vote even on the formal motion for the consideration of a bill on the Senate calendar. Senator Vandenberg ruled that the cloture rule by its terms was applicable only to debate "upon any pending measure" and that a motion to consider a bill was not a "pending measure." This ruling was the death knell of cloture; endless debate on motions to amend the Journal or other trivia was thus legalized.

In 1949, an effort to consider a resolution reported favorably by the Senate Committee on Rules and Administration that would have killed this joker in the cloture rule was itself subjected to a filibuster.¹⁹³ When a cloture petition was filed, Vice-President Alben Barkley overruled the point of order that the cloture rule was not applicable to a motion to consider. But on appeal to the Senate, the Barkley ruling was reversed and the Vandenberg ruling reaffirmed.¹⁹⁴ The filibuster then continued until Minority Leader Kenneth Wherry and Senator Richard Russell for the southern bloc¹⁹⁵ proposed a compromise and the present form of Rule XXII was adopted.¹⁹⁶

Rule XXII now provides that cloture petitions are applicable "to bring to a close the debate upon any measure, motion, or other matter pending before the Senate, or the unfinished business"¹⁹⁷ and so can cut off debate on motions to

¹⁹⁰ Senate Manual, *op. cit.* supra note 189, Rule XXII. Wilson's biting remark, "A little group of wilful men representing no opinion but their own have rendered the great Government of the United States helpless and contemptible," dramatized the issue to the country. See 2 Public Papers of Woodrow Wilson 433 (1925).

¹⁹¹ From 1917 through 1950, cloture petitions invoking the rule were filed on twenty-one different occasions but succeeded in attaining the necessary two-thirds vote only four times. See Galloway, *op. cit.* supra note 188, at 26.

¹⁹² 94 Cong. Rec. 9,602 (1949).

¹⁹³ Sen. Res. 15, Sen. Rep. No. 69, 81st Cong. 1st Sess. (1949).

¹⁹⁴ By a vote of 46 to 41. See 95 Cong. Rec. 2,275 (1949).

¹⁹⁵ See testimony of Sen. Russell, Hearings before the Senate Committee on Rules and Administration on the Cloture Rule, 82d Cong. 1st Sess. 255-57 (1951).

¹⁹⁶ 95 Cong. Rec. 2,724 (1949). The filibuster had meanwhile continued intermittently from February 28 to March 17.

¹⁹⁷ Senate Manual, *op. cit.* supra note 189, Rule XXII.

consider a bill or motions to amend the Journal. But a high price was exacted by the southern bloc for this concession. The number of votes necessary to invoke cloture was increased from a "two-thirds vote of those voting" to an affirmative vote "by two-thirds of the Senators duly chosen and sworn."¹⁹⁸ In addition, the cloture rule was explicitly made inapplicable to "any motion to proceed to the consideration of any motion, resolution, or proposal to change any of the Standing Rules of the Senate."¹⁹⁹

The new rule requires sixty-four votes to limit debate; the old rule required only two-thirds of a quorum, which might be as low as thirty-three,²⁰⁰ and has rarely exceeded fifty-five.²⁰¹ The second change made any amendment of the Senate rules impossible as long as a minority of the Senate wished to block it by a filibuster.²⁰²

Amending the Rule

The prospects of crushing a determined filibuster by the twenty-two Senators representing the deep South seem slim indeed. When one Senator's vocal cords are frayed, he can be relieved by another, to rest until his turn comes again.²⁰³ Any effort by all-night sessions to wear down the filibusterers requires the continuous attendance of the majority bloc, for at any time that the minority temporarily becomes a majority, a motion to adjourn can be put to end the session and provide rest for the weary. At any time the attendance drops below forty-nine, a point of order of no quorum can be made, which again would provide rest and refreshment for the obstructionist until a sufficient number of absent Senators could be rounded up to make a quorum.²⁰⁴

Unlike the practice in the House, which adopts a set of rules at the opening of each Congress (usually by a simple motion to adopt the rules of the last Congress), the Senate deems itself a continuous body, at least as far as its rules are concerned. Consequently no opportunity is afforded at the beginning of a

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ The Constitution fixes a quorum of the Senate (and of the House) as a majority of its members. U.S. Const. Art. 1, § 5.

²⁰¹ On May 19, 1950, and July 12, 1950, cloture petitions filed to break up filibusters on the FEPC bill were defeated when opponents of the filibuster could only muster fifty-two and fifty-five votes respectively, substantially short of the sixty-four required. See Galloway, *op. cit. supra* note 188, at 26.

²⁰² Prior efforts simply to amend the cloture rule so as to make it all embracing were unsuccessful despite favorable reports from the Senate Committee on Rules and Administration. See Sen. Rep. No. 87, 80th Cong. 1st Sess. (1947); Sen. Rep. No. 69, 81st Cong. 1st Sess. (1949).

²⁰³ Senate Rule XIX forbidding a Senator to "speak more than twice upon any one question in debate on the same day" would not bar such relief, because every motion before the Senate or any amendment thereof would constitute another "question." Riddick, *The United States Congress, Organization and Procedure* 370 (1949). The "day" in the rule means "legislative day" and not "calendar day." Sen. Journal 365 (1935). See also testimony of Sen. Carl Hayden, Hearings before the Senate Committee on Rules and Administration on the Cloture Rule, 81st Cong. 1st Sess. 100 (1949).

²⁰⁴ For a description of historic filibusters, see Burdette, *op. cit. supra* note 40.

Congress to consider amendments to the rules. The present rules were adopted in 1884.²⁰⁵ An effort to amend the rules requires therefore the introduction of a Senate resolution, its referral to the Senate Committee on Rules and Administration, a report by that Committee (which results in placing the resolution upon the Senate Calendar) and a favorable vote upon a "motion to consider," which results in placing the measure before the Senate for consideration.²⁰⁶

Efforts since the Wherry compromise of 1949 to follow this procedure have led nowhere. Early in the 82d Congress, a group of eleven Senators, led by Senators Herbert Lehman and William Benton, introduced Senate Resolution 105 to provide for the limitation of debate by majority vote, effective fourteen days after the filing of a cloture petition. The resolution would also have repealed the present section of the rule that forbids cloture on motions to amend the rules. Despite overwhelming testimony as to the necessity of such a change,²⁰⁷ the Committee merely reported out a resolution that would have reduced the number of votes necessary to invoke cloture to two-thirds of those present and retained unaltered the present protection against limiting debate on proposals to change the rules.²⁰⁸ Even this mild reform was not considered further by the Senate.²⁰⁹

Faced with this impasse, civil rights advocates have made two novel suggestions. The first is that the President convene a special session of the Senate alone²¹⁰ to consider changes in the rules. This would give the Senate the opportunity, at a time when it was free of pressure of legislative matters, to attempt to crush the inevitable filibuster or at least to dramatize the problem for the country.²¹¹

The other was a truly revolutionary proposal advanced by Walter Reuther, president of the United Automobile Workers, that the Senate, on the convening of the 83d Congress on January 3, 1953, refuse to be bound by the rules of the prior Senate and by majority vote adopt a new set of rules that would include a limitation of debate by majority vote.²¹² The Reuther proposal was based on

²⁰⁵ Riddick, *op. cit. supra* note 203, at 330.

²⁰⁶ For a description of Senate procedure, see Riddick, *op. cit. supra* note 203, at 328-92.

²⁰⁷ See Hearings, *op. cit. supra* note 195.

²⁰⁸ Sen. 203, Sen. Rep. No. 1,256, 82d Cong. 2d Sess. (1952).

²⁰⁹ It is curious to note that the Reorganization Act of 1939, 53 Stat. 561 (1939); the Reorganization Act of 1945, 59 Stat. 613 (1945), 5 U.S.C.A. §§ 133y-133y-16 (1950); and the Reorganization Act of 1949, 63 Stat. 203 (1949), 5 U.S.C.A. § 133z (1950), all of which gave Congress a period of 60 days in which to disapprove a Presidential reorganization proposal, contain statutory safeguards against filibusters. The 1949 Act, for example, provides that debate on the proposal is to be limited to ten hours and that further motions to limit debate or appeals from decisions of the chair are not debatable. 63 Stat. 205-6, 5 U.S.C.A. §§ 133z-14, 133z-15 (1950).

²¹⁰ Expressly authorized by U.S. Const. Art. 2, § 3: "... he may, on extraordinary occasions, convene both Houses, or either of them. . . ."

²¹¹ See testimony of Will Maslow, Hearings, *op. cit. supra* note 195, at 101.

²¹² See Hearings, *op. cit. supra* note 195, at 125-72. This proposal was apparently first advanced by Senator Thomas Walsh in March 1917. 55 Cong. Rec. 8 et seq. (1917).

two main theoretical assumptions: first, that the Senate was not a continuous body and that each new Senate was therefore free to adopt its own rules and, second, that during the debate on such a proposal the general parliamentary rules of procedure, which contain ample safeguards against minority obstruction and filibuster, would apply. Whether a majority of the Senate is ready to accept these assumptions remains to be seen.²¹³ Reuther, however, did convince the Leadership Conference on Civil Rights, a mobilization of fifty-three national agencies, including labor, Negro, Jewish and religious groups, whose nine point civil rights program is headed by the Reuther proposal.²¹⁴

There is one further possibility. The filibuster can only function because the Senate permits its members to talk with the frank purpose of obstruction. The Senate Rules do not expressly permit this obstruction. The filibusterers are protected only by precedent in the form of prior rulings by presiding officers, sustained in some cases by Senate votes. The Senate may be reluctant to overturn precedents but it has undoubted power to do so by simple majority vote. A determined Vice-President could simply assert the inherent duty of all presiding officers to halt dilatory conduct and thus stop filibusters.²¹⁵ If a majority of the Senate sustained such a ruling, filibusters would soon be curbed.²¹⁶

²¹³ In support of the proposition that the Senate is not a "continuous" body, despite the fact that two-thirds of its members hold over in each Congress, are the facts that: (1) All proceedings in connection with the ratification of treaties (in which the House of Representatives plays no constitutional role) terminate with each Congress and are resumed *de novo* at the commencement of the next Congress. Rule XXXVII, § 2. (2) All legislative business of the Senate must start afresh at each Congress. Rule XXXII. (3) Each Senate makes its own committee assignments. See, e.g., 89 Cong. Rec. 145 (1943); 91 Cong. Rec. 168 (1945). See also Rule XXV on the election of standing committees. For some of the arguments to the contrary, see Arthur Krock's column, N.Y. Times, p. 22, col. 5 (Aug. 14, 1952). It must also be noted that Senators who continue their term of office do not take a new oath at the beginning of each Congress. See, e.g., 93 Cong. Rec. 110 (1947); 97 Cong. Rec. 5 (1949). In New Jersey, it has been held that the Senate of that state is not a continuous body and that holdover Senators may not pass on the qualifications of newly elected members. *State v. Rodgers*, 56 N.J.L. 480, 619-31, 28 Atl. 726, 757-63 (S.Ct., 1894).

²¹⁴ For the text of the nine points, see 175 Nation 269 (1952). The 1952 Democratic Party Platform urged improvement of congressional procedures to permit decisions by a majority rule after reasonable debate. There was no corresponding provision in the Republican Party Platform. Upon the convening of the 83d Congress in January 1953 (subsequent to the submission of this article), an attempt was made to change the Senate Rules to curb the filibuster by the procedure just described. On January 7, 1953, the motion to adopt a new set of rules was tabled by a vote of 70 to 21, thus preventing a ruling by the Vice-President or the Senate on whether each new Senate is free to adopt its own rules.

²¹⁵ Cf. Robert's Rules of Order Revised 40 (1943). "But without adopting any rule on the subject, every deliberative assembly has the inherent right to protect itself" from obstruction. Filibusters are impossible in almost all of the upper chambers of American state legislatures. See Maslow, *Limitation of Debate in State Legislatures*, Cong. Rec., App., 3,645 (June 5, 1952). They are also forbidden in the upper chambers of foreign countries, e.g., Australia (Standing Orders, § 154) authorizes the previous question; Italy (Rules, Art. 70) cloture by majority vote on the motion of eight Senators; Great Britain (Standing Orders) authorizes the previous question; France (*Règlement*, Art. 44, 67) cloture by majority vote.

²¹⁶ A ruling of the Chair can be appealed to the floor and is debatable. However, a motion to table the appeal may be made which is not debatable. If the motion carries, the Chair's ruling stands.

Whatever "gimmick" is devised, civil rights groups have at last realized that without reform of the Senate rules it is quixotic to hope for the enactment of any significant federal civil rights law opposed by the southern states. Realizing that the filibuster has blocked all such legislation since 1875, civil rights forces have made its elimination their principal target. It is unlikely that they will succeed in this aim until they obtain allies among non-civil rights groups who must ultimately realize that the filibuster threatens any bill opposed by a wilful minority and can, at any time, make "the great government of the United States helpless and contemptible."²¹⁷

VIII. OTHER STATE LAWS

Because the bricks have been laid down one at a time, few realize how high a wall against discrimination has been erected in some states in the last decade. Partly because in some areas, like education, the states have plenary powers excluding the federal government and partly because civil rights groups stymied in Congress have increasingly turned to state capitals, scores of state anti-discrimination and anti-bias laws have been enacted in this period. Since 1945, when the first state fair employment practice law was adopted in New York, eleven FEPC laws, two fair educational practice acts, five acts improving the administration of public accommodation laws (one of which applies to schools and is thus, in effect, a third fair educational practice act), nineteen laws forbidding discrimination in various types of housing, five laws forbidding segregation in state units of the National Guard, five laws forbidding or reducing segregation in public schools, two anti-lynching laws, four anti-mask laws directed at the KKK, and forty other miscellaneous anti-discrimination and anti-bias laws have been enacted.

In a few states in the Northeast, like Massachusetts, Rhode Island, Connecticut, New Jersey and New York, the legislative trend is to center responsibility for all of a state's anti-bias laws in one commission against discrimination. Thus both the Massachusetts and Connecticut commissions now enforce state laws forbidding discrimination in employment, public housing and places of public accommodation. In New Jersey, the list consists of employment, education and places of public accommodation.

Of course, not all states have moved forward at the same pace and some states, both northern and southern, have stubbornly refused to admit that a problem exists requiring legislative intervention. A count of state anti-discrimination and anti-bias laws reveals, however, that about 365 such measures are now on the law books throughout the country.²¹⁸ In this section, we shall briefly survey this type of legislation, to the extent that it has not already been covered.

²¹⁷ See note 190 *supra*.

²¹⁸ See Graves, *Anti-Discrimination Legislation in the American States* (Lib. of Cong. Legis. Ref. Service, 1948); American Jewish Congress Checklist, *op. cit. supra* note 103.

Places of Public Accommodation

The most widespread form of anti-discrimination legislation is that which applies to what has become known as "places of public accommodation," the modern statutory successor to the inns and common carriers of the common law. Indeed, until recently, these statutes were what was usually meant by the term "civil rights law."

In 1865, immediately after the Civil War, Massachusetts enacted a statute forbidding discrimination because of race or color in any public place of amusement. Within a few years, six southern states controlled by Reconstruction legislatures had enacted similar legislation²¹⁹ and four northern states followed suit.²²⁰ The drive gained momentum in 1875 with the enactment of the Federal Civil Rights Law of that year. Shortly afterwards, this law was invalidated by the Supreme Court on the ground that the Fourteenth Amendment gave Congress no power to prohibit discrimination by private citizens.²²¹

The immediate reaction to this mortal blow to federal intervention was an increase in state legislative action. One northern state after another adopted public accommodation statutes so that, by 1909, eighteen northern states had such laws on their books.²²²

These statutes are generally applicable to all places of public accommodation, resort, amusement, refreshment, and transportation²²³ and forbid racial or religious discrimination in the admission of guests. Some likewise forbid any public advertisement designed to discourage the patronage of any minority group. In some states, violation is a criminal offense punished as a misdemeanor by fine or imprisonment. In others, the aggrieved individual is allowed a civil action for damages. Some states allow a choice of either remedy or both.²²⁴

²¹⁹ Private Remedies Under State Equal Rights Statutes, 44 Ill. L. Rev. 363 (1949).

²²⁰ The District of Columbia, which then enjoyed a measure of home rule, enacted two such statutes in 1872 and 1873. The Court of Appeals for the District of Columbia has held that these laws are no longer in effect. See *District of Columbia v. Thompson Co.*, 81 A. 2d 249 (D.C. Mun. C.A., 1951); rev'd, 21 U.S. L. Week 2352 (App. D.C., 1953).

²²¹ See note 37 *supra*.

²²² California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Washington, and Wisconsin. For the text of these laws or digests thereof, see Konvitz, *op. cit.* note 34; Murray, *op. cit.* *supra* note 126; Johnson, *op. cit.* *supra* note 44; American Jewish Congress Checklist, *op. cit.* *supra* note 103. No comprehensive laws of this type have been enacted since 1909, although some of the existing laws have been broadened in scope and their administration improved. Maine (1917) and New Hampshire (1919) adopted laws which merely prohibited discriminatory advertisements but not discrimination itself. The public accommodation laws enacted in the South during Reconstruction have all been repealed, except in Louisiana where the law has, of course, become dead letter. See Murray, *op. cit.* *supra* note 126, at 171-72.

²²³ The New York law, which is typical, lists fifty-three types of such places. Civil Rights Law (McKinney, 1952) § 40.

²²⁴ The statutes are compared and analyzed in Konvitz, *op. cit.* *supra* note 34, at 109. See also Emerson and Haber, *op. cit.* *supra* note 34, at 1133-37. It has been held, under an analo-

By and large, these statutes have not proved effective. Jail sentences are almost never imposed and fines are trifling. Suits, whether criminal or civil, are infrequent,²²⁵ for public prosecutors rarely take the initiative in prosecuting such offenses and are loath to take action even when complaints are made to them. Victims of discrimination are generally unwilling to assume the burdens of a law suit that usually turns out to be profitless in view of the small recovery allowed or the difficulty of proving larger money damages. Equally important as a deterrent to litigation is the difficulty of getting unanimity from a jury, criminal or civil, that usually includes some members who share the prejudices of the community.

To improve the administration of the civil rights law, the Illinois legislature in 1935 empowered its Attorney General to investigate complaints and to take enforcement measures. Similarly, in 1944 in New Jersey and in 1945 in New York, the state Attorney General was given the power, in certain circumstances, to supersede local district attorneys in the enforcement of existing civil rights laws.²²⁶ But these steps proved of little value.

In the last few years, a significant new development has taken place, the adoption of the administrative process in the enforcement of equal accommodation laws. In 1949, New Jersey entrusted its existing Division Against Discrimination of the State Department of Education (which enforces the state FEPC law) with the additional duty of enforcing the state's equal accommodation law.²²⁷ Similar delegations of authority have since been made to the anti-discrimination commissions of Connecticut, Massachusetts, New York, and Rhode Island.²²⁸ The results have been good. Each state has seen an increase in the number of complaints, almost all of which have resulted in voluntary compliance without the necessity of formal complaint proceedings.²²⁹

gous statute, that enforcement may be had by equity injunction. *Orloff v. Los Angeles Turf Club*, 30 Cal. 2d 110, 180 P. 2d 321 (1947); *Equity's Role in the Protection of Civil Rights*, 37 Iowa L. Rev. 268 (1952); *Civil Rights Acts: Scope and Equitable Enforcement*, 35 Calif. L. Rev. 571 (1947).

²²⁵ Wis. Legis. Ref. Lib., op. cit. supra note 182, at 19; Konvitz, op. cit. supra note 34, at 124-25; Maslow, *The Law and Race Relations*, Annals 76 (1946); Goostree, *The Iowa Civil Rights Statute: A Problem of Enforcement*, 37 Iowa L. Rev. 242 (1952); *Legislative Attempts to Eliminate Racial and Religious Discrimination*, 39 Col. L. Rev. 986, 1002 (1939).

²²⁶ Ill. L. (1935) § 1, added to Smith-Hurd Ann. Stat. (Supp., 1952) c. 38, § 128; N.J. Stat. 52:17A-4d; N.Y. Executive Law (McKinney, 1951) § 63.

²²⁷ N.J. Rev. Stat. (Cum. Supp., 1950) 18:25-8. The law did not repeal existing criminal and civil remedies but merely provided an alternative mode of relief. The aggrieved party, however, could not invoke the administrative process after he had started a criminal or civil action.

²²⁸ Wis. Legis. Ref. Lib., op. cit. supra note 182, at 19-20; Conn. Gen. Stat. (Supp., 1951) § 1408b; Mass. Gen. Laws (1950) c. 151b, § 5; N.Y. Executive Law (McKinney, 1951) § 296(2); R.I. Gen. Laws (1938) c. 606, §§ 28, 29.

²²⁹ Since 1949, a total of 323 such complaints have been filed in Connecticut, Massachusetts, and New Jersey, of which 217 have been satisfactorily adjusted. Balance Sheet, op. cit. supra note 64, at 86 (1951); Emerson and Haber, op. cit. supra note 34, at 1,134; Conn. Commission on Civil Rights, *Report of Activities 1951-52*, at 25-26; Biannual Report, N.J. Division Against Discrimination, July 1, 1949-June 30, 1951, at 4-7.

Unfinished business in public accommodations legislation includes revising existing laws to make the list of enterprises covered as complete as possible and introducing the administrative enforcement procedure in those states which have not yet adopted it. In other states, notably Maine, Vermont, and New Hampshire where discrimination in hotels and resorts against Negroes and Jews is notorious, the problem is more basic, requiring the enactment of prohibitory legislation. With or without legislation, interested groups will continue to use persuasion and public exposure to curb the abuses.

Housing

Of all discriminations encountered by the Negro and other minority groups, none has proved more difficult to overcome than exclusion from housing. Until the advent of the New Deal, housing was exclusively the responsibility of private groups, and these groups—builders, banks and brokers—were believed to be outside the reach of federal and even state power. Moreover, people who were ready to accept Negro suffrage or equality of job opportunity reacted savagely to any threat of Negro immigration into “white” neighborhoods.²³⁰

After World War I, when Negroes first began to move from the South in large numbers, local legislative bodies in the border states looked about for legislative contrivances to prevent whites from selling property to Negroes. Zoning ordinances were then being used to prevent residential and commercial property from industrial encroachment and it seemed a simple matter to apply them also against Negro “encroachments” on white property. In 1914, Louisville, Kentucky, adopted an ordinance forbidding one race to occupy houses on streets occupied by members of the other race, except with the consent of the majority of the latter. But the United States Supreme Court refused to countenance this interference with the “civil right of a white man to dispose of his property if he saw fit to do so to a person of color,”²³¹ rejecting the argument that residential segregation would prevent race conflict or that “acquisitions by colored persons depreciate property owned in the neighborhood by white persons.”²³²

²³⁰ The 1951 Cicero (Ill.) riot, the Miami (Fla.) bombings in December 1951, and scores of other recent bombings and burnings in the North and the South were simply brutal efforts to prevent such migrations. Balance Sheet, *op. cit. supra* note 64, at 80 (1951).

²³¹ *Buchanan v. Warley*, 245 U.S. 60 (1917). A similar New Orleans law was also invalidated, *Harmon v. Tyler*, 273 U.S. 668 (1927), as was a Richmond, Va. ordinance, *Richmond v. Deans*, 281 U.S. 704 (1930). Nevertheless, even twenty years later, such clearly unconstitutional ordinances were still being enacted. See *Birmingham v. Monk*, 185 F. 2d 859 (C.A. 5th 1950). Racial zoning was itself forbidden by statutes in Colorado and Kansas. Colo. Stat. Ann. (1935) c. 26, § 25; Kan. Gen. Stat. (1935) c. 12-713.

²³² Evidence that integrated housing actually reduces prejudice is presented in Deutsch and Collins, *Interracial Housing, A Psychological Evaluation of a Social Experiment* (1951); *Intergroup Contact and Racial Attitudes*, 8 J. of Social Issues, No. 1 (1952). That panic selling by whites and not the movement of Negroes into white neighborhoods is responsible for the sharp declines of real estate values which sometimes occur and that in any event such declines are temporary is indicated by recent surveys. See Morgan, *Values in Transition Areas: Some New Concepts*, Rev. of Society of Residential Appraisers 5-10 (Mar., 1952); Laurenti,

Blocked in this direction, real estate lawyers hit upon another stratagem, the restrictive covenant. Originally designed to prevent undesirable industrial uses of a particular plot of land, this covenant was expanded to prevent grantees of land from selling to Negroes, Jews or other minority groups.²³³ This device received judicial approval in 1926²³⁴ and spread throughout the country.²³⁵ In 1945, Professor McGovney developed the ingenious theory that judicial enforcement of such covenants constituted a form of state action forbidden by the Fourteenth Amendment²³⁶ and within three years the covenants were declared unenforceable in the state and federal courts.²³⁷

The social pressures behind race bias in housing are so powerful, however, that they flourish even without protection from the legislatures or the courts.²³⁸ Bills have been introduced in state legislatures²³⁹ to forbid racial or religious discrimination in "multiple dwellings" (those housing three or more families),²⁴⁰ and to forbid discrimination in mortgage financing²⁴¹ but these proposals have not been considered seriously by any legislative body. Hence, the New York State Committee Against Discrimination in Housing, which coordinates the activities of many agencies, has limited its campaign against *private* housing

Effects of Nonwhite Purchases on Market Prices of Residences, 20 Appraisal J. 314-29 (July, 1952); Abrams, The New "Gresham's Law of Neighborhoods"—Fact or Fiction, 19 Appraisal J. 324 (1951).

²³³ The restrictive covenant was apparently first used against Chinese. *Gandolfo v. Hartman*, 49 Fed. 181 (C.C. Cal., 1892).

²³⁴ *Corrigan v. Buckley*, 271 U.S. 323 (1929).

²³⁵ Minnesota, in 1919, passed a law declaring void restrictive covenants based on religion but not race. Minn. Stat. Ann. (1949) § 507.18.

²³⁶ McGovney, Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds Is Unconstitutional, 33 Calif. L. Rev. 5 (1945).

²³⁷ *Shelley v. Kraemer*, 334 U.S. 1 (1948). Efforts to circumvent these decisions (which outlawed injunctions to prevent sale to or occupancy by Negroes) by bringing actions for money damages are not proving successful. See Groves, Judicial Interpretation of the Holdings of the United States Supreme Court in the Restrictive Covenant Cases, 45 Ill. L. Rev. 614 (1950); 66 Harv. L. Rev. 353 (1952), noting *Phillips v. Naff*, 332 Mich. 389, 52 N.W. 2d 158 (1952). That restrictive covenants are still being incorporated into deeds is indicated by the recent exposure that six United States Senators had accepted such deeds several years after the 1948 restrictive covenant decisions. See *Washington Afro-American* 1 (Oct. 4, 1952); *ibid.*, at 1 (Oct. 14, 1952); *Baltimore Afro-American* 1 (Oct. 4, 1952).

²³⁸ See the following pamphlets: Abrams, *Race Bias in Housing* (1947); Crosby, *Forbidden Neighbors* (1950); Crosby, *In These Ten Cities* (1951). See also Weaver, *The Negro Ghetto* (1948); *Race Discrimination in Housing*, 57 Yale L.J. 426 (1948); Emerson and Haber, *op. cit. supra* note 34, at 1001-13 (1952); National Community Relations Advisory Council, *op. cit. supra* note 133.

²³⁹ The debate on anti-segregation provisions in the federal housing laws has already been described. See pp. 390-91 *supra*.

²⁴⁰ See the "fair housing practices bill" sponsored in New York by the American Jewish Congress and the NAACP, A. Int. 2384 (1949).

²⁴¹ Wachtel-Jack bill, S. Int. 1802, A. 2021 (1949). For the text of a series of "model" anti-discrimination housing bills, see National Community Relations Advisory Council, *op. cit. supra* note 133, at 56-62.

discrimination and segregation to a proposal for a legislative investigation of discrimination.²⁴²

The advent of public housing in the 1930's was accompanied by a drive for safeguards against discrimination and segregation. Racial or religious discrimination by a public housing project is clearly forbidden by the Fourteenth Amendment, independently of statute,²⁴³ but to emphasize the public policy of the state and to provide enforcement procedures, northern states began to adopt laws barring such discrimination. Beginning with New York in 1939, to date nine states have enacted such laws.²⁴⁴

When the resources of the states proved inadequate to house the millions unable to afford decent private housing, a new type of "urban redevelopment" was devised to attract insurance and other capital to the housing market by offers of tax exemption, assemblage of plottage through the power of eminent domain and other forms of assistance. But of the twenty states which enacted such laws since 1945, only a few were careful to insert nondiscrimination clauses²⁴⁵ and recourse was again had to the courts for judicial protection. The New York Court of Appeals, however, by a vote of four to three rejected the contention that the \$90,000,000 Stuyvesant Town housing project of the Metropolitan Life Insurance Company had received sufficient assistance from the City of New York to bring the commands of the Fourteenth Amendment into play²⁴⁶ and efforts were renewed in the legislature. In 1950, while the Stuyvesant Town litigation was pending in the Supreme Court, the New York State legislature forbade discrimination and segregation in all "publicly-assisted" housing.²⁴⁷ The law vested enforcement powers in the State Commissioner of Housing but also allowed rejected applicants or taxpayers to bring suits for damages or to enjoin such discrimination.

Since public housing and urban redevelopment programs are frequently car-

²⁴² Scanlan-Schuyler bill, S. Int. 1800, A. Int. 2045 (1949). Such legislative inquiries preceded the successful campaigns in New York for a fair employment practice law (1945) and for a fair educational practices law (1948).

²⁴³ Whether segregation in private housing projects is also forbidden by the Fourteenth Amendment has not been authoritatively determined. See note 133 supra.

²⁴⁴ Connecticut, Massachusetts, Michigan, Minnesota, New Jersey, New York, Pennsylvania, Rhode Island, and Wisconsin. See Wis. Legis. Ref. Lib., op. cit. supra note 182, at 5-8; Housing and Home Finance Agency, Non-Discrimination Clauses in regard to Public Housing and Urban Redevelopment Undertakings (1952).

²⁴⁵ Illinois, Indiana, Minnesota, Pennsylvania, and Wisconsin. The Minnesota statute, however, forbids only religious discrimination, although exclusionary policies are largely directed against Negroes. See American Jewish Congress Checklist, op. cit. supra note 103.

²⁴⁶ *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E. 2d 541 (1949), cert. denied, 339 U.S. 981 (1950). The case was carried through the courts by the American Jewish Congress, the NAACP, and the American Civil Liberties Union, Robison, *The Story of Stuyvesant Town*, 172 Nation 514 (1951).

²⁴⁷ N.Y. Civil Rights Law (McKinney, Supp., 1952) § 18. Similar statutes were enacted in New Jersey in 1950 applicable to public, publicly-assisted, and urban redevelopment projects, N.J. Stat. (Cum. Supp., 1950) 55:14G-21, 14A-39.1, 14C-7.1, 14D-6.1, 14H-9.1, 14A-7.5, 14B-5.1, 14E-7.1, and 16-8.1.

ried on by municipal housing authorities, local ordinances likewise have been adopted forbidding racial or religious discrimination in the selection of tenants. Among the cities which have adopted such ordinances are Cleveland, Los Angeles, New York, Philadelphia, and Toledo.²⁴⁸

A growing realization that the enforcement of housing discrimination laws, like other civil rights statutes, is best entrusted to state commissions against discrimination is indicated by recent legislation in Connecticut, Massachusetts and Rhode Island, authorizing such commissions to investigate complaints and issue cease and desist orders against discrimination by public housing projects.²⁴⁹ Judging by the Connecticut and Massachusetts experience, such legislation is effective in putting pressure on municipal housing authorities to abandon segregation policies.²⁵⁰

Legislation against discrimination and segregation in public and redevelopment housing can be expected to make additional progress in the states outside the South. Where it fails, litigation can prevent all discrimination in public housing. Discrimination in private housing is quite a different matter. Legislation against that evil should continue to be a state objective but with the realization that many years of education will be needed before it is widely accepted. Perhaps most important is to overcome the widespread misconception that interracial housing necessarily breeds racial tensions and depreciation of real estate values.

Education

One other type of state civil rights law deserves mention. In 1948, following an exhaustive investigation under the auspices of the New York Temporary Commission on the Need for a State University²⁵¹ of discrimination against Jewish applicants to colleges and professional schools, a state fair educational practices act was enacted.²⁵² Realizing that few students were likely to file com-

²⁴⁸ Housing and Home Finance Agency, *op. cit.* supra note 244, at 13-35.

²⁴⁹ See, e.g., Conn. Gen. Stat. (Supp., 1949) §§ 691a, 692a.

²⁵⁰ Conn. Commission on Civil Rights, *op. cit.* supra note 229, at 23-24; Mass. Comm. Against Discrimination, Pub. Doc. No. 163, at 6-7 (1951).

²⁵¹ Berkowitz, *Inequality of Opportunity in Higher Education, A Study of Minority Groups and Related Barriers to College Admission*, N.Y. Leg. Doc. No. 33 (1948). For other governmental surveys of discrimination in education see Report of the Special Investigating Committee of the Council of the City of New York, adopted Dec. 23, 1946 and Supplementary Report (1947); New York Mayor's Committee on Unity, Report on Inequality of Opportunity in Higher Education (1946); Stetler, *College Admission Practices with Respect to Race, Religion, and National Origin of Connecticut High-School Graduates* (Conn. Interracial Comm'n, 1949); President's Commission on Higher Education, 2 *Higher Education for Democracy, Equalizing and Expanding Individual Opportunity* 25-44 (1947). Unofficial studies are Davis, *On Getting into College, A Study Made For the Committee on Discriminations in College Admissions* (American Council On Education, 1949); Shostek and Baer, *Two Hundred Thousand Jewish Collegians* (1946); American Jewish Congress, *The Quota System in Medical Schools, An Analysis of the Existing Evidence* (mimeo., 1950); *Segregation in Education*, *The Southern Patriot* (Oct., 1947).

²⁵² N.Y. Education Law (McKinney, 1950) § 313.

plaints because of the fear of reprisals or blacklisting, the New York law wisely allows the Commissioner of Education to investigate the admissions practices of an educational institution, even in the absence of a complaint.²⁵³

Massachusetts also adopted a Fair Educational Practices Act in 1949²⁵⁴ and similar action was taken by New Jersey in the same year.²⁵⁵ Whether the Massachusetts or the New Jersey law has had any noticeable effect is still unknown. The experience in the three states, home of many of our best known colleges and universities, indicates that state education departments may be too close to educational institutions to be able or willing to attack subtle forms of discrimination in such places.

Legislative correction of discrimination in colleges and universities will probably continue to be confined to the problem of obtaining fair treatment of applicants from northeastern states to institutions in the same area. While discrimination also exists elsewhere, the principal pressure for relief comes from the large number of Jews, Italian-Americans, and Negroes in the Northeast who face discriminatory treatment in obtaining an education in their home states.

Government Commissions on Group Relations

We come finally to a nonregulatory type of legislation, the creation of a governmental agency with a broad mandate to lessen racial tensions and a minimum of statutory instruction on the means of accomplishing this task. Following the Detroit race riot of 1943, in which scores lost their lives, mayors and governors throughout the country hurriedly appointed good will committees to head off the mounting racial tensions in the country. It soon became apparent, however, that staffs and statutory authority were required if these committees were to be any more than window dressing. Soon, city after city put these commissions on a statutory basis. To date there are at least seventy-five such committees or commissions serving in eighteen states.²⁵⁶

These commissions on human relations, community relations boards, or mayor's interracial committees, as they are variously named, are created by local ordinance (or, as in Philadelphia, by charter). They consist of boards of from nine to forty-five members with annual budgets ranging from token

²⁵³ But this power has not been exercised. Only a handful of complaints have been filed and the State Education Department has done little under the law except eliminate discriminatory questions from application blanks and attempt to cajole medical school deans to adopt non discriminatory policies.

²⁵⁴ Mass. Stat. (1949), c. 151C.

²⁵⁵ As already noted (p. 406 supra) note 226, New Jersey, in 1949, empowered the Division Against Discrimination of its Department of Education to enforce the existing law against discrimination in places of public accommodation. Educational institutions were included in the list of such places.

²⁵⁶ For a critical evaluation of such intergroup relations agencies, see Liveright, *The Community and Race Relations*, 244 *Annals* 106-17 (1946); Dodson, *Public Intergroup Relations Agencies*, 20 *J. of Negro Educ.* 398 (1951); *Wis. Legis. Ref. Lib.*, op. cit. supra note 182, at 22-32; Waldman, *Programs of Municipal Group Relations Agencies* (American Jewish Congress, mimeo., 1952).

sums to \$125,000. Their statutory mandate is to promote better intergroup relations, although ordinances differ widely in spelling out subsidiary functions.²⁵⁷ With the exception of the Philadelphia and Cleveland commissions, which also administer the local FEPC ordinances, and those in Detroit and a few other cities, which may act against discrimination by city departments, these agencies have no regulatory functions, have no subpoena power, and depend on conciliation, research and education as their means of operation.

Although these commissions operate predominantly in northern areas, Baltimore and St. Louis have established such agencies pursuant to local ordinances and Dade County (Miami, Florida) is now in the process of creating such a commission.

The councils have, of course, varied in effectiveness, tending to reflect the sincerity of the municipal administration. Some councils apparently exist only to act as buffers for the mayor, shielding him from community protest, and as official excuses for lack of government action. But the overall impression of these councils is that of earnest and increasingly more effective effort to mobilize the community to wipe out prejudice and discrimination.²⁵⁸

Despite the considerable number of new anti-discrimination laws, the advances have been spotty. Such laws have not been enacted in the South where the need is the greatest. Failure in legislative campaigns in the North has been attributable largely to the adverse votes of rural legislators who, although having no strong interest one way or the other, have been inclined to side with the groups opposing the bills. The disproportionate influence of rural areas in the upper chambers of most state legislatures is an obstacle not easy to overcome. Despite these reservations, the prognosis for further state legislation in some of the northern and western states is distinctly favorable.

IX. CONCLUSION

Is the current agitation for civil rights legislation a passing phase or will it continue until it achieves its goal? No one would even attempt to answer that question now. It can be said, however, that nothing like the present ferment has been seen for seventy-five years. It has already lasted more than a decade and shows no sign of abating.

The legislative campaign, of course, has been only one aspect of a broad drive for equality which has already achieved important gains. Chief among these have been a number of forward-looking decisions of the Supreme Court, notably in the white primary, restrictive covenant, and segregation cases; new legislation against discrimination in a number of states; and federal executive action against racist practices in government, such as segregation in the armed forces.

²⁵⁷ For the text of representative ordinances see Wis. Legis. Ref. Lib., op. cit. supra note 182 at 116-30.

²⁵⁸ Rep. Franklin D. Roosevelt, Jr., who was at one time chairman of the nonstatutory New York Mayor's Committee on Unity, has introduced a bill, H.R. 8096 (1952), providing for \$6,000,000 of federal grants to such commissions annually.

There is every reason to expect further advances along these lines, advances that may affect new areas, such as judicial condemnation of segregation, legislation against discrimination in housing, and executive action against segregation in the District of Columbia.

Yet, only a beginning has been made and many of the obstacles to complete equality loom as large as ever. Violence against minorities continues to achieve its objectives with impunity and the possibility of obtaining federal civil rights legislation is still slim indeed.

One conclusion may be drawn with some confidence: group relations have been the last fortress of the doctrine of *laissez faire*. Long after resort to legislation to curb existing evils had been taken for granted, the theory survived that discrimination was not susceptible to this treatment. The past decade has given the death blow to that theory. Opponents and proponents of legislation will still argue about whether the people are ready to move forward, about states' rights, and about the form which laws should take. It is unlikely, however, that any large part of the population will, in the foreseeable future, accept the notion that democratic government should ignore practices that oppress some of its people solely because of race, color, religion, or national origin.

November 6, 1952.