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Constitutional limitations on discrimination in the sale and rental of property

CONSTITUTIONAL LIMITATIONS ON DISCRIMINATION IN THE SALE AND RENTAL OF PROPERTY

By

William Schwartz

APPROVAL PAGE

Approved
by

FIRST READER John L. Fletcher Jr.

SECOND READER George D. Blackwood

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I. Introduction

In 1896, Mr. Justice Harlan remarked that our Constitution was "color blind."[1] Unfortunately, this was only a dissenting opinion. The Court required a half century before it perceived the true light and refused to sanction discrimination based upon race, creed or color.

In 1896, minority groups had mere token political representation in this country. Today, minority groups are no longer in Egypt. Rather they are on Mt. Nebo, the promised land of complete equality is within their reach and they are advancing forward to reach it. Hence, the pendulum is now swinging in the opposite direction. Minority groups are now advocating the adoption of legislation barring discrimination. In 1896, the government was the "silent ally" of the forces of bigotry. Today, the states are being asked to join (as an active partner) private groups fighting discrimination.

Nevertheless, this forward advance has been an uneven one. This is especially true in the field of housing. The key weapon in the battle for equality in housing has been the Fourteenth Amendment. Before this amendment can be applied, "state action" must be found to exist. Since much of the discrimination present in housing has evolved from private agreements and private legal devices, the Courts have encountered difficulty in finding the requisite "state action." In addition, the Courts have failed to completely illumine the scope and outer limits of their decisions. Therefore, we are left with doubts as to how much inequality, if any, the law will tolerate. It

is the purpose of the author to trace the development of constitutional restrictions on discrimination in the field of housing and to analyze the weaknesses of the adjudicated cases in this area.

We shall be concerned with discrimination in both private and public housing. In addition, we shall discuss recent legislative activity in the field of "fair housing legislation."

Equality implies the attainment of brotherhood. The word "brothers" contains another word - "others" - within it. I am suggesting, in a sort of symbolic way, that the problems in this area are not purely legal. The legal problems have to be interpreted within the broader framework of human relations. Hence, we begin our study by viewing the sociological and psychological effects of discrimination in housing.

II. The Sociological and Psychological Effects of Discrimination in Housing

A. The General Characteristics of Minority Housing

To fully appreciate the sociological and psychological effects of discrimination in housing, one needs to merely observe the general characteristics of one area of discrimination - nonwhite housing. These general characteristics have been described by one commentator as follows:[1]

> "Nothing is so obvious about the Negroes' level of living as the fact that most of them suffer from poor housing conditions."

More specifically, such housing suffers from the following defects:[2]

1. Most such homes are in older sections having long histories of deterioration.
2. In 1950, more than 27% of the homes were delapidated, about five times the proportion of those of white families.
3. Many such homes lack the basic amenities (toilets).
4. Repairs to the homes are either not made or are not feasible.
5. Banks refuse to finance the repair of such homes.
6. There is little investment in new buildings in nonwhite sections. What public housing there is destroys as many homes as it builds.
7. Tax arrears are higher in these sections than others.
8. Nonwhites receive less housing value per dollar than do whites.
9. Public services, such as garbage collection, building inspections, street maintenance, are less satisfactory than in other areas.
10. Building values are lower in relation to rents than in other areas.
11. Overcrowding of land and buildings exists in 18% of the homes. Only 5% of white families were extremely overcrowded in 1950.
12. Schools, hospitals and recreational facilities are inferior.
13. Single family dwellings have been subdivided into multiple dwellings even though they were not suited for that purpose.

These conditions have had an adverse effect, not only upon the minority groups involved, but also upon the dominant majority.

B. The Effect on the Minority Group

Let us begin with the more obvious situation - the effect

of these conditions upon the minority. Such areas are synonymous with areas of disease and illhealth, crime and juvenile delinquency, and general social disorganization.[3] A study by a federal government agency has concluded that slum areas comprising about 20% of metropolitan residential areas throughout the United States, contained 33% of the population but produced 50% of the arrests, 55% of the juvenile delinquency, 60% of the tuberculosis victims, and 50% of the diseased.[4]

Studies with respect to respiratory diseases are revealing. Woofter has found a Pearsonian correlation of +.809 between Negro death rates from tuberculosis and congestion in New York City.[5] In the Black Belt of Chicago where Negroes were living 90,000 per square mile as compared with 20,000 whites per square mile in an adjacent area, the Negro death rate for tuberculosis was more than five times the rate for whites in 1940-41.[6] Although the high tuberculosis rate was caused partially by other factors such as malnutrition resulting from poverty and ignorance, overcrowding was a substantial contributing cause.[7]

The non-physical effects on the minority are even more shocking.

Overcrowding and the lack of proper facilities contributes to family disorganization. Thus, Frazier writes:[8]

> "Because of their poverty it is often necessary for the two or even more families to occupy a single house or the same apartment. Thus individual families are denied the privacy which is necessary to family exclusiveness. Even where the family is isolated from other families, very often the Negro family in the city is forced to take in lodgers... Often where Negro families

> occupy a single dwelling unit without lodgers, the space at their disposal provides no privacy for the individual members of the family."

Furthermore, Woofter reports a Pearsonian correlation of +.243 between the density of the Negro population and the rate of illegitimacy.[9] Frazier concludes his survey with this observation:[10]

> "...the house is not a home, but a place to cook and eat as individuals and sleep at night. When the weather permits it is generally a place from which one escapes. This is true of adults as well as children. This fact probably explains why so many Negroes concentrate on the streets of Negro neighborhoods. So far as the children are concerned, the house becomes a veritable prison for them. There is no way of knowing how many of the conflicts in Negro families are set off by the irritations caused by overcrowding people who come home after a day of frustration and fatigue, to dingy and unhealthy living quarters."

The findings of psychologists and sociologists presented to the Court in the Brown case reveal other aspects of the problem.[11] This report demonstrates that minority group children who were subjected to segregation, prejudice, and discriminations "learn the inferior status to which they are assigned as they observe the fact that they are almost always segregated and kept apart from others who are treated with more respect" and that "they often react with feelings of inferiority and a sense of personal humiliation." This "leads to self-hatred and rejection of his own group." Some children "may react by overt aggression and hostility;" others "by withdrawal and submissive behavior"; most children "react with a general defeatist attitude and a lowering of personal ambitions." "Many minority group children of all classes also tend to be hypersensitive and anxious about

their relations with the larger society. They tend to see hostility and rejection even in those areas where these might not actually exist." Although these findings were presented to the Court in a case involving segregation in education, they are clearly relevant to housing segregation as well. Furthermore, segregated housing tends to perpetuate segregation in education. A Commission of the North American Council of the World Presbyterian Alliance has recently published a report which recognized that it is the "prevailing pattern of segregated housing" from which "stem other forms of discrimination." It reported that so long as segregated housing continues "any integration of churches or schools tends to be no more than a token."[12]

The adverse effects of segregated housing are not limited to the children of the minority group. It extends to the adults in the minority group as well.[13] "Whenever discrimination prevails it is always accompanied by tension, challenge, aggression, difficulties and flex."[14]

C. The Effect on the Majority Group

However, in a more subtle way, segregated housing has a harmful effect upon the members of the dominant majority. Thus Myrdal concludes that the low economic, political, legal, and moral standards of southern whites is kept low because of discrimination against Negroes.[15] Linder pinpoints the problem even more cogently by observing that:

> "People preoccupied with hate are people subject to emotional turmoil. Since the entire visceral system is affected by emotional states, hatred and the tensions accompanying hatred seriously effect mental balance and physical health. In truth, people who are preoccupied with hate are sick people who become more sick the more they hate."[16]

The Social Science Statement attached to the Appellants' brief in Brown,[17] indicates that more than 80% of the social scientists polled stated it as their opinion that the effects of such segregation are psychologically detrimental to the majority group members. This statement indicates that:

> "...confusion, conflict, moral cynicism, and disrespect for authority may arise in majority group children as a consequence of being taught the moral, religious and democratic principles of the brotherhood of man and the importance of justice and fair play by the same persons and institutions, who, in their support of racial segregation and related practices, seem to be acting in a prejudiced and discriminatory manner. Some individuals may attempt to resolve this conflict by intensifying their hostility toward the minority group. Others may react by guilt feelings which are not necessarily reflected in more humane attitudes toward the minority group. Still others react by developing an unwholesome, rigid, and uncritical idealization of all authority figures -- their parents, strong political and economic leaders. As described in "The Authoritarian Personality," they despise the weak, while they obsequiously and unquestioningly conform to the demands of the strong whom they also, paradoxically, subconsciously hate."

D. The Harmful Effects on Society as a Whole

Furthermore, there is a definite correlation between segregated housing and the occurrence of race riots. Where Negroes are integrated with Whites into self-contained communities without segregation, reach daily contact with their co-tenants,

are given the same privileges and share the same responsibilities, initial latent tensions tend to subside, distinctions become reconciled, cooperation ensues and an environment is created in which interracial harmony is achieved.[18] Thus, Lee, in analyzing the race riot concludes that:

> "No Negroes and whites who lived close together as neighbors showed any tendency to fight each other."[19]

In tracing the real causes of race riots Lee emphasizes the two opposing processes of: (1) a tremendous accumulation of pressures within the hemmed in Negro district and, (2) sharp defensive movements to keep the Negro community from expanding.[20]

Segregation in housing has other harmful effects.[21] Segregated housing involves a loss of the social values of cultural interchange of mixed groups. It is a factor leading to the decay of American cities. In addition, segregated housing in the United States adversely affects our world political position and our relations with other nations.

E. Discrimination as a Prime Cause of Segregated Housing

On the assumption that each man gets the full housing value he can pay for, it is frequently argued that Negroes cannot obtain better housing because of inability to pay rather than because of discrimination. This contention is based on the fact that non-white income is less than one-half of white income, with government data establishing that the median income of white families in 1950 was $4,135, whereas for non-whites it was only $1,569.22. Nevertheless, the potency of discrimination is proven by the fact that Negro families get

less for their housing dollar than white families on the same income level.[23]

"Negro residents of the Chicago 'Black Belt' pay as much per cubic foot per room as that paid by wealthy residents for equivalent space of the Lakeside Drive."[24]

Indeed, the relative inferiority actually increases as the rental value increases.[25]

PERCENTAGE OF SUB-STANDARD UNITS

Monthly Rental Value	White	Non-White	Ratio (Non-White to White)
Under $5	90.2	97.6	1.1
$5 - $9	87.7	94.7	1.1
$10 - $14	69.4	79.4	1.1
$15 - $19	42.1	55.3	1.3
$20 - $24	25.0	43.8	1.8
$25 - $29	14.4	31.0	2.2
$30 - $39	7.7	20.9	2.7
$40 - $49	4.0	13.5	3.4
$50 - $59	3.2	10.9	3.4
$60 - $74	2.8	9.1	3.3
$75 - $99	2.7	10.7	3.9
$100 and over	2.8	13.4	4.8

Hence, discrimination is a prime cause of this injurious situation which still plagues our society.

III. Discrimination, Property Values, and Other Myths

One of the major justifications for discrimination in housing has been an economic one. Up to about 20 years ago,

even unbiased students of the subject assumed that the presence of minorities in a neighborhood was a serious value destroying influence.[1] Thus, in listing the factors to observe in appraising, one expert stressed the necessity to inquire as to whether there are "undesirable racial elements in the neighborhood, and, if so, are they likely to expand in a way that may injure the property."[2] Mcmichael pointed out that values almost always decline when a white district is colonized by Negroes.[3] The desirability of enforcing racial restrictions was strongly recommended by appraises.[4] Louis M. Platt wrote:[5]

> "Badly neglected properties are salable in a settled district; but let one Negro move into a white district and a chain of events that will halt the sales of nearby properties is set in motion."

Appraisers soon set up a hierarchy showing how land values are affected by races and nationalities. From most favorable to least favorable, the list was:[6]

1. English, Germans, Scotch, Irish, Scandinavians
2. North Italians
3. Bohemians or Czechs
4. Poles
5. Lithuanians
6. Greeks
7. Russian Jews
8. South Italians
9. Negroes
10. Mexicans

However, scientific examinations in recent years have reversed this line of thought. These studies indicate that under present day conditions the infiltration of minority groups tend to stabilize or even raise property values.[7] Although panic selling sometimes follows early sales to the minority group and prices drop, prices soon become stabilized after the first hysterical selling phase has passed. After this period has passed, prices gradually increase under the pressure of Negro bidding.[8]

"It usually will be found that sales activity is greater in racially mixed areas, especially in low and moderate price ranges, and that the high effective demand among Negro buyers not only sustains price levels but often increases them."[9]

However, majority groups still entertain the misconception that minority groups do not properly maintain their homes, and over-occupy them.[10] These groups fail to realize that these minority persons are the victims and not the cause.[11] The recently published Report of the Commission on Race and Housing summarizes some of the salient aspects of the evidence concerning property values and race as follows:[12]

> "More often than not, residential areas in which nonwhites are permitted to enter are older neighborhoods where the housing is already obsolescent or deteriorating. Declining values in those districts, coinciding with nonwhite entry, have furnished much of the evidence for the thesis that nonwhites injure property values."

Despite the overwhelming evidence to the contrary, modern proponents of discrimination in housing still cling to the notion that property values will be depressed by integration. In fact,

this has been (as shall be indicated later) the rallying cry in opposition to Fair Housing Legislation.

In addition to the valuation argument, the following other arguments have been made in opposition to integration:

1. Negroes and Whites do not mix.
2. Nonwhites are dirty and spoil the neighborhood.
3. Nonwhites hurt the social status of white neighbors.
4. The minority always goes where it is not wanted.

Reasoned and scientific analysis has clearly demonstrated the falsity of these positions.[12]

IV. The Common Law and Public Policy

Aside from constitutional considerations, discriminatory devices in housing may be violative of the public policy of a state as expressed in its common law.

The power of alienation is so commonly one of the constituent elements of property that it is now regarded as a characteristic attribute of ownership. Restraints which make it impossible for the owner of property to transfer his interest have grave social and economic consequences.[1] Such restraints take the property out of commerce. They also have the tendency to concentrate wealth. Another evil growingout of a restraint is its effect to discourage improvements when it is imposed upon an interest in land. Some, if not all, of these consequences flow from a discriminatory restraint. Hence, it might be contended that a restraint on alienation based upon race is contrary to common law public policy and is void.

Clearly at the early common law a restraint on alienation that closed "the market afforded by a whole race of the human family"[2] was void. The older authorities conclusively indicate that a restraint barring sale to all of a race would have not been tolerated.[3] Unfortunately, the American courts and authorities have not uniformly followed the earlier approach.

In 1915 and 1918, the courts of Louisiana and Missouri held discriminatory restraints to be valid.[4] The next court to consider the question was the Supreme Court of California.[5] The California court held that a covenant prohibiting sale to a non-caucasian was forbidden by the common law rule against restraints on alienation, but that a covenant prohibiting occupancy by a non-caucasian was valid. This left the Negro buyer in the odd position of having title, but being unable to occupy the land. Such inconsistent thinking created a serious split of authority among the American common law jurisdictions. Thus Tiffany reports:[6]

> "Prohibitions against alienation to persons of a particular race or color have been regarded as invalid, on the ground that they violate the general policy against restraints upon alienation, but there is a considerable body of authority which supports the opposite view. A restraint on the use of property, as where it is provided that the property shall not be used or occupied by a person not in a particular race, has generally been considered as not invalid as a restraint on alienation."

The distinction suggested appears to be a victory of form over substance.[7] Tiffany concedes that a restriction on use and occupancy is as a practical matter a restraint on alienation.[8]

Furthermore, even from a technical point of view, a restraint on use does prevent a seller from conveying a full fee simple - use and occupancy being one of the attributes of ownership. However, although some courts were perhaps prepared to concede that such covenants were restraints on alienations, they considered them reasonable restraints. One of the justifications for the reasonableness of such restraints and their compliance with public policy has been that it was "good business practice."[9] Thus, economic and business considerations were considered more important than human values.

The lack of reasoned analysis in the area misled even such a dignified body as the American Law Institute to sustain the validity of a discriminatory restraint.[10] In the opinion of the Institute, the avoidance of unpleasant racial and social relations and the stabilization of land values which supposedly result from the enforcement of an exclusion policy outweighted the evils which normally result from a curtailment of the powers of alienation.

Sporadically, courts found other means and theories for invalidating such covenants. One of these was the "changed conditions" doctrine. Thus, where Negroes infiltrated into a restricted area in large numbers so that the party seeking enforcement of the covenant was already living under the very conditions it was designed to prevent, a court of equity would refuse to enforce the discriminatory covenant.[11] Other courts have inquired as to whether the restriction was sufficiently

definite in terms. In a Canadian case[12] the Court held that a restriction against transfer to "Jews" was void for indefiniteness. This latter problem has, however, not been considered difficult in the American cases. Thus, a restraint against "persons of the negro race or blood" was enforced against an "octoroon."[13]

In discussing the relevant policies, the Courts rarely discussed the aspect of human values. Thus, Judge Traynor of the California Supreme Court was an early prophet of change when he wrote that these covenants:

> "...must yield to the public interest in the sound development of the whole community."[14]

V. Segregated Housing and the Framers of the Fourteenth Amendment

Despite the reluctance of the Courts to strike down segregated housing as an illegal restraint on alienation, there was historical precedent to indicate that such segregation was violative of our basic notions of justice. In fact, it appears that the framers of the fourteenth amendment (had they been asked the specific question,) would have answered that segregated housing constitutes an abridgement of equal protection and due process.

The general objectives of the framers were stated as follows:[1]

> "Slavery by building up a ruling and dominant class had produced a spirit of oligarchy adverse to republican institutions which inaugurated civil war. The tendency of continuing the domination of such a class, by leaving it in the exclusive possession of political power would be to encourage the same spirit and lead to a similar result."

More specifically, Thaddeus Stevens, the Joint Reconstruction Committee member in charge of the Amendment in the House declared:[2]

> "...Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford equal protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows a white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes. ... Some answer: 'Your Civil Rights Bill secures the same things.' That is partly true, but a law is repealable by a majority."

It is evident that the framers meant that all persons should have equal opportunity to buy property.[3] That was one of the primary objectives of the Civil Rights Bill.[4] According to Stevens' statement, the amendment also had to make this guarantee since it was equal in scope to the Civil Rights Bill.

In the Senate, Senator Howard quoted at length from Corfield v. Coryell,[5] in which Washington, J. included the right to hold property as being a "fundamental right."[6]

In addition, the opponents of the Amendment agreed that equal rights to property were also protected by it. Thus, Representative Rogers declared:[7]

> "This section of the joint resolution is no more nor less than an attempt to embody in the Constitution of the United States that outrageous and miserable Civil Rights Bill ..."

It is interesting to note that the Civil Rights Bill provided that all persons shall have the right "to make and enforce contracts to sue, be parties, give evidence, inherit,

purchase, lease, sell, hold, and convey real and personal property."[8]

Thus, a court could have reached (with ease) the conclusion that discrimination in housing is prohibited by the fourteenth amendment. Yet, as we shall now see, the courts chose to carve out a thorny path of delay.

VI. The Pre-Shelley Era

The earliest American case probing the constitutionality of discrimination in the sale or occupancy of land is Gandolfo v. Hartman.[1] In that case, plaintiff took title to land under a deed containing an agreement that the land was never to be rented to a "chinaman." The plaintiff having conveyed a part of the property to the defendant brought suit to enjoin the latter from renting to "chinamen" who were joined and made parties defendant. In refusing relief, the court stated:

> "It would be a very narrow construction of the constitutional amendment in question, and of the decisions based upon it, and a very restricted application of the principles upon which both the amendment and the decisions proceed, to hold that, while state and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract, which the courts may enforce. Such a view is, I think, entirely inadmissable. Any result inhibited by the constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other."

It took the Courts a half century to revive and return to this thinking. In subsequent cases involving restrictive

covenants against Negroes the Gandolfo case was generally overlooked, or, when noticed, it was distinguished.[2] The precedent value of Gandolfo was further diminished by the fact that the court, in the latter half of its opinion, stated an alternative basis for its decision - that enforcement of the agreement would also violate the most-favored nation clause of a treaty between the United States and China.[3]

Thirty years elapsed before the question was again presented to the Federal courts in the landmark case of Corrigan v. Buckley.[4] This was a suit to enjoin one defendant, a white land-owner, from conveying his land to the other defendant, a colored would-be purchaser, in violation of a restrictive covenant against sale or leasing to a colored person. The colored defendant took the position that the covenant was void since it was violative of due process. The lower court rejected this argument and the Supreme Court dismissed his appeal for want of jurisdiction. This opinion was relied upon by the state courts as settling the constitutionality of court enforcement of race residential restrictions.[5]

However, was Corrigan v. Buckley really authority for such a proposition? Professor McGovney feels that the case is a square holding only for the proposition that racial residential restrictions do not create slavery or involuntary servitude in violation of the thirteenth amendment. He feels that the court's statement that court enforcement of a restrictive covenant does not violate due process, is a "very off hand

dictum." He also points out that:

> "More important, it is obvious that the case did not decide anything with respect to the effect of the Equal Protection Clause as a limitation on the states."[6]

Nevertheless, it was upon such a thin ground that a fortress-like structure of discrimination was erected.

This development is made even more enigmatic by the Court's activity in a closely related area - the racial zoning ordinance.

The leading case of Buchanan v. Warley,[7] held a city ordinance unconstitutional which forbade any white person or any Negro person to move into and occupy as a residence any house in a city block in which a majority of the houses were already occupied by persons of the other race or color. The attack in this case came from a white man who had contracted to sell to a Negro a lot in a block in which a majority of the houses was then occupied by whites. The white seller sought specific performance and challenged the ordinances' constitutionality. The specific ground of decision was that the ordinance curtailed the white owner's property rights without due process of law. The court did not rest its decision on the ground that the ordinance abridged a potential Negro buyer's rights without due process of law. However, Buchanan does contain a far reaching statement rejecting the argument that racial zoning was necessary in order to avoid racial conflict. Said the Court:

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."[8]

In all likelihood, the reason why the Courts did not follow the approach of Buchanan in the area of the restrictive covenant was their inability or unwillingness to find state action where the legislature was not involved.

VII. Shelley and Barrows

A. Shelley v. Kraemer

The status of the law on the subject has been aptly described by one commentator as follows:[1]

> " "The main claim made by the Caucasians upon the judicial system from 1915 to 1945, was for the enforcement of racial restrictive covenants. The courts made good this claim."

It was only in the late 1940's that a new civil rights climate became manifest and that the problem's importance became obvious. Hence, the Court agreed to review a number of covenant cases. For the first time, the Supreme Court passed judgment on the constitutional validity of racial restrictive covenants. In 1948, the Court decided the companion cases of Shelley v. Kraemer, McGhee v. Sipes, and Hurd v. Hodge.[2]

The court's decisions were revolutionary. Since Gandolfo, judicial doubts as to the constitutionality of these covenants were seldom expressed.[3]

All of these cases came up to the Supreme Court via certiorari. In Shelley, suit was brought in a circuit court of St. Louis to restrain Negroes from taking possession of property and to forfeit their title to the property which was subject to a restrictive covenant. The trial court denied the relief requested, not on constitutional grounds, but because the agreement in question was not effective due to a lack of signatures. The Supreme Court of Missouri reversed the lower court which was directed to grant the relief requested. It held that the covenant was effective and constitutional.

The McGhee case exacted a large amount of public interest because of the policy arguments founded on a huge volume of social data advanced in the amicus curiae briefs. The Michigan Court in this case dismissed the arguments based upon public concern and welfare by noting that "these pronouncements are merely indicative of a desirable social trend. ..."[14]

In Hurd, the Court of Appeals for the District of Columbia upheld a perpetual deed covenant against transfer, lease, rent or conveyance. The majority opinion was firm on the point that the restriction was not an unlawful restraint on alienation.

The Shelley and McGhee cases were decided in a unanimous opinion by Vinson, C.J. (Reed, Jackson and Rutledge did not participate -- possibly because they owned property subject to such restrictions). The key issue decided by the Court was that judicial enforcement by state courts of such covenants

violates the equal protection clause of the fourteenth amendment.

The Court reaffirmed its prior holdings that the agreements, standing alone, were valid since the fourteenth amendment only relates to state action. But here there was more than a mere private contract. Here there was, in addition, the power of the judiciary, a branch of the state, behind the enforcement of the contract - this is state action. Vinson, C.J., reviewed the cases, starting with Twining v. New Jersey[5] holding that a State could act as well through its judiciary as through its executive, or legislature, in the enforcement of its laws. Thus, Vinson points out:

> "These are not cases, as has been suggested in which the states have merely abstained from action, leaving private individuals free to impose such discrimination as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights on premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell."[6]

However, the discriminating parties were still not vanquished. They tried to contend that even granting that the action herein was in fact State action, it was not violative of the equal protection clause, since the State courts were open on exactly the same basis for the enforcement of Negro restrictive covenants excluding white persons. Vinson disposed of this argument by saying:

> "The rights created by the ... Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of occupancy on grounds of race or color. Equal protection of the laws is not achieved through the indiscriminate imposition of inequalities."

It is to be noted, however, that in none of these decisions was the validity of the covenant itself attacked or questioned by the Court. Thus, the Court stated at the outset:

> "We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear that there has been no action by the State and the provisions of the Amendment have not been violated."[8]

In the Hurd case, Vinson reached the same result by a different line of reasoning. The enforcement of the covenants in the District of Columbia was held to violate the Federal Civil Rights Act and to contravene the public policy of the United States not to permit action to be taken in the Federal Court which is forbidden by the Constitution to be taken in a state court. Thus, the Supreme Court found it unnecessary to pass upon the contention that such agreements violated the Due Process clause of the Fifth Amendment.[9]

B. The Impact of Shelley.

Although public reaction to these cases was not as strong as it was to the Brown case, these decisions had a profound impact upon the community.

On the one hand, some were overly optimistic. A Negro newspaper greeted the decision with a headline reading: "Live Anywhere You Can Buy."[10] Others were more cautious. Thus, The Notre Dame Lawyer reported that:

> "... the Negro who seeks entrance into the holy of holies, a 'white neighborhood,' still must face onerous difficulties."[11]

These decisions also evoked statements betraying the prejudice of the speaker. Thus, the New Republic declared that the Court's action was to be regarded as "a reaffirmation of the basic principle that the law can't be used as weapon to deprive Americans, regardless of their color, creed or social condition, of equality of opportunity."[12] On the other hand, John Rankin remarked:[13]

> "Mr. Speaker, there must have been a celebration is Moscow last night; for the Communists won their greatest victory in the Supreme Court of the United States on yesterday, when that once august body proceeded to destroy the value of property owned by tens of thousands of loyal Americans in every state in the Union by their anticovenants decision."

However, at least one Southern law review justified the decision on the ground that the Court was forced to formulate public policy in this area, since no other agency of government was prepared to undertake the challenge.[14]

Other writers were in disagreement as to the decision's meaning in the context of the Negro's place in American public law. One critic could not reconcile these cases with decisions sustaining segregation in education.[15] Another believed that the anomaly would be ended to the advantage of Negroes.[16]

In terms of legal consequences in future cases, much was left to speculation. Thus, the Harvard Law Review stated that:[17]

"The scope of this novel extension is difficult to define. For example, will it be 'state action' for a state court not to enforce a restrictive covenant specifically, but to use it as a basis for an award of damages, or as the reason for failing to act in behalf of a Negro seeking specific performance? What should a court do in cases arising out of rights of entry and other conditions in deeds or leases? And how should it treat devices - as a corporation's retention of title to all lots in a new development and exercise of continuing control through 'leasing' to would be purchasers - whose only purpose obviously is to avoid the result of the instant case?" Although the Court's opinion may have been revolutionary, these questions indicate that Vinson did not illumine the area at all.

Furthermore, in terms of precedent, one has difficulty in finding state action on the facts of Shelley and its companion cases.[18] The cases relied upon by Vinson merely appear to hold that there is state action only when procedural due process is involved. While it is true that in some of these cases there was no procedural due process issue, these cases can be distinguished on the basis that they were criminal actions and the state was a party so that state action was clear in any event. In addition, some have criticized Vinson for his failure to rest the decision in Shelley on the broader

ground that these restrictive covenants violate public policy as expressed in the United Nations Charter. Thus, Sayre concludes that:

> "In the Shelley case we ignored the Charter entirely. Here, in effect, we broke a solemn treaty of this Government. This was not only betrayal morally; it was stupid and needless betrayal."[19]

With all due respect to Professor Sayre, hindsight reveals that Vinson's approach may have been the wiser one. The Canadian Court after having relied upon the U.N. Charter in striking down such a covenant in Re Drummond Wren[20] reversed itself four years later.[21] Hence, Vinson's action can be said to have strengthened the result reached. This tends to prove that judges must know their logistics.

C. Between Shelley and Barrows

Following Shelley, four similar cases appeared. The first of these cases was Weiss v. Leaon.[22] Here an adjoining property owner conveyed to Negroes in violation of a restrictive agreement and the plaintiff sought to oust the Negroes and to collect damages for the breach of the agreement. The Missouri Supreme Court pointed out there was not even dicta in Shelley concerning the constitutionality of granting damages. It then went on to discuss the differences in relief between damages at law and specific performance by injunction in equity. The court held that although one remedy, injunction, was prhibited by Shelley, that in itself did not rule out other remedies such as damages. "Thus it indicated its belief that the method of enforcement

and not the right to jucicial relief was what was unconstitutional."[23]

The second case to appear was Roberts v. Curtis[24] in which the court interpreted Shelley as validating these covenants only if their purposes could be achieved by voluntary adherence.

The third case was Conell v. Earley.[25] Here the court sustained an award for damages. Some writers have justified the result on the peculiar facts of the case - a conspiracy had been entered into in order to destroy a racial covenant. They feel that if no such factor had been present, the court would have given a wide sweeping interpretation to Shelley.[26]

The fourth case was Phillips v. Naff.[27] Here the court concluded that Shelley was broad enough to prohibit this "indirect" method of enforcement, that is, the giving of damages for the breach of the covenant. Thus, the state courts were divided 2-2 on the issue of whether damages could be awarded for the breach of such a covenant. The problem was finally resolved by the Supreme Court in Barrows v. Jackson decided in 1953.[28]

D. Barrows v. Jackson.

This case involved an action at law for damages for an alleged breach of a restrictive covenant by a co-covenantor who had conveyed real estate to non-caucasians. The California state court had sustained a demurrer to the complaint, and

certiorari was granted by the United States Supreme Court. The Supreme Court affirmed the judgment of the lower court. The Court felt that an award of damages would tend to support indirectly covenants which it already decided could not be enforced directly. Oddly enough, Vinson, C.J., who had written the opinion in Shelley dissented.

The petitioners contended that to refuse to enforce the covenant is to impair the obligations of their contracts under Section 10 of Article 1 of the Constitution. The Court (Minton, J.) answered this by citing Tidal Oil v. Flanagan[29] which held that the "impairment of obligations" clause is directed against legislative action only, and not judicial action. Petitioners also contended that they were denied due process and equal protection of the laws by the failure of the courts to enforce the agreement. Mr. Justice Minton answered this contention as follows:[30]

> "The Constitution confers upon no individual the right to demand action by the state which results in the denial of equal protection of the laws to other individuals."

Although the Court declared that a judicial award of damages constitutes state action (and thus plugged the gap left open in Shelley), the Court reiterated its prior position that:[31]

> "... so long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the state and the provisions of the Amendment have not been violated."

In reaching its conclusion that an award for damages constitutes state action, the Court appears to have glossed over a major problem - that of standing to raise the constitutional issues decided. Vinson makes much of this in his dissent. It was vigorously argued before the Court that the respondent who was being sued for money damages for her breach of a restrictive covenant was relying on the rights of prospective Negro purchasers as a defense, and thus she was not claiming an abridgment of any constitutional right of her own, but was asserting the rights of others not parties to the action. Mr. Justice Vinson accepted this argument asserting that:[32]

> "The majority identifies no non-caucasian who has been injured or could be injured if damages are assessed against respondent for breaching the promise which she willingly and voluntarily made to petitioners ... Because I cannot see how respondent can avail herself of the Fourteenth Amendment rights of total strangers - the only rights which she has chosen to assert - and since I cannot see how the Court can find those rights would be impaired in this particular case by requiring respondent to pay petitioners for the injury which she recognizes she has brought upon them, I am unwilling to join the Court in today's decision."

The other judges acknowledged that as a general rule a party has no standing in the Supreme Court to raise the constitutional rights of others, but that under the peculiar facts of this case a departure from the rule was justified. The Court went on to say that in order to have "standing," two conditions must be fulfilled:

(1) There must be a "case" or "controversy" - that is, there must be a party with a direct legal interest at stake who may suffer some sort of damage or injury. There must be a real controversy between actual litigants. The court will not decide hypothetical problem cases. This condition is imposed by Article III of the Constitution. Thus, Mr. Chief Justice John Marshall has said:[33]

> "The article does not extend the judicial power to every violation of the Constitution which may possibly take place, but to a 'case in law or equity,' in which a right, under such law, is asserted in a court of justice. If the questions cannot be brought into a court, then there is no case in law or equity and no jurisdiction is given by the words of the article."

It is obvious that this constitutional condition was satisfied in Barrows. As the Court points out:[34]

> "This principle has no application to the instant case in which the respondent has been sued for damages totalling $11,600 and in which a judgment against respondent would constitute a direct, pocketbook injury to her."

(2) In addition to this constitutional condition, the Court has adopted a self-imposed rule of restraint that it will not decide constitutional issues if the party whose constitutional rights have been abridged is not before the Court. The Court had greater difficulty showing that this condition had been satisfied. In fact, it conceded that this self-imposed condition had not been satisfied. Rather, it chose to depart from the rule. Thus, the Court said:[35]

> "This is a salutary rule, the validity of which we reaffirm. But in the instant case, we are faced with a unique situation in which it is the action of the

> state court which might result in the denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievances before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained."

It is true that to sustain an award for damages would result in discrimination in a future case. That is, the enforcement of the covenant would result in discrimination against non-Caucasians through higher prices to them induced by vendors fearing contracts' actions. In addition, enforcement would also probably lead to the insertion of liquidated damage clauses in the covenants and thus further discourage their breach.[36] Nevertheless, it is to be noted that the parties to be discriminated against are not before the court - in fact, they are not even involved in this case. The Negroes who purchased the property in Barrows would not have suffered any loss even if their vendor had been compelled to pay damages for breach of contract. Hence, one has difficulty in justifying the Court's departure from this self-imposed restraint.

This action constitutes a serious departure from the Court's own precedents. In Tiletson v. Ullman,[37] the Court held that a doctor, subject to prosecution for disseminating birth control information, could not set up his patient's constitutional right to life. Likewise, in Tyler v. The Judges,[38] the petitioner sought to have a land registration act declared

unconstitutional on the grounds that the rights of parties might be foreclosed without actual notice to them. The petitioner himself had actual notice. Hence, the Court reasoned that it could not pass upon the general question of whether the statute would deprive others of their property without due process of law.

The Court attempted to justify its departure from its own self-imposed rule by relying upon other cases in which it had followed the same practice. It relied heavily upon Pierce v. Society of Sisters.[39] In Pierce, a state statute required all parents to send their offspring to public schools. Certain private schools sought to enjoin the enforcement of the statute as a violation of the Due Process Clause of the Fourteenth Amendment. The Court held for the private schools and stated:[40]

> "... we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."

Thus, the Court in Barrows could point out that its self-imposed rule was not an inflexible one. The Court had departed from it in Pierce to permit a litigant to assert another person's constitutional rights as a part of his case, since those rights were closely involved with the litigant's position and the issue was important enough to the Court. Yet Barrows is distinquishable from Pierce. For in Pierce the constitutional rights asserted were those of parents presently threatened with injury

while in Barrows the only non-caucasian actually involved is safely in possession of his property.[41] Furthermore, in Pierce, the denial of the constitutional rights of the parents did threaten the existence of property of the private schools, and also to a degree interfered with the schools' liberty to teach.[42]

Another justification for the departure from the general rule was that the Court holds the rule inapplicable where the persons discriminated against had no means of bringing the question before the Court for its determination.[43] Thus, in Greene v. State,[44] a defendant, convicted under a statute which made it a penal offense to commit blackmail against residents of Nebraska, successfully attacked the statute by reason of the fact that it only protected residents, and therefore discriminated against non-residents. It could be contended that the would-be future, hypothetical purchasers (in Barrows) whose constitutional rights will be infringed, will never be in a position to assert their own constitutional rights. Nevertheless, the Court could have followed its own self-imposed rule to a greater extent by requiring the non-caucasian purchaser to sue for a declaration of the unconstitutionality of the contract between his seller and the covenantees. Arguing by analogy from Truax v. Raich,[45] the declaration could have been granted.[46] Furthermore, the Court (in Barrows) appears to be guilty of making too sweeping a statement that it would be impossible for

a non-caucasian to assert his own rights. Under the Federal Rules of Civil Procedure and a few states codes, it might be possible to join the non-caucasian if an indemnity clause were inserted in the contract of sale.[47]

Perhaps, the action of the Court can be justified under the doctrine of Thornhill v. Alabama.[48] Under that theory, hypothetical persons' constitutional rights may be asserted against a statute restricting free speech. Departure from the general rule may be easier in Barrows than in the ordinary case because minority rights as well as free speech are regarded as having a "preferred position." This reasoning, however, would necessarily involve the finding of a rationale different from that of the free speech cases, which were based on the special protection of basic democratic processes.[50]

Serious analysis of the standing problem raised in Barrows compels the author to join in the following conclusion:[51]

> "Certain of the policies which justify rules of standing seem to be ignored by the instant holding. It tends to upset the equality of the legislative branch of government by resolving problems where the injured parties are not before the decision - making body. Furthermore, allowing persons to raise the rights of others causes a commensurate increase in the practical burden of litigation in the Court. Nevertheless, the holding is certainly justifiable because ... the alternative would be to allow state action resulting in discrimination to go forever unchallenged. Since a primary purpose of the decision was to supplement Shelley, it may be that Barrows will be limited to its facts ..."

Thus far, we have been merely criticizing the procedural aspects of Barrows. An examination of the substance of Barrows and its predecessor Shelley also tends to indicate that the Court has brought its processes into disrepute.

VIII. Hand to Wechsler to Pollack: A Legal Thinkers to Evers to Chance.

Since its decision in Brown, the Court has found itself engulfed in controversy. The Court has become the target of criticism aimed at it from many sources. Some of this denunciation can be attributed to the Court's own failures. As Professor Henry Hart has recently revealed:[1]

> "The opinions of the Justices, if one turns to them, confirm the conclusion that the Court is trying to decide more cases than it can decide well. Regretfully and with deference, it has to be said that too many of the Court's opinions are about what one would expect could be written in twenty-four hours. There are able opinions, to be sure, including many that have manifestly taken much more time than that in thought and composition. But few of the Court's opinions, far too few, genuinely illumine the area of law with which they deal. Other opinions fail even by much more elementary standards. Issues are ducked which in good lawyership and good conscience ought not to be ducked. Technical mistakes are made which ought not to be made in decisions of the Supreme Court of the United States. The measured judgment of two thoughtful commentators expressed two years ago has lost none of its force in the two terms which have elapsed since: The Court's product has shown an increasing incidence of the sweeping dogmatic statement of the formulation of results accompanied by little or no effort to support them in reason, in sum, of opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree."

In many respects, Shelley and Barrows can be said to be prime examples of the Court's failures. Whether they are or not has become the cardinal question in a new wave of controversy.

This new controversy was ignited in 1958 by a series of speeches delivered by Learned Hand at Harvard.[2] Hand took the position that the Supreme Court's power to review the constitutionality of acts of other branches of national and state government is not one which can be found in or inferred from the words of the Constitution. However, in order to prevent anarchy, the Court had to assume the power of keeping governmental officials within their prescribed limits. Hand concludes that the Court's power is to be used as sparingly as possible merely to confine officials to actions within the spheres of their allocated power, but the Court was never to have the power to review the substance of such actions. Hand contended that the current Court, in exercising its "powers" of review, had assumed the role of a "third legislative chamber."[3]

Hand's comments provoked Professor Wechsler to write a learned article contradicting the learned justice.[4] Wechsler demonstrated that the power of judicial review was grounded in the language of the Constitution. Wechsler finds the power to be derived from the Supremacy Clause.[5] Wechsler, however, concedes that there are limitations to the review power. These limitations form the core of Wechsler's thesis. Wechsler states his concept of "neutral principles" as follows:[6]

> "... The Courts have both the title and the duty when a case is properly before them to review the actions of the other branches in the light of constitutional provisions, even though the action involves value choices, as invariably action does. In doing so, however, they are bound to function otherwise than as a naked power organ; they participate as courts of law. This calls for facing how determinations of this kind can be asserted to have any legal quality. The answer, I suggest, inheres primarily in that they are - or are obliged to be - entirely principled. A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved. When no sufficient reasons of this kind can be assigned for overturning value choices of the other branches of the Government, or of a state, those choices must, of course, survive."

Wechsler concludes that the Court departed from "neutral principles" in its adjudication of the constitutionality of the restrictive covenant.[7]

Professor Wechsler has no difficulty with the thought that judicial action is "state action" for fourteenth amendment purposes. He is troubled, however, by the fact that "the state may properly be charged with the discrimination when it does no more than give effect to an agreement that the individual involved is, by hypothesis, entirely free to make."[8] The Court had indicated rather clearly that it still thought the underlying agreement to be valid. Hence, Wechsler is puzzled at the notion that the enforcement of the private covenant is deemed state discrimination rather than a legal recognition of the freedom of the individual to contract.

Wechsler is unable to discern any underlying principle that guided the Court. He asks:[9]

> "What is the principle involved? Is the state forbidden to effectuate a will that draws a racial line, a will that can accomplish any disposition only through the aid of law, or is it a sufficient answer there that the discrimination was the testator's and not the state's? May not the state employ its law to vindicate the privacy of property against a trespasser, regardless of the grounds of his exclusion, or does it embrace the owner's reason for excluding if it buttresses his power by the law? .... None of these questions has been answered by the Court nor are the problems faced in the opinions."

Wechsler concludes his discussion of Shelley and Barrows by stating that he fails to perceive any principle susceptible of broad extension that was applied in these cases. He feels that these decisions are ad hoc determinations of their narrow problems, "yielding no neutral principles for their extension or support."[10]

The ball was tossed to our "legal Mr. Chance," Prof. Pollak. Pollak has leaped to the defense of the Court.

Pollak begins his defense by pointing out a major fallacy in Wechsler's line of reasoning. Wechsler had difficulty reconciling the imputation of discrimination to the state when the state merely gives effect to an agreement that the individual is free to make. Professor Pollak points out that:

> "Law is a statement of the circumstances in which the public force will be brought to bear upon men through the Courts."[12]

To Pollak, it is the disposition of this "public force" which is in issue in every case. The disposition necessarily involves a choice. "And when the arrangements contemplated by the instrument will fail but for the intervention of 'public force' - when 'it becomes not respondents' voluntary choice but the state's choice that she observe her covenant or suffer damages'", Pollak concludes that the fourteenth amendment is then called into the picture.[13]

Pollak continues by asserting that in Shelley and Barrows the Court did not announce a new principle. Rather, the Court was returning to the principle enunciated thirty years earlier in Buchanan v. Warley.[14] There the Court had unanimously voided a racial zoning ordinance. Pollak concludes this part of his analysis by saying that:[15]

> "...if Buchanan was right, the result at last reached in Shelley was foreordained; for it had long been clear that whether a challenged discrimination is legislative or judicial is a matter of no consequence in finding the state action on which the fourteenth amendment operates."

However, Professor Pollak does concede that one has difficulty in predicting the results in future cases on the basis of Shelley and Barrows.[16] Nevertheless, he indicates that, in any event, a critic must bear in mind that the ends sometime justify the means. That is, "the decisive constitutional principles here relevant are in a vital sense not neutral."[17] In other words, the goal of the emancipation of the Negro justifies the Court in departing from Wechsler's concept of

neutrality in adjudication.

Regardless of one's subjective judgments as to the merits of the controversy within the legal fraternity, one feels uneasy about the speculative future course that decisions of the Court may take in this area.

For example, the Florida courts were recently confronted with this situation.[18] In this case, a real estate broker accepted a listing of real property for sale to Christians only. He knowingly negotiated a sale to a Jew, representing to the seller that the buyer was not Jewish. An information was filed with the Florida Real Estate Commission, a state body having quasi-judicial powers, requesting suspension of the defendant's license on the ground that his action constituted a violation of the Real Estate License Law. On appeal to the Florida Supreme Court, the court held that there was no violation of the fourteenth amendment since the purpose of the proceeding was not to enforce the religious restriction, but to punish the broker for breach of his fiduciary relationship. Was the state court correct?[19]

On the one hand, it might be contended that the Commission's action in disciplining the broker would deter other brokers from violating such restrictive covenants. Hence, under Barrows which tried to avoid discrimination against "unidentified" persons, this would be a denial of equal protection to

prospective Jewish purchasers. Or it might be argued that if the state in effectuating a valid and substantial state policy, incidentally permits discrimination against private individuals, there is no denial of equal protection. Under this line of reasoning, the state policy of regulating fiduciaries would outweigh the discrimination. If so, how can we distinguish the state interest present in Shelley and Barrows. Another approach is to say that Shelley and Barrows apply where the party seeking to enforce the discrimination is not a party to the immediate transaction. In the Florida case, the owner of the property was a party to the immediate contract. Hence, the state's action should be classified as "non-state" action. Another alternative is to say that Shelley and Barrows are applicable only when no effective discrimination could take place in the absence of judicial proceedings. The application of this test to the facts of the Florida case raises doubts as to the wisdom of the result reached.[20] In any event, this case illustrates the lack of guidance given us by Shelley and Barrows.

This lack of guidance was made evident to everyone in the leading case of Rice v. Sioux City Memorial Park.[21] In Rice, the petitioner's husband was refused burial because he was not white. The cemetary relied on its contract with the plaintiff which permitted burial of members of the Caucasian race only. The Iowa court held that recognition of that defense in that action was ~~only~~ not affirmative state action in violation of the

Fourteenth Amendment. The United States Supreme Court granted certiorari and by an evenly divided court, affirmed the Iowa decision without opinion. Some commentators[22] declared that the action of the Court was suprising in view of the Barrows case. Others said the case was not to be given too much weight.[23] They said that Rice did not involve as substantial a denial of rights as does the divestiture of a bona fide purchaser's title. But is unconstitutionality only a matter of degree?

Likewise, suppose the grantor goes upon the land and is sued for trespass. The grantor then defends by pointing to the breached racial limitation.[24] The Supreme Court has not ruled on this specific question. On the basis of Shelley and Barrows, and Rice, speculation as to the outcome appears futile.

The failure of the Court to clearly define the basis of its holdings in Shelley and Barrows has had another adverse effect. It has invited the cunning to invent techniques for evading the objective which the Court sought to attain in those cases.

IX. Techniques for Evasion

Because of the many questions left open in Shelley and Barrows, some have thought that there are still methods available for evading or avoiding (depending upon one's point of view) the results reached in those cases.

Shelley and Barrows were concerned with the constitutionality of the restrictive covenant's enforceability. Following these decisions, there remained the question as to whether court enforcement of similar but more subtle devices would also amount to state action.

A. The Possibility of Reverter

One such device is the possibility of reverter. This device was used in the case of Charlotte Park and Recreation Commission v. Barringer. The facts of the case may be summarized as follows: In 1929, several private individuals conveyed lots of land to a recreation commission "for the use of, and to be used and used by persons of the white race only." The deeds provided that "in the event that the said lands shall not be kept, used and maintained for park, playground and/or recreational purposes, for use by the white race only...then....the lands hereby conveyed shall revert in fee simple," to the grantors. The Commission sought a declaratory judgment determining the validity of the reverter clause. The Supreme Court of North Carolina held that the provision in the deed that the State shall terminate operates by its own limitation automatically without judicial enforcement by the state courts; therefore, non-whites seeking to use the park will not be denied equal protection of the laws through the operation of the possibility of reverter.

In order to fully understand the implications of this decision, we must first grasp the essential nature of the possibility of reverter. From the point of view of property law, the key distinguishing feature of the possibility of reverter is that it takes effect automatically on the happening of the condition or event named in the creating instrument.[2] Hence, property law provides some justification for saying that a possibility of reverter does not constitute state action within the meaning of the fourteenth amendment. Nevertheless, it is submitted that the Supreme Court would probably strike down the possibility of reverter as an attempt to evade Shelley and Barrows.

Although the Supreme Court denied certiorari in Barringer, no inferences as to the validity of the action taken by the state court should be drawn therefrom. The Court, has said on many occasions in the past that no inference should be drawn from the denial of certiorari. We may merely speculate. On the one hand, the Court may have thought that the matter was obviously unconstitutional and hence there was no need to expend valuable court time on the matter. On the other hand, the Court may not have been prepared to extend Shelley and Barrows to the determinable fee at this time because it was waiting for a more receptive public opinion. It appears that wise adjudication sometimes has its own time for ripening.

Furthermore, other state courts have refused to follow the result reached in Barringer. Thus in Smith v. Clark,[3] the Colorado Court declared:

> "Every refusal to abide by the terms of the restriction, requiring suit to make effective such restrictions, removes the case from the rule of voluntary adherence. Such is the present suit (to quiet title); the parties are in court, and the court must withhold its hand to enforce in any wise the covenant."

In other words, the difference between the possibility of reverter and the restrictive covenant is one of form. Even if you claim "automatic" rights under a possibility of reverter you must still go into court to enforce your rights. In the case of a breach of a covenant it is only when legal force is given to the occurrence that liability arises. Likewise, although the owner of a possibility of reverter theoretically acquires title upon the breach of the condition, this right of title is meaningless unless it is enforced in a court of law. Ubi Jus Ubi Remedium. Without the remedy, there is no right.

However, this does not mean that the possibility of reverter does not present difficulties. It is obviously an unconstitutional device where the owner of the possibility of reverter seeks court aid to regain possession of the land. This is patently state action. On the other hand, more difficulty is met in the situation where the owner of the reverter has managed to regain possession by himself and seeks to invoke his title as a defense to a suit by the

grantee to eject him. Here the conceptualistic reasoning of property law may well lead the court, if it recognizes the title of the grantor, not to eject him in favor of a person who has no title once the condition has been breached. However, it is submitted that this analysis loses sight of the fact that legal terms are defined relatively. For example, the term "possession" is considered a many splendored thing. It may mean one thing for civil purposes and another thing for purposes of criminal liability. Domicile is another term that is given different meanings in different contexts. Likewise, what is considered a completed gift for property law purposes may not be considered perfected in the area of taxation.[4] Hence, although property law deems the title of the owner of a possibility of reverter to take effect automatically and upon breach of the condition, the Court may well say that for constitutional law purposes the reverter has no legal force until judicial sanctions are extended to it.

Furthermore, the argument that the owner of the reversion would be divested of a property right without due process of law is met by the long established rule that whenever a determinable fee is based on an invalid limitation, the limitation is inoperative and the estate becomes a fee simple absolute (absolute ownership).[5]

B. The Penalty Bond

Another plan would be the use of a cash penalty bond, given by each successive grantee to insure compliance with a restrictive covenant. The bond would be held in escrow and payable to the original grantor by the escrow agent if there was a wrongful transfer. However, this device also presents problems. From a legal point of view, it is doubtful whether the covenant could be used as a defense in a suit brought by a grantee (who has breached the covenant) to recover the deposit. It is only the Rice case[6] that appears to sustain the use of the covenant as a defense in a collateral proceeding. Furthermore, there are practical problems. Suppose the escrow agent refused to transfer the bond back to the grantor upon the breach of the condition. Under Barrows, the escrow holder could probably not be forced to return it to the grantor? In addition, it really does not prevent a breach - all it does is provide greater incentives for self-adherence to the contract. Furthermore, it is doubtful that many purchasers would accept such a contract. To be an effective deterrent, the deposit would have to be substantial and few persons would be willing to contribute to such a scheme since it would be to their immediate economic detriment.[8]

C. The Option to Repurchase

Another technique would be to insert an option to repurchase in the deed. Such a clause might read as follows:[9]

> "No sale of said lot shall be consummated without giving at least 15 days notice to the grantor, and the owners of the two adjoining lots on the sides,... and any of them shall have the right to buy said lot of such terms."

This clause would allow the grantor to repurchase without the question of discrimination being brought before the court, even though this might be the sole purpose for the grantor exercising the option. This device presents practical as well as legal problems. For one thing, how many buyers would be willing to have such a clause inserted in their deeds. Second of all, the clause may be deemed invalid as a violation of the common law rule against Perpetuities.[10] Finally, a court might look behind the option and deem it to be part of a discriminatory scheme.

D. The Intervention of an Entity

Another technique for evasion is the "Club Membership Plan." This is coming into use in connection with real estate sub divisions which are sold in conjunction with a golf club, tennis club, or a garden club. The title to the land remains with the club and the members of the club own shares of stock entitling them to club privileges. Certain minorities would be excluded from membership. The member would have no title to any particular piece of property. All that he could convey would be his membership rights subject to approval by the Club's board. Suppose the club member allowed possession to pass to an undesirable? Could the club assert legal title and

evict the buyer? The Court might well look at the substance of the entire scheme and void it as an illegal attempt to evade Shelley and Barrows.

A variation of the club plan leaves title to the land in a business corporation. The Board of Directors of the corporation would then determine the persons to whom the land is "leased." However, this plan has certain obvious practical disadvantages. It runs counter to the natural tendency of persons to desire their own homes. The experience of some leading realtors in the San Francisco area has been that in established communities the number of persons who could be persuaded to join and convey title to such a corporation would be well under 50%.[12] To avoid the advantages of the leasing plan, title could be vested in the individual residents, but permission of the board of a non-profit corporate organization would be a requisite for sale or occupancy.

These devices basically cast the question of discrimination into the realm of proof. However, the person who has been denied permission to sell to the minority group knows the truth and hence, can testify as to the real reason for exclusion. Furthermore, a consistent history or rejection of members of one race, supports the inference that discrimination has been practiced. Nevertheless, this may be difficult for almost any

purchaser has some characteristic which may support a claim that he is undesirable.[13] This, of course, assumes (although Shelley and Barrows leave much to speculation) that these devices are violative of the fourteenth amendment if discrimination can be proven.

X. Public and Publicly-Assisted Housing

Thus far, we have been concerned with discrimination in private housing. Now we move on to a consideration of the problems present in the area of "public housing."

The government itself has been responsible for a large proportion of the discrimination practiced. From its inception, the Federal Housing Administration (FHA) set itself up as the protector of the all-white neighborhood.[1] It exerted pressure against minorities to keep them from buying homes in certain neighborhoods. It insisted upon racial "homogeneity" in all of its projects as the price of insurance. Thus, its official manual provided:[2]

> "If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes."

Furthermore, the Home Loan Bank System has followed the FHA practice. When loans were made, the policy was to encourage segregation.[3] In addition, the government's urban renewal program has resulted in more segregation.[4] If this was not

bad enough, Public Housing Authority (PHA) funds have been used to aid segregation in locally owned housing projects. The PHA has vacillated from a policy intimating acceptance of separate but equal projects,[5] to a policy of leaving general decisions concerning segregation to local authorities. Thus, a PHA official has stated that the PHA did not enforce segregation and had neither a policy for or against it.[6]

In this area, we are not confronted with the problem of whether judicial enforcement constitutes state action. Rather, we are concerned with the question of whether a person can force a housing project in which some arm of government has played a role to admit him. As far as private housing is concerned, the state action doctrine absolves a private discriminator from liability. You cannot be forced by a projective purchaser to sell to him. However, in the field of so-called "public housing," the role played by the government may in and of itself constitute state action justifying a suit for admission by a discriminated party.

In order to adequately cope with the problems presented, we must deal with the various types of public housing separately.

A. Publicly Built and Operated Housing

First of all, let us consider publicly-built and operated housing. The Brown doctrine (that segregated education is per

se unequal) is as applicable to publically-built and operated housing as it is to other types of governmental facilities. Every case that has considered the question has invalidated the discriminatory practices involved. The Supreme Court itself has not ruled on the question. The closest it has come to so doing was in Banks v. Housing Authority.[8] In Banks a California court had ordered a local housing authority to admit the Negro plaintiffs to the project. The defendant had been operating several projects, only one of which was open to Negroes and that one exclusively so. However, the total number of Negro tenants was proportionate to their membership in the community. The court discussed the separate but equal doctrine, but decided the case without expressly rejecting it. The court stated that equal protection is an individual, and not a group right. As the projects were designed for a certain income group's benefit, the plaintiffs, members of that group, were denied equal protection when they were considered as members of a racial group. The Supreme Court denied certiorari. Some constructed this to mean that since Brown was then before the Court, that Brown controlled and Banks required no discussion. Others construed it, however, as meaning that the Court was not taking a position at that time.[9]

In any event, suits against the local housing authorities have been sustained, However, the more difficult question in

this area is whether suit may be brought against the PHA. Although public housing is owned usually by local housing authorities, these projects could never have been built withoug PHA financial assistance.[10] In addition, federal control of these projects is thoroughgoing and significant. That the PHA plays a dominant role should be evident from the following facts:[11]

1. The need for the project must be demonstrated to the satisfaction of PHA.
2. PHA must approve the agreement between the local housing authority and the local government body.
3. PHA makes a preliminary loan to the local authority for the purpose of starting the project.
4. PHA reviews, approves and submits to the president the contract providing for annual contributions.
5. PHA reviews and approves tenant income limits, rentals, size and cost of contracts, sites, personnel policies, and budgets.
6. PHA has final and conclusive authority to determine whether there has been a default with respect to federally imposed obligations.

If PHA adopted an anti-segregation policy, it would spell an end to locally compulsory segregated public housing.[12] Hence, there have been attempts to require PHA to cease payments to local segregating authorities.

PHA has presented two major defenses to these suits. First of all, it contends that procedural rules prohibit suit

against it. A 1954 decision of the Court of Appeals for the District of Columbia seems to sustain the PHA position.[13] That case held that the local housing authority is a "conditionally necessary" party. Because of federal venue rules, local housing authorities may be sued only in their own districts. PHA then argues that neither can it be sued in the district of the local authority, but rather, only in the District of Columbia. Hence, procedural rules may absolve the PHA from responsibility for the activities of local housing authorities except that of the District of Columbia. As a second line of defense, PHA contends that it has no power to desegregate.[13a] This contention obviously is contrary to the wide powers enjoyed by the PHA. Furthermore, the PHA statute[14] itself may be deemed to outlaw segregation. The statute lists several groups which must be given housing priority. It would seem that a member of such a group, such as a disabled veteran, would seem to be able to demand housing equivalent to that given other members of his group (disabled veterans) regardless of his race. Although a non-discriminatory amendment to PHA was proposed in 1949 and defeated, no negative inferences should be drawn therefrom. It was defeated on the grounds that it was not needed[15] or that it would cause the bill's defeat.[16] Hence, it might be contended that the PHA statute, aside from constitutional considerations, requires integration.

B. Privately Built and Operated Housing Receiving Public Assistance

Housing owned and operated by private parties, but built with some quantum of governmental assistance, presents more difficult problems. A leading case in point is: Dorsey v. Stuyvesant Town.[17] In this case, eighteen square blocks of New York's east side were cleared and redeveloped to house 25,000 families by a subsidiary of the Metropolitan Life Insurance Company. This private housing corporation had acquired the land as a result of an agreement with New York City whereby the city had condemned property, granted large tax exemptions, and exchanged city streets within the project for land outside it. The private corporation entered into a policy of racial exclusion. The New York City Court of Appeals refused to order an end to the corporation's discriminatory policies holding that it would be too great an extension of the "state action" doctrine. The United States Supreme Court refused to grant certiorari.

A closer scrutiny of Dorsey raises doubts as to the wisdom of that decision. The project involved therein was built under the Urban Redevelopment Corporation Law.[18] That statute limits the rents and profits of private urban redevelopment corporations, and requires community approval of plans for acquisition, clearance, and rebuilding. This

relationship was described by Justice Fuld dissenting in Dorsey as follows:[19]

> "In sum, the companies and the enterprises were to be governmentally aided and effectuated, as well as supervised and regulated, in numerous ways."

Mr. Justice Fuld continues his dissent by adding that:[20]

> "To intimate that this is just another instance of a government subsidy is to misconceive the case...Unmistakable are the signs that this undertaking was a governmentally conceived, governmentally aided and governmentally regulated project in urban redevelopment. Everywhere in evidence are the voice and authority of the State and City...In addition, there is the exceedingly significant fact that the City's Board of Estimate approved and authorized the contract...after having been appraised...that Negroes would be excluded...here was action..'consciously exerted' by the state 'in aid of' the discrimination being practiced..."

In the light of Mr. Justice Fuld's dissent, the majority opinion appears even more unconvincing. Nevertheless, the majority opinion in Dorsey tried to distinguish previously decided "state action" cases on the theory that "they disclose the exertion of government power directly to aid in discrimination,"[21] while the government role here assumed the guise of being "indirect,...helpful cooperation."[22]

The Stuyvesant Corporation had one equity in its favor. While negotiating with the government authorities, it expressly declared that it could not make the necessary investment unless it adopted a racial exclusion policy. The contract was entered into without provision for the selection of tenants. The Stuyvesant Corporation relied upon a sort of tacit government

agreement not to interfere in the selection of tenants. It could be said that Stuyvesand relied to its detriment since it invested not less than ninety million dollars of its own private funds. This appealing aspect of Stuyvesant's case may well have offset the inequities created by their policy of racial exclusion. Nevertheless, even if there was a government contract (even an express agreement) not to interfere with Stuyvesant's policy with respect to the selection of tenants, this contract would not be enforceable. A contract that violates the constitution is null and void.[23]

The New York Court of Appeals decision also failed to grasp the possibility of the doctrine of Marsh v. Alabama[24] being applicable to the facts of Dorsey. In Marsh the United States Supreme Court indicated that a private person who has gained a position of significant societal power and is performing the functions usually performed by the government itself is subject to the fourteenth amendment. Marsh involved a private company town outside Mobile, owned by the Gulf Shipbuilding Corporation. Describing the project, the Court said:

> "...the property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a business block on which business places are situated... in short the town and its public district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that title to the property belongs to a private corporation."

Can Marsh be readily distinguished from Dorsey? Is it enough to say that Marsh was a free speech case and that Dorsey was an equal housing case? If so, are we to assume that the Constitution has established a hierarchy of freedoms and that adequate housing is less important than free speech? To the contrary, studies indicate the inter-relationship between discrimination in housing and the abridgment of other civil rights.[25] Can it be said that a project designed to accommodate some twenty-five thousand persons was not of such proportions as would warrant the application of the Marsh principle?

It would seem as if Mr. Justice Fuld was correct when he concluded that:[26]

> "All in all, the resemblance between Stuyvesant Town and the company town of Marsh v. Alabama (326 U.S. 501) is strong, the analogy between this case and that one, clear."

In addition, it appears difficult to reconcile this result with the court's decisions in the field of the "White primary." Until World War 2, the white primary was the principal device by which the South banned Negroes from effectively voting. It was widely assumed that relinquishment of state controls over the primary would permit the Democratic party to conduct the primary as a "non-state" venture. But in 1944, the Court held that such a system constituted "state action."[27] And in 1953 the Supreme Court struck down a subtle device which had been invented to evade the Court's earlier edict. The Court, in Terry v. Adams[28] held that pre-primary

exclusion of Negroes from voting in a poll conducted by the Jaybird Democratic Association also constituted illegal state action. The Court held in these cases that the state could not abandon a situation "in a form which permits a private organization to practice racial discrimination."[29] Arguing by analogy to the facts present in Dorsey, one could contend that the State of New York could not abandon its urban renewal project to the constitutionally immune whims of a private corporation.

The Supreme Court denied certiorari in Dorsey. Some have justified the court's failure to review Dorsey on the grounds that the passage of New York City legislation forbidding discrimination in all similar future projects solved the problem for the city and eliminated the necessity for the court's deciding the important constitutional issues involved at that time.[30] Others, like Charles Abrams, were more critical.[31] Thus, Abrams points out that:

> "...No technical reasons for refusing review existed, and Justices Black and Douglas dissented from the majority's refusal to hear the case. These dissents in themselves spotlighted the need for airing the issue... The points remain....that the very refusal to review which today may be salutary, may in the hands of a less enlightened court tomorrow represent the most flagrant and frustrating denial of justice....From an adverse decision by the Court, the aggrieved might have a remedy...From the refusal to hear there is no protest and no appeal. The refusal often encourages continuation of the wrongs of oppressions from which the complainant sought relief."

Perhaps, the best justification for the Court's refusal to review Dorsey lies in our earlier observation that "wise

adjudication has its own time for ripening."[32]

The unsoundness of Dorsey is further highlighted by the contrary result reached in Ming v. Horgan.[33] In Ming suit was brought to enjoin a project developer from discriminating in the disposition of his property which was wholly privately constructed and financed. The court granted the relief requested and found the requisite state action in the fact that the developer's houses were approved for FHA financing to buyers. Dorsey is an a fortiori case, on this basis, for finding the requisite state action. Hence, if New York went to one extreme in Dorsey, the California court went as far in the opposite direction in Ming.

In order to fully understand Ming, we must first examine the activities of the FHA. Basically, FHA relieves banks of the risk involved in placing mortgages on homes approved by it, for if the fortgagor defaults, FHA will indemnify the bank for its loss. FHA benefits three groups: the mortgagees, the purchasers, and the builders.[34] The banks are protected against the risk of any loss on the loan, the purchasers are benefited by being able to finance on terms more favorable than they could otherwise obtain, and the builders are benefited by having their market widened as a result of the financing advantages that FHA offers purchasers.[35]

An examination of the FHA system reveals that the

activities of the builder are to some extent aided and regulated by the federal government. Before construction is commenced, the FHA may issue a commitment to the bank that the FHA promises, subject to certain conditions, to insure the mortgages of prospective purchasers.[36] As stated in the commitment, the FHA will insure mortgages only if a certain percentage is paid as a down payment, the term of the mortgage is limited, and the interest rate does not exceed FHA limits. Before approval of the commitment, the FHA requires submission of the plans and the bill of materials for the construction in order that the FHA may appraise the economic value of the home.[37] After approval and during construction, the agency makes at least three inspections to ascertain whether the building is in accordance with the approved plans,[38] and satisfactory performance is a prerequisite to the issuance of the FHA insurance. On these facts, was there enough to find "state action" or (in this case "federal action)" in Ming?

The Ming opinion does not clearly indicate whether the California court granted relief on the theory that the defendant had violated the FHA statute rather than the constitution or whether relief was granted because the constitution was violated by the builder's discriminatory activities.

In any event, the builder's activities do not seem to be an essential function of the federal government. The Federal Housing Authority has not the authority to implement any national

housing policy by actually engaging in the construction of private housing. Hence, on this basis, it becomes difficult to find "state action" in Ming.[39]

Furthermore, it has not been decided that private action becomes state or federal action merely because the project received financial assistance from the government.[40] Thus, in Eaton v. Board of Managers,[41] a hospital which was a private corporation receiving public funds on a contractual basis to care for indigents, was upheld in its refusal to admit Negro physicians to its staff. Likewise, in Norris v. Mayor,[42] a Negro was successful in seeking entrance to a private vocational institute which received financial assistance partially on a contractual basis from the state and local governments. Hence, the mere fact that the FHA extends financial aid in the form of mortgage insurance should not make this "state" or "federal" action.

Would the fact that financial assistance is coupled with regulation make this a "state" action? Nevertheless, the element of regulation should be deemed relevant only if it is imposed in sufficient quantity. On the facts of Ming, it is doubtful as to whether it is present in sufficient degree.[43] In fact, a 1955 federal district court case involving Levittown, Pennsylvania, reached a conclusion opposite to the Ming result.[44] In the Levittown case, the federal district court held that an operative builder's activities did not

constitute federal governmental action. As to Levitt, the developer, the Court held that it lacked jurisdiction over him, since there was no claim that he had acted under Pennsylvania state law. The federal jurisdictional questions were by-passed in Ming. The builders sued in Ming did not appeal to the California Supreme Court. They were probably fearful of a state supreme court affirmance.[45]

Ming and Dorsey are extreme cases. Yet one feels that there should be a workable middle ground. Certainly, the Stuyvesant Towns and Levittowns should not be allowed to go their own merry way. Unfortunately, the court has failed to provide definitive guidance in this area.

C. Urban Renewal

Another important area in the field of public housing is urban renewal. Under the urban redevelopment program, federal loans and grants are made available for the purpose of slum clearance, redevelopment, or conservation.[46] State enabling acts place the actual work of slum clearance and demolition in the hands of local authorities. Discrimination has resulted from the administration of this program. The majority of the families displaced by urban redevelopment projects are non-whites.[47] If the area is to be redeveloped for commercial purposes, no new housing will be provided on the project site. Even if the cleared area is to be redeveloped for housing, population density is reduced.[48] Housing that is provided may

not be available to the non-white because of the high cost.[49] When non-whites look elsewhere, they find that they can be relocated only in existing segregated sections which are themselves slum-like. "The urban renewal program - operating within a pattern of segregated housing - is creating slums faster than it is clearing them."[50]

It could be contended that the federal relocations provisions, as administered, violate the guarantees of the fourteenth amendment. If the local authority, by condemning the Negroe's homes, forces the Negro to relocate in a housing market, which is known to be prejudiced against Negroes, it may be deemed to violate due process and equal protection.

Victory for a Negro in a condemnation case would stop renewal at the crucial point. However, the Negro would be confronted with the argument that courts need not presume that illegality is going to take place at some future date.[51]

D. The Benign Quota

Another interesting problem present in the field of public housing is the reverse of the one we have been considering up to this point. Not withstanding the removal of legal barriers to integrated housing, racial segregation may continue to exist. Integrated housing presents this problem. An overwhelming majority of one ethmic group may occupy a housing development. This may be due to a number or different factors:[52]

1. They may be holdovers from a period of racial segregation.
2. Other racial groups may have gradually removed.
3. Other groups may be reluctant to accept the facilities.
4. One group predominates in the segment of the population eligible to occupy the development.

Experience with integrated projects reveals that where the minority only has token representation difficulties arise.[53] Members of the token minority feel out of place. In projects where the minority accounts for more than half the tenants, the majority may feel like a minority. They try to be transferred elsewhere. Soon the project becomes all Minority.[54] It is difficult to determine the best ratio, for much depends upon the proportion of the minority members in the area, the type of project management, the site selected, and the attitude of the community.[55] One learned commentator feels that the most successful projects have been those in which minority representation has ranged from 6 to 30 per cent.[56] He feels that this ratio works out well since the minority has sufficient representation to give it security, while the majority does not feel dominated by a group that is different. The suggestion has been made that the government institute some sort of "control" or "quota" to maintain a balanced representation of ethinic groups in each housing project in order to overcome the phenomenon we have described. Thus, the Chairman of the New York State Commission Against Discrimination has said that the state's housing projects will

be "ghettoized" unless this quota problem is solved. He has indicated that a public housing program could not prevent segregation if it rented solely on the basis of need and if at the same time "the need happened to be all Negro."[57]

Bearing in mind this problem, could a housing project institute a quota system? Some communities have done this. New Haven sometimes withholds vacant apartments from Negroes while waiting for white applicants. Pittsburg has solicited white applicants through advertisements.[58] One author has justified this practice from the following point of view:[59]

> "There may be some who would call this a 'quota' system. But it is far from that. A quota system is a device to exclude people, not include them; to effect segregation not to break it down."

On the other hand, others have replied that:[60]

> "...we would have the law invoked against us if we followed the policy...We would not have white apartments and black apartments and brown apartments set up in our projects."

In actuality, the adoption of a "quota" system presents practical and legal questions.

The practical considerations may be summarized as follows:[61]

1. There is a resulting possibility that needier applicants will often be rejected in favor of those who can complete quota demands.

2. Fears must be overcome that quotas will not be used to effectuate discrimination.

3. There may be difficulty in obtaining and retaining the necessary variety of tenants needed to maintain the quota system.

4. The quota system must conform with certain federal administrative regulations which condition the receipt of federal aid.

5. It may be difficult to pinpoint the desired quota with scientific accuracy.

6. The moral judgment must be made that it is more desirable for the government to engage in a quota system than to permit the continuance of defacto segregation.

Many of these problems can be solved by such plans as locating projects in undeveloped or already racially mixed areas, raising income limitations, and educational programs for the public.[62] However, the legal and administrative barriers are more difficult.

One of the basic PHA regulations requires that there be:[63]

> "..equitable provision for eligible families of all races for such housing."

The key here is the meaning of the term "equitable." What is meant by it? In some regulations a "color blind" policy is prohibited.[64] At one time a regulation was in effect which appeared to permit the establishment of "separate but equal" facilities.[66] It has now been deleted which may indicate a change in policy. In any event, the regulations do provide that:[67]

> "...selection of tenants and the assignment of dwelling units are primarily matters for local determination."

This tends to indicate that the federal government would not object to a locally adopted quota system provided it made "provision for All...races determined on the approximate volume and urgency of their respective needs."[68]

Despite the fact that a "quota" system may be able to overcome this administrative hurdle, it still may be deemed to ~~be~~ violate the constitution. The Supreme Court has never passed upon the Constitutionality of this so called benign quota system. Hence, we must rely upon analogous precedents in order to discern its legality.

The closest situation which the Court has ruled upon is racial discrimination in the selection of a jury. A leading case in this area is Cassel v. Texas.[69] In Cassel, a Negro sought a reversal of his conviction of murder. He based his appeal on the ground that his indictment by the grand jury was invalid because Negroes had been purposefully excluded therefrom. Although some members of his race had been admitted to grand jury service, jury service by them had been limited to not more than one each grand jury. This number was in exact proportion to the number of Negroes living in the community. In reversing his conviction, the Court said.[70]

"Proportional representation of races on a jury is not a constitutional requisite....Obviously the number or races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of negroes as a race and no discrimination because of color, proportional limitation is not permissible."

The concurring opinion in Cassel viewed the problem even more cogently when it said:[71]

> "...It is not a question of presence on a grand jury nor absence from it. The basis of selection cannot consciously take color into account. Such is the command of the constitution."

In another closely related area, the Court has intimated that the benign quota is unconstitutional. In Hughes v. Superior,[72] the court ruled upon the validity of a state court injunction against the picketing of a retail store to enforce a demand that the employer hire negro employees in proportion to the amount of negro customers patronizing the store. In the course of his opinion, Mr. Justice Frankfurter noted that:[73]

> "To deny California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portugese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities. States may well believe that such constitutional sheltering would inevitably encourage use of picketing to compel employment on the basis of racial discrimination. In disallowing such picketing, States may act under the belief that otherwise community tensions and conflicts would be exacerbated."

Although this case does not present a square holding that a state may not constitutionally enforce a quota, there are strong indications in the opinion that the court would not acknowledge any benefits that could flow from a quota system of employment.

What is the true rationale of these cases (especially the grand jury case)? It is that (even though proportional representation might in a given case lead to less discrimination) the Constitution prohibits per se the taking of race into account. After all, if Negroes were granted proportional representation there would probably be less probability of discrimination occuring. Giving Brown v. Board of Education, its widest reading we would say that the Constitution is now "color blind."[74]

Furthermore, the quota system adopts a "group" approach to discrimination and submerges the rights of the individual member of the minority. The Supreme Court has held that:[75]

> "It is the individual who is entitled to the equal protection of the laws...."

The Court has continued to reiterate this philosophy. Thus, a railroad had adopted the practice of alloting ten tables exclusively to white passengers and one table exclusively to Negro passengers. In striking this system down the court said:[76]

> "Other Negroes who present themselves are compelled to await a vacancy at that table, although there may be many vacancies elsewhere in the diner. The railroad thus refuses to extend to those passengers the use of its existing and unoccupied facilities."

Hence, it could obviously be contended that an individual Negro who had been denied occupancy in a housing project because the "quota" was filled (and there were vacant apartments waiting for whites) had been individually deprived of equal protection and due process.

Nevertheless, it might be contended that the benefits that would flow from the benign quota make it constitutional. It could be contended that a housing authority was merely righting a situation created by discriminatory practices in the past, whereas the grand jury decisions were aimed at discriminatory practices. Thus, piercing mere form, the Court might justify the practice. Nevertheless, the Court rejected such an argument in Buchanan v. Warley.[77] In addition, it could be reasonably argued that harmful effects might flow from the adoption of a quota.[78] Some feel that governmental imposition of a quota is itself undesirable. In addition, a quota may result in needier applicants for housing being rejected in favor of the less needy majority members in order to fill quotas. In addition, scientific data has not really been accumulated as yet to determine the exact point at which a quota become benign rather than malign. Hence, the benefits that might flow in a given case might be too conjectural. Hence, in the absence of a square holding from the Supreme Court, one must entertain serious doubts as to the constitutionality of the so called benign quota.

XI. Discrimination and the Anti-Trust Laws

Admirable as the results sought to be obtained in Shelley and Barrows are, there are practical difficulties in the path of the effecuation of those decisions. One major

obstacle is the organized movement of realtors who have combined in an effort to resist integrated housing.

For example, by 1950, the National Association of Real Estate Boards was composed of 1100 member boards and 43,539 realtors who contributed dues of more than $400,000 annually. It maintained a lobby in Washington.[1] Another group, the National Association of Home Builders, had a membership of 16,350. At least once a month the wire services put the realty lobby's releases to real estate editors on the wires as authoritative comment.[2] In one month newspaper stories of the NAREB totaled 2500, an average of 83 per day.[3] In addition, such radio and TV commentators as Fulton Lewis, Jr. are known to faithfully state the realty lobby's point of view.[4]

Until 1950, the official code of ethics of the Association carried the following canon:[5]

> "A realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individual whose presence will clearly be detrimental to property values in the neighborhood."

Violations of this rule exposed a board to expulsion. In 1950, the canon was modified (on the advice of Counsel perhaps[6]) so that it now reads:

> "A realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy of any race or nationality,....which will clearly be detrimental to property values in that neighborhood."

In practice, local real estate boards continued to give the canon its original interpretation?

How can such an organized movement militating for discrimination in housing be handled? One obvious method is the passage of anti-bias legislation. We shall discuss such legislation in our next chapter. In addition, it has been suggested that the activities of these groups might be deemed to be violative of the anti-trust laws.[8] The refusal to sell or rent homes to a certain class might be deemed a violation of the anti-trust laws if it reaches such proportions that it bars a large segment of the community from the city's housing market. The concerted refusal of lending institutions to deal with Negroes might be deemed an illegal boycott.[9] In fact, in 1946, the federal government did obtain a consent decree against the Mortgage Conference of New York, enjoining an agreement among its members to refrain from making mortgage loans for Negro and Spanish speaking occupancy.[10] The major difficulties to be expected with respect to such an action would be the showing of the affect of the restraint on inter-state commerce and the proof of the conspiracy." However, some state anti-trust statutes are broad enough to include real estate discrimination within their prohibitory scope.[12]

XII. Anti - Bias Legislation

A. Summary of Existing Laws

The pendulum has begun to swing in the opposite direction. Minority group interests have become more vocal. They

have gained greater political representation. This has resulted in the enactment of statutes in various states barring discrimination in housing.

The status of existing state anti-bias legislation with respect to housing can be summarized as follows:

1. Some statutes prohibit discrimination only in publically assisted housing, including housing receiving assistance in the form of FHA and Veterans Administration Mortgage Insurance.[1]

2. Some statutes only apply to multiple dwelling units.[2]

3. Some statutes regulate all real estate owners regardless of the noncommercial nature of the property as long as at least indirect governmental assistance has been furnished.[3]

4. Some statutes do not require that public assistance be furnished before they are applicable. They are applicable as long as the property in question is part of a multiple unit development.[4]

5. Some laws permit a person discriminated against direct access to the courts.[5]

6. Most laws provide that relief must first be sought before an administrative agency.[6] If after a hearing the agency concludes that there has been discrimination, it will issue a cease and desist order. Under some statutes, the agency may order the violator to sell or rent to the person who has been discriminated against.

7. Provision is made for judicial review of the agency's action.[8]

8. Only a few laws impose criminal sanctions.[9]

9. None of the enacted laws are applicable to purely private housing. However, the Lawyer's Guild has proposed a model bill which would include discrimination in all housing accommodations (except lodgers) within its anti-bias ban.[10] This model bill was introduced in the Rhode Island Legislature last year

but it encountered strong opposition. In fact, the opponents organized a Committee for Individual Liberty to express their sentiments." This Committee issued the following statement:[12]

"The Committee for Individual Liberty will continue to defend the right of all people in this state to sell or rent their houses to anyone of their own choosing. We shall, therefore, oppose any legislation, whatever its label and however subtly camouflaged, which would deny this right.

We continue to receive many letters and telephone calls from people in every part of the state expressing opposition to the passage of a so-called 'fair housing' bill in any form. In their behalf, we shall be prepared to do what is necessary to inform the public the real issues involved and to use every lawful means at our disposal to defeat any such legislation if it is introduced in the coming session of the General Assembly.

The issue, and the only issue as far as our organization is concerned, is individual liberty for all. (It is not segregation versus integration of any particular race, despite the efforts of the proponents of this legislation to dress it up in that light.) To substitute governmental coercion for freedom of choice in the area of private housing should be abhorrent to every freedom - loving American. On that issue there can be no compromise."

B. The Constitutionality of Anti-Bias Legislation

Opponents of anti-bias legislation have based their objections on constitutional grounds. They claim that such legislation deprives them of property without due process of law. Attempts to limit the scope of a proposed bill to multiple dwelling units have been met with the contention that this violates the equal protection clause of the constitution. Thus, the committee for Individual Liberty has proclaimed that:[13]

> "The present bill (S.27) is, of course, class legislation of the rankest sort."

Others have contended that anti-bias legislation deprives them of a constitutional right to choose one's own neighbors - freedom of association.[14] Hence, without further ado, let us attempt to determine the constitutionality of legislation barring discrimination in housing.

These bills will probably be sustained as a valid exercise of the police power of the state. Thus, as Justice Rugg has so eloquently said:[15]

> "The police power is recognized as an attribute of government. It may be put forth in any reasonable way in behalf of the public health, the public morals, the public safety and, when defined with some strictness so as not to include mere expediency, the public welfare."

Every form of property may be controlled by the police power.[16] The Supreme Court of the United States has declared:[17]

> "From time to time for a generation, as arose, this court has held that there is no such inherent difference in property in land, from that in tangible and intangible personal property as exempts it from the operation of the police power in appropriate cases."

The trend of Supreme Court decisions has been to extend the definition of "general welfare" so that today there is hardly any need which may not be remedied by the exercise of the policy power. The statute will be deemed constitutional as long as it has some "reasonable relation" to a valid state public policy.[18] Furthermore, the Court, will not substitute its judgment for that of the legislature. Thus the Supreme

Court has declared that:[19]

The trend of Supreme Court decisions has been to extend the definition of "general welfare" so that today there is hardly any need which may not be remedied by the exercise of the police power. The statute will be deemed constitutional as long as it has some "reasonable relation" to a valid state public policy.[18] Furthermore, the Court, will not substitute its judgment for that of the legislature. Thus, the Supreme Court has declared that:[19]

> "When the subject lies within the policy power of the State, debatable questions as to the reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment."

Assuming for purpose of argumentation (and this has been disproven as indicated earlier) that the adoption of an anti-bias statute would have an adverse effect on property values, is this the deprivation of property without due process of law? As has been indicated, the police power is a limitation upon due process. The police power has been applied and sustained in other areas to control or regulate the use of property. They consist of:[20]

1. Laws prohibiting advertising billboards except of a prescribed size and location, or their use for certain kinds of advertising.
2. Laws authorizing encroachment by party walls in cities.
3. Laws fixing the heights of buildings.
4. Laws regulating the character of materials.

5. Laws regulating the method of construction.

6. Zoning Laws excluding certain buildings from designated neighborhoods.

7. Rent control laws.[21]

8. Urban Renewal laws.[22]

In upholding the constitutionality of an Urban Renewal Law, the Supreme Court has reiterated the applicability of the police power to property:[23]

> "We deal...with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless for each case must turn on its own facts...Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well - nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia...or the States legislating concerning local affairs...."

In addition, statutes which required non-discriminatory policies in semi-public activities have encountered no constitutional barrier. In District of Columbia v. Thompson,[24] the Court decided the validity of legislation barring discrimination in restaurants. The Court held that:[25]

> "...so far as the Federal Constitution is concerned there is no doubt that legislation which prohibits discrimination on the basis of race in the use of facilities serving a public function is within the police power of the state."

Likewise, in Bob - Lo v. Michigan,[26] the Court sustained the power of the state to ban discrimination by a pleasure boat.

Arguing by analogy, it appears that housing would seem to fulfill the same basic "public Function" and hence, anti-bias housing legislation should be deemed a proper exercise of the police power.

However, even though the United States Supreme Court concludes that such a statute does not violate Fourteenth Amendment Due Process, it does not follow that a state court will give the Due Process clause of its own constitution the same interpretation. The states tend to view the police power more strictly, for purposes of interpreting their own state constitution, than does the Supreme Court in viewing Fourteenth Amendment problems.[27] States courts tend to give their own legislatures less latitude.[28] Hence, an interesting "state action" problem would be raised under the Fourteenth Amendment if a state court were to hold an anti-bias statute unconstitutional under its own state constitution. The question raised is whether state court in validation of such a statute involves "state action," since such private discrimination is legally possible only after the state, through its courts, invalidates the statute. One formal way out of this dilemma would be to say that an unconstitutional statute is a comple nullity - so that it is never deemed to have existence. Nevertheless, the State court by its action, would seem to be placing the stamp of judicial approval on discriminatory practices.[29]

Some statutes are only applicable to multiple dwelling

units, others to publicly assisted housing. It might be contended that such a statute violates the equal protection clause of the constitution. It would seem, however, that such a classification would be deemed justified. A classification is not repugnant to equal protection guarantees where, considering the subject matter and object of the legislation, it rests upon some reasonable basis and where no "invidious discrimination" can be found.[30] The prior separate regulation and classification of multiple dwelling units may be justified on the grounds that there is a greater need for regulating them. Furthermore, no genuine question of "invidious discrimination" can be raised since "commercial" and "single-residence" properties are not in substantial competition with each other.[31] More difficulty may be encountered in sustaining the validity of statutes barring discrimination in publicly-assisted housing. It is difficult to see how indirect governmental assistance, such as FHA insurance, justifies the carving out of a separate regulated class. Furthermore, such housing may be in direct competition with non-aided housing. Hence, isn't this "invidious discrimination?" The New York Supreme Court[32] justified this classification on the basis of the "step-at-a-time" rule formulated by the United Supreme Court that:[33]

> "Reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."

The next objection to this legislation is based upon the contention that such a statute is violative of one's freedom to choose his own neighbors - freedom of association. Where a single dwelling is involved, this argument lack vitality since the violation of the statute would be moving out of the neighborhood once he is compelled to sell or rent. It is a much more forceful argument where multiple dwelling units are involved. To some, like Professor Wechsler,[35] the Court failed to adequately come to grips with this issue in Brown v. Board of Education. Nevertheless, the Court has indicated fairly strongly that freedom of association must bend to a more urgent public need. Thus, in Railway Ass. v. Corsi,[36] the Supreme Court sustained the validity of a state statute which required that labor unions admit all applicants to membership without regard to race, creed, color or national origin. The Court stated in Corsi:[37]

> "A judicial determination that such legislation violated the fourteenth amendment would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetrate discrimination on the basis of race or color."

C. Additional legal problems have been raised by the attempts of municipalities to legislate in this field.[38] Since many of the problems will vary from state to state and are primarily within the domain of the Law of Municipal Corporations, we will merely summarize these problems:[39]

1. A city ordinance barring discrimination in housing may not be a proper "municipal function."

2. Such a city ordinance may be invalid as a deprivation of common law rights.

3. The city ordinance may be inconsistent with a state law on the subject.

4. The state may be deemed to have preempted the field of housing regulation.

In view of the complexity of the questions, one should hesitate before he advocates the adoption of anti-bias legislation on a municipal ordinance basis.

XIII. Conclusion.

It is the belief of the author that the development of the law in this area, although admirable in many respects, has been an uneven one. The decisions of the Courts fail to truly illumine the areas with which they deal. In addition, the Supreme Court has added to the existing confusion by refusing to grant certiorari in many critical cases.

The practice of law has been defined by many scholars as consisting of the art of prediction. The existing decisions fail to provide a clear enunciation of principles upon which future decisions can be based.

To the Court's credit, the individual and human dignity have been riding the crest of a wave of social philosophy that has greatly submerged the more reactionary arguments in favor of discrimination in housing. The Court has come a long way in Shelley and Barrows. The Court is no longer living in the shadow of Corrigan v. Buckley. The Court has now placed a higher premium on human values than on property rights. Hence, it may fairly be concluded that the burden of proof has shifted to those who advocate discriminatory practices. Thus, it is submitted, that the history of adjudication in this area supports an inference that the Court has evolved a general philosophy in which human rights are being elevated. Nevertheless, if the Court is to retain public respect, it must do more

than announce decisions based upon admirable value judgments. The Court is bound to decide cases in accordance with sound principles of constitutional law. The Court's decisions have been woefully weak in this respect.

The key constitutional provision that is involved in this area is the fourteenth amendment. Before the amendment can be applied, "state action" must be present. Shelley and Barrows clearly tell us that there is state action where suit is directly based upon a breach of a discriminatory contract. The Court, however, leaves us in a penumbra as far as the validity of such a covenant is concerned in a collateral proceeding. The failure of the Court to define "state action" with exactitude has resulted in evasive techniques being adopted and being sustained by the Court's certiorari policy. Furthermore, the lack of a precise analysis of "state action" has had ramifications in the field of public and quasi-public housing. The validity of the Stuyvesant Towns and Levittowns remains in doubt.

In addition, the Court has failed to correlate its decisions in the field of housing with those in the area of education. More specifically, there has been no clear cut determination that "separate but equal" housing is per se unconstitutional. This judicial inaction has resulted in some doubts as to the constitutionality of certain public housing programs

and certain aspects of urban renewal. Furthermore, such an absolute per se attitude is a two edged sword. The prevalence of such an attitude could spell defeat for the adoption of a benign quota.

Even within the framework of general legal philosophy, the Court has had some shortcomings. Indeed, the Court has stated that the discriminatory contract is valid - it becomes tainted with illegality only by judicial action. Thus, one may not sue for the breach of a valid contract! Furthermore, the Court has failed (both here and in Brown) to come to grips with the problem of evaluating the constitutional weight to be attached to argumentation based upon the principle of freedom of association. It will be recalled that this principle is now being utilized with vigor by the opponents of fair housing legislation.

In addition, although Brown presents somewhat of a clue, one would not want to hazard a guess as to the extent to which the Court will utilize societal facts in its determinations. For example, would the Court recognize the recently produced scientific data to the effect that integration in housing does not adversely affect property values?

However, these problems are not due exclusively to a deficiency in judicial personnel. Rather, it may be due to

the fact that the courts have had to assume a role that should have (and still should be) played by the legislative and executive branches of the government. The Commission of Civil Rights has recently reported that the other branches of government should assume the responsibility of constructive leadership.[1] The Courts should not have to be placed in the position of being the exclusive creators of public policy in the field of housing.

The enactment of anti-bias statutes may be a step in the right direction. Nevertheless, one must ponder and inquire as to whether equality can be legislated. The underlying problems have deeper roots. They require a spirit of benevolence, good will and mutual understanding. We will not have the brotherhood of man unless we first have the manhood of brothers.

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APPENDIX A

A COMPILATION OF RECENT STATUTORY ENACTMENTS IN THE FIELD OF HOUSING.

Race Relations Law Reporter
VANDERBILT UNIVERSITY
NASHVILLE 5, TENNESSEE

February 1, 1960

Professor William Schwartz
Boston University School of Law
Boston 8, Massachusetts

Dear Professor Schwartz:

I am sorry to have delayed so long in giving you a reply to the questions you asked about legislation relating to discrimination in housing. About the time I returned to the office our secretary became ill, and I am just now catching up on back correspondence.

As I told you in St. Louis, the Reporter will carry all legislation that we know has been enacted. I have been looking over all the material which has come across my desk and am enclosing a copy of an item which I believe may be of interest to you. It is taken from a publication entitled "From the State Capitals," published by Bethune Jones, 234 River Road, Red Bank, New Jersey, and relates to discrimination in private housing.

I am sorry that I cannot be of more assistance to you in this connection. If you feel at any time in the future that we could supply you with further information on your question, please do not hesitate to let us hear from you.

Sincerely yours,

T. A. Smedley

T. A. Smedley, Director

TAS/a

enclosure

P.S.: I am also enclosing a copy of the "Housing" section, taken from "SUMMARY OF 1958 and 1959 STATE ANTI-DISCRIMINATION LAWS" prepared by Commission on Law and Social Action of the American Jewish Congress, 15 East 84th Street, New York 28, N.Y. This may be helpful.

DISTRICT OF COLUMBIA: Urging leaders of business and labor to give up the "luxury" of job discrimination against Negroes, Director David A. Sawyer of the District Commissioners' Council on Human Relations asserted that unless job openings are filled on the basis of skill, "we will be continuing with the tragic merry-go-round where racial bias in employment continues to be a major factor to the problem surrounding dependency and poverty in Washington."

He said the human relations commission and the district commissioners agree that Negro youth must be given wider opportunities to learn a trade.

Addressing a meeting of the Washington Area Conference on Inter-Group Relations, Sawyer said the commissioners were "greatly disturbed" over reports of holdouts among employers in the building trades. He said employers, when faced with appeals to end discrimination in hiring for government construction work, tend to blame unions and the unions tend to blame employers.

Some local businesses, he added, have moved on their own initiative to end job bias. However, qualified resident Negroes may be cast aside in preference to outsiders.

"This kind of discrimination," Sawyer said, "is too costly in terms of relief. It is the kind of luxury that a progressive metropolitan community can no longer afford to enjoy."

While many department and specialty stores find it good business to employ by merit, the majority still does not favor equal job opportunities, Sawyer declared, adding: "I hope that business and labor will relax their timidity about instituting a merit employment program. Employers take much greater risks in many other things they do in their daily business ventures -- risks taken with much less prospect of gain -- not only to business but, in reality, gain to the total and economic welfare of a community in which they do business."

NEW YORK: A bill filed for consideration by the New York State legislature would prohibit discrimination in the sale or rental of most private housing in the state.

The proposal, known as the Metcalf-Baker fair housing bill, is expected to lead to a major legislative struggle. Outcome of the struggle may depend on how strong a stand is taken by Governor Rockefeller.

The governor said he did not expect to support the bill, but would introduce his own proposal. "We have made our own investigation and studies on this subject," he said, "and I will submit a bill of my own."

Declining to say what his bill would contain, the governor observed: "I can't say that there can be any bill in this field that wouldn't meet some opposition, either from people who say it doesn't go far enough or from those who say it goes too far."

(over)

Sponsors of the filed bill are Senator George P. Metcalf of Auburn and Assemblyman Bertram L. Baker of Brooklyn, who also sponsored present New York State law prohibiting discrimination in housing that receives any form of public aid.

The new proposal would prohibit discrimination because of race, creed, color, or national origin in the sale or rental of all housing except one-family homes occupied by the owner and two-family homes in which the owner occupies one unit.

This bill, in addition to extending to the entire state those prohibitions against discrimination already in force in New York City, also would ban such discrimination by real estate brokers, salesmen, mortgage companies, banks and other lending institutions. In these matters, the measure goes beyond New York City's Sharkey-Brown-Isaacs anti-bias law, which has been in effect since April, 1958.

The new provisions also would extend to New York City if the Metcalf-Baker bill, or some substitute bill retaining its conditions, became law. The proposed law would be enforceable by the State Commission Against Discrimination through the same procedures the commission now uses in enforcing laws against discrimination in employment, education, places of public accommodation, and publicly assisted housing.

In New York City, this would mean a transfer of enforcement powers from the City Commission on Intergroup Relations, which now has responsibility for obtaining compliance with the Sharkey-Brown-Isaacs law.

A press conference called by the New York State Committee on Discrimination in Housing indicated expectation of a legislative struggle and the possibility that the bill might be somewhat modified to garner sufficient votes in the legislature.

The committee represents 38 organizations throughout the state. Committee Chairman Algernon D. Black said Governor Rockefeller had indicated soon after his election in 1958 that he favored a statewide ban on discrimination in housing, although details had not been spelled out.

The Metcalf-Baker bill would make it a violation for a broker to refuse to show a home-seeker any listed property, even though the owner could refuse legally -- in the case of some one-family and two-family houses -- to rent or sell.

Bills under the same sponsorship died in committee in the 1958 and 1959 New York State legislatures. These proposals would have banned bias in selling or renting real estate in apartment buildings with separate accommodations for three or more families and in housing tracts of 10 or more dwellings bordering on each other.

In another New York State development, the State Commission Against Discrimination said it had no jurisdiction in the case of a doctor who was barred from a Roman Catholic hospital because of his connection with the Planned Parenthood Association.

(over)

$100 to 500 may be imposed for violation of this requirement.

The Connecticut Commission on Civil Rights was given broader powers in employment discrimination cases. Previously, when the commission found that an employer had engaged in unlawful discrimination, it could only order it to cease and desist. Under the amendment, it can require affirmative action, such as granting reinstatement and back pay. The same bill amended the law by reducing the time within which a complaint must be filed from six months to 90 days. (A separate bill amended the anti-discrimination law to prohibit employment discrimination on the basis of age. A similar change was made in Wisconsin.)

New Mexico amended its Fair Employment Practices Act to make it a misdemeanor to spend public money in violation of the Act. Violation of this section is punishable by a fine of $50 to $500 and/or imprisonment for not more than 90 days. The same bill reworded the definition of unfair employment practices but without making substantive changes in the statute.

Missouri adopted a bill prohibiting discrimination in state employment. However, all enforcement provisions were removed from the bill before its final approval.

HOUSING

Laws relating to discrimination in housing were adopted by six states (California, Colorado, Connecticut, Massachusetts, Oregon and Washington) and by New York City and Pittsburgh.

Up to the end of 1957, all laws relating to discrimination in housing were limited to housing receiving some form of public assistance. The break through into the general housing market occurred in New York

City with the enactment of the Sharkey-Brown-Isaacs Fair Housing Law on December 30, 1957, effective April 1, 1958. A year later, a similar ordinance was adopted in Pittsburgh.

The New York City law prohibits discrimination in the sale or rental of multiple dwellings (i.e., buildings containing three or more apartments) and projects of ten or more homes on contiguous land. The Pittsburgh ordinance bars such discrimination as to housing accommodations controlled by any person who controls five such accommodations anywhere in the city and as to parcels of land, whether or not contiguous, controlled by one person, which are available for construction of five or more housing units. It also bars discrimination by real estate agents as to all residential property.

Under both laws, complaints may be made by an aggrieved person to an already existing city human relations commission. The Pittsburgh ordinance also allows complaints by the commission itself and "by an organization which has as one of its purposes the combatting of discrimination or the promotion of equal housing opportunities."

The Pittsburgh commission is authorized to issue affirmative orders enforceable in the courts. In New York City, the commission, if it finds discrimination, refers the case to an independent panel, appointed by the Mayor, which has power to issue orders enforceable in the courts.

In 1959, the example set by these two cities was followed by four states: Colorado, Connecticut, Massachusetts, and Oregon. Three of these states had already enacted laws prohibiting discrimination in publicly assisted housing but the fourth, Colorado, was enacting its first law in this area.

The Colorado law applies to all housing facilities except the owner's home. (It bars housing discrimination on account of sex except that one may limit rental accommodations to persons of one sex.)

Connecticut's statute applies to any housing accommodation which is one of five or more such accommodations located on contiguous land and owned or controlled by one person.

The Massachusetts law applies to multiple dwellings (that is, buildings with three or more units) and to one and two family homes sold or rented in projects of ten or more contiguous homes. This provision includes all projects of ten or more homes in tracts whose plans are submitted under the state's subdivision control law. Once a tract is so submitted, the houses are covered by the law even on resales by the original purchasers. It is believed that most one-family home projects will be covered by this provision.

Oregon replaced its statute dealing with discrimination in publicly assisted housing with new provisions broadly prohibiting discrimination in the sale or rental of any real property by a person who sells or leases real property "as a business enterprise" or "in connection with or as an incident to his business enterprise." This draws the line roughly between persons who handle housing as a commodity and those who enter the market only incidentally to sell their own homes.

The law further provides that real estate brokers may not accept a property listing with an understanding that a purchaser may be discriminated against. This will apply not only to listings by persons engaged in the business of selling real property but also to listings by individual home owners. Thus, although the individual home owner is allowed to discriminate, he cannot use the aid of a broker in doing so.

It may be noted that this law applies to all real estate, business

as well as residential. All the other laws apply only to residental property.

All four of these laws are to be administered by existing anti-discrimination agencies. In Connecticut, Massachusetts and Oregon, the agencies will apply the same procedures they already apply in cases of discrimination in employment and public accommodations. The Colorado law contains a new set of procedural provisions that differ in some respects from those now applicable to employment.

Oregon enacted an additional law which makes violation of the fair housing law a ground for suspension or revocation of a real estate broker's or salesman's license.

California passed two laws dealing with discrimination in publicly assisted housing. The major bill applies to housing that enjoys tax exemption, housing that has been built on land assembled by condemnation proceedings and redevelopment housing built under the 1949 Federal Housing Act. It also applies to FHA and VA housing in multiple dwellings (three or more units to a building) and in projects of five or more contiguous homes. Under this law, aggrieved parties may sue for damages or for an injunction to halt the discrimination. There is no provision for enforcement by a state agency.

The other California bill, which was a general measure dealing with community development and urban renewal, included a provision declaring it to be the policy of the state that there should be no discrimination in such projects.

As noted below, Washington enacted a bill broadly prohibiting discriminatory questions on applications for loans. This bill would apply to the financing of housing accommodations.

APPENDIX B

A COMPILATION OF MATERIALS OF THE OPPONENTS OF FAIR HOUSING LEGISLATION. (THE AUTHOR ACKNOWLEDGES THE AID OF ROBERT B. DRESSER, ESQ. IN THE GATHERING OF THESE MATERIALS.)

Set of Rhode Island #1
papers

15 Westminster Street
Providence 3
Rhode Island

Note.
Published by the Journal
Jan.11,1959, with the paragraph
on page 2 marked X omitted.

December 18, 1958.

Editor,
The Providence Journal Company,
75 Fountain Street,
Providence, R. I.

Dear Sir: Re Proposed Fair Housing Law.

According to recent press reports a Rhode Island group having the title, "Citizens United For a Fair Housing Law", are preparing a bill for introduction in the Rhode Island General Assembly designed to prohibit discrimination because of race, color, religion or national origin in any kind of housing, public or private, single homes, or multi-family units.

According to these reports, the following are the facts:

The bill would apply equally to the rental and sale of residential property, and to the issuing of mortgages or loans for housing.

The bill would give the Commission Against Discrimination authority to enforce the law. Court orders could be obtained against the persons judged to be practicing discrimination, and they could be cited for contempt of court if they failed to obey.

The president of the group stated:

> "When our proposed law becomes law, we will be the first state to have a comprehensive measure covering all property, both public and private."

This is an amazing proposal. I do not question the sincerity or good intentions of the proponents of the measure. I do, however, seriously question the soundness of their proposal.

As the president of the group stated, it is very comprehensive. It applies not only to single houses, but to multi-family houses, and to rentals as well as sales. As an example of its

application, the owner of a two-family house who wished to rent one of the apartments would be forbidden to choose the tenant if his choice were based upon considerations of race, color, religion or national origin, and the reason for his choice would not be determined by the landlord but by the governmental Commission Against Discrimination or by the courts.

This, I submit, is an outrageous and unconstitutional interference with the right of private property and personal freedom. These rights, guaranteed by the Constitution of the United States, constitute the basic difference between a free society and a Socialistic or Communistic society in which the government dictates and the people obey.

If a law of this sort can be passed, it is but a short step
X to extend it to owners who rent rooms or take in boarders. Or does the bill apply to those who rent rooms?

Is there no longer any respect for the Constitution or for the concept of private property and personal freedom?

Have we at last reached a stage in our country's history when a person is no longer allowed to choose his own associates,--no longer master of his own house and undisputed owner of his own property?

If so, a major step has been taken toward the destruction of the great American experiment in individual liberty.

The issue is not whether any racial or religious group is superior or inferior to another. The issue is whether a person, regardless of his race or religion, is to be free to exercise certain fundamental rights guaranteed by the Constitution. On this there should be no difference of opinion.

Very sincerely yours,

/s/ R. B. Dresser

Robert B. Dresser.

#2

EDITORIAL

THE PROVIDENCE SUNDAY JOURNAL
Providence, R. I. January 18, 1959

THE FAIR HOUSING LAW WOULD BENEFIT R. I.

A citizens' committee has laid before the General Assembly a bill that would seek to guarantee all citizens of Rhode Island--regardless of race, color, religion or national ancestry--an equal opportunity to rent, lease or buy a home.

This is in one sense a revolutionary proposal, because for the first time it would deny the right of an individual to refuse to dispose of his private property purely for reasons of racial discrimination. No other state in the union has such a law in force, although a New York City ordinance closely approaches it.

Precisely because it is unique in its scope, the proposed bill is certain to provoke controversy. This is as it should be, because no new departure in public policy ought to be undertaken without thorough-going democratic debate. We have no doubt that all of the reputable citizens who endorse the plan have done so with good will and in good faith. By the same token, they should be prepared to accept honorable and open opposition to the bill in the spirit in which it is offered. To oppose the bill in good faith will no more mark a man as a bigot than lip-service to integration converts a hypocrite into an honest man.

There are two questions implicit in the draft act: Is it constitutional, and is such a measure necessary and wise for Rhode Island?

Competent legal opinion indicates that the law would stand up in a test of its constitutionality. Both state and federal courts repeatedly have upheld statutes designed to discourage discriminatory practices because of the social evils they breed.

In the field of housing, these decisions nearly always have affected property in which public money is involved. The difference here is that purely private housing also would be affected. But the principle is well established in law that property rights are not absolute. Where the exercise of property rights in a particular way adversely affects the public good, the latter repeatedly has been held superior, and the property rights have been restricted. The most familiar example of this, perhaps is zoning legislation.

The proposed law proceeds on the same principle. It assumes that there is racial discrimination in housing in this state--aimed largely at the Negro--and that this discrimination produces tangible and serious social evils which do harm to the entire community. These assumptions seem to us demonstrably true.

The bill therefore restricts the rights of the property-holder by forbidding him to refuse to sell or rent on racial grounds alone. It sets up a rather elaborate system for complaints, investigations, consultations, persuasion, education, hearings and administrative decisions. Only after all this procedure had been exhausted might a recalcitrant property-owner be ordered by a court to desist from discrimination, and punished, if he refused, under the normal contempt of court process.

Is such a law necessary in Rhode Island, and is it wise? On the assumption that it would be administered sensibly, we think that it is both.

Nobody with two eyes in his head could seriously deny that racial discrimination in housing does exist in this state. Nobody who took the trouble to think about it could reasonably question that such discrimination does inflict real social evils upon the community as a whole. If these things are true, then does it not make sense to restrict property rights by way of forbidding racial discrimination, in order to serve the greater good of a healthier community?

Ideally, of course, the eradication of racial prejudice and discrimination should be sought, not through governments and laws, but through those social institutions most directly concerned with individual and community morality--the home, the school, the church. When, however, these agencies fail to accomplish such an objective through education and persuasion, and when in consequence the whole community suffers, then government and law become society's final recourse. So far as discrimination in housing is concerned, we think this is what has happened in Rhode Island.

Passage of such a law will not, of course, eliminate racial discrimination in housing overnight. Nor should any such thing be attempted. Persuasion, education and orderly legal process are far preferable to bulldozing police tactics in such work. But these approaches would be far more effective, without real damage to anyone, with a law to back them up.

The law would be administered by the same commission that oversees the state's fair employment practices system, designed to discourage racial discrimination in hiring and firing. Though its inquiries may have irritated some people from time to time (as what government agency does not?), the commission's overall record is one of quiet persuasion far more than of legalized black-jacking. We think the same thing is likely to be true in the field of housing, if the bill becomes law, and we think that in the end Rhode Island will be the better for it.

THE CASE AGAINST
THE FAIR HOUSING BILL
By ROBERT B. DRESSER

The so-called "Fair Housing Bill" is based upon the premise that there are many people in Rhode Island who are living under depressed or sub-standard housing conditions, and that this situation can and should be cured by prohibiting discrimnation because of race, color, religion or national origin in the sale or rental of housing accommodations or land, or the taking of mortgages on such property.

Such discrimination can be made the subject of an order to cease and desist issued by the Commission against Discrimination, which, if not obeyed, can thereafter be enforced by decree of the Superior Court. Disobedience of this decree is punishable by fine or imprisonment, or both.

In discussing this subject it should be borne in mind that the issue is not whether the unfortunate housing conditions exist and steps should be taken to remove them, but whether the burden of such action should be borne by the portion of our population that has houses or land for sale or to rent, rather than by the government or some charitable organization.

Also, the proponents of the Bill seem to assume in their arguments that the Bill relates only to discrimination against Negroes. This, of course, is not the fact. All races and religions are involved; so that if the owner of a house with two or more apartments, whether he be white, colored, Protestant, Catholic, Jew, Italian, Irish, French, Yankee, etc., wishes to rent the other apartment or apartments in the house in which he lives to a person or persons of his own race or religion, he does so at his peril, and should he be found guilty of racial or religious discrimination which he fails to stop or correct he could be fined and even sent to jail. And the same rule applies to sales.

The only offense committed by the unforunate owner is the exercise of what has heretofore been regarded as inviolable personal rights, namely, (1) the right to choose one's own associates and (2) the right to enjoy the benefits of property ownership.

If these are not rights protected by the Constitution of the United States, I am certain that it is a very different Constitution from what its authors intended and students of the Constitution have for generations supposed. It is not surprising that, in the words of the Providence Journal, "No other State in the Union has such a law."

And let there be no mistake, if this breach in the wall of Constitutional protection is permitted, it will be only a beginning. It would be but a short step to extend the law to owners who rent rooms in their own homes or take in boarders. The history of legislation of this character is that it seldom ends with the original act. This is but a beginning.

The restrictions upon the use of private property cited by the proponents of the Bill, such as zoning legislation and the forbidding of nuisances, are obviously of a very different character.

Who would have thought that in this land of much-vaunted freedom serious consideration would ever be given to a proposal to deprive a person of the right to sell or rent his house, or an apartment in his house, to a respectable, law-abiding citizen of his own choice, and to put him in jail if he did so? And yet this is precisely what this Bill does.

I wonder if all those who have endorsed the Bill have fully understood its provisions and its possible consequences. Have they by any chance felt that they were not in a position, or not likely to be in a position, where the law would affect them?

Would it be presumptuous to suggest that it would be entirely possible for them to do VOLUNTARILY what the Housing Bill COMPELS, and by their example to inspire others to do the same? This could readily be accomplished by purchasing or renting a neighbor's house and making it available to a family having sub-standard housing accommodations, as was rightly suggested in a recent letter to the Journal, or by renting rooms in their own homes where such homes are above the average size. This would make the proposed law unnecessary.

As I have above pointed out, there are two rights of the individual involved in this measure: (1) the right to choose one's own associates, and (2) the right to enjoy the benefits of property ownership—rights which by any reasonable interpretation of the Constitution of the United States cannot be violated. I submit that under no circumstances should any bill giving countenance in the slightest degree to a violation of these rights be enacted.

◆

NOTE!

With the exception of the paragraphs in *italics*, the foregoing is a copy of a letter written by me to the Governor and Members of the General Assembly on January 19. Although a copy was given to the Journal, it was, I believe, neither published nor referred to by the Journal in any of its publications. I am, therefore, publishing it as a paid advertisement.

I urge you to let Governor Del Sesto and your State Senators and Representatives know as early as possible how you feel about the Bill.

January 26, 1959

ROBERT B. DRESSER

#6

ROBERT B. DRESSER
15 Westminster Street
Providence, R. I.

February 16, 1959

re "FAIR HOUSING BILL"

Opponents of the "Fair Housing Bill" will be given an opportunity to express their views at a public hearing before the House Judiciary Committee.

Place	State House, Providence Room 313
Time	Friday, February 20, 1959, at 7:30 P.M.

I urge you to attend this hearing and to bring with you as many people as possible.

You may wish to speak before the Committee, but you will be under no obligation to do so. Even if you do not speak, your presence in the hearing room will help to demonstrate that a large number of people are opposed to the Bill. This is extremely important.

Let us make it clear to the Members of our General Assembly that we, with the majority of the people of Rhode Island, are opposed to the passage of this Bill because of its extreme, unfair and unwarranted interference with basic individual rights which belong to all of our people. If we do so, there is good reason to believe that the Bill will be defeated.

Please do not fail to attend the hearing.

Very sincerely yours,

ROBERT B. DRESSER

#5

STATEMENT OF
ROBERT B.DRESSER

In Opposition to the so-called
"FAIR HOUSING BILL"
(S.31: H.1037)

Presented to the Judiciary Committee of the House of Representatives of the Rhode Island General Assembly, February 20, 1959.

The so-called "Fair Housing Bill" (S. 31: H. 1037) is based upon the premise that there are many people in Rhode Island who are living under depressed or sub-standard housing conditions, and that this situation can and should be cured by prohibiting discrimination because of race, color, religion or national origin in the sale or rental of housing accommodations or land, or in making loans with respect to such property.

Provisions of Bill.

Under the Bill an owner is forbidden (1) to make any written or oral inquiry concerning the race, color, religion or national origin of a prospective purchaser or tenant, or (2) to refuse to sell or rent his property for any such reason, or (3) to discriminate against an individual on any such ground in the terms of sale or lease. There are similar provisions regarding loans.

Enforcement of the Act is placed in the hands of the Commission against Discrimination, which is empowered to act on its own initiative or on complaint of an aggrieved individual or an organization chartered for the purpose of combating discrimination or racism or of safeguarding civil liberties. Failure to obey a decree of the Court entered to enforce an order of the Commission is

punishable by "fine or imprisonment, or both." (R.I.Gen.Laws 8-6-1.)

The proponents of this Bill have sought to convey the impression that those opposing it are opposed to removing the existing unfortunate housing conditions and are opposed to giving aid to those who are living under such conditions. Nothing could be farther from the truth.

The issue is not whether the unfortunate housing conditions exist and steps should be taken to remove them, but whether the burden of such action should be borne by the portion of our population that has houses or land for sale or to rent, rather than by the government or some charitable organization.

Also, the proponents of the Bill seek to give the impression that the Bill relates only to discrimination against Negroes. This is not the fact. All races and religions are involved; so that if the owner of a house with two or more apartments, whether he be white, colored, Protestant, Catholic, Jew, Italian, Irish, French, Yankee, etc., wishes to rent the other apartment or apartments in the house in which he lives to a person or persons of his own race or religion, he does so at his peril, and should he be found guilty of racial or religious discrimination which he fails to stop or correct he could be fined and even sent to jail. And the same rule applies to sales.

The only offense committed by the unfortunate owner is the exercise of what has heretofore been regarded as inviolable personal rights, namely, (1) the right to enjoy the benefits of property ownership, and (2) the right to choose for one's self the persons with whom one associates in connection with his own

property.

If these are not rights protected by the Constitution of the United States, I am certain that it is a very different Constitution from what students of the subject have for generations supposed. "No other State in the Union has such a law."

If this Bill is passed it will be only a beginning. It would be but a short step to extend the law to owners who rent rooms in their own homes or take in boarders. The history of legislation of this character is that it seldom ends with the original act. This is but a beginning.

Who would have thought that in this land of boasted freedom serious consideration would ever be given to a proposal to deprive a person of the right to sell or rent his house, or an apartment in his house, to a respectable, law-abiding citizen of his own choice, and to put him in jail if he did so? And yet this is precisely what this Bill does.

I wonder how many of those who support this Bill have ever read it.

Constitutionality of Bill.

And now a word regarding the constitutionality of the Bill. Arguments on this question pro and con have been made. The answer lies with nine men sitting in Washington as members of the Supreme Court of the United States. What they would decide if the question should come before them no human being today knows. The proponents of the Bill argue that during recent years the Supreme Court has been steadily expanding the concept of "Civil Rights" by conferring on certain groups rights which they did not previously have, and

depriving others of rights which they had theretofore enjoyed.

Whether the Court would still further expand this concept to include the present case one can only guess. All I can say is that if the Court does so expand this concept it will have taken a major step toward the destruction of individual liberty in the United States of America,--a step that would have shocked their predecessors of not too many years ago.

In the circumstances, are we going to take the position that because there is a chance that the present Supreme Court might hold the pending measure constitutional it should be passed? A holding by the Supreme Court that the Bill is constitutional would not make it a good Bill.

The real question is whether in any reasonable view of the facts the rights of which an individual is deprived by this Bill are basic rights which belong to him in any free society. On this, I submit, there should be no difference of opinion.

* * * * *

The letters and telephone calls that I have received, and the large number of signatures that have been obtained to our petition indicate that the great majority of the people of this State are against this Bill. Up to last Monday, February 16, almost 1500 signatures to the petition opposing the Bill had been received, and only a small fraction of the petitions in circulation had been returned.

Let me read a few letters I have received.

(Letters read).

175 years ago the illustrious English statesman, William Pitt, a staunch friend of America, arose in the British House of Commons and made one of his great speeches. In it he said:

> "Necessity is the plea for every infringement of human freedom. It is the argument of tyrants.
>
> "The poorest man may, in his cottage, bid defiance to all the force of the Crown; the wind may blow through it, the storms may enter, the rain may enter, but the King of England may not enter."

How sad it is that an Englishman's appeal for freedom in 1783 is made a travesty in the State of Rhode Island in 1959.

I implore you, with all the power at my command, to give this Bill the burial it deserves.

Respectfully submitted,

ROBERT B. DRESSER

15 Westminster Street,
Providence, Rhode Island

February 20, 1959.

is to stretch things pretty far. The unrestricted right to choose for himself any law-abiding citizen as the purchaser or tenant of one's property cannot injure property owners and will not create an unhealthy community.

Where does the process end?

By such reasoning, individual liberty is being eaten away, supposedly for the common good, until before long there will be nothing left.

In these times, isn't the Bill valuable as a gesture of brotherhood?

There is a lot of irrelevant chatter along these lines. It is unlikely that true brotherhood will result from situations in which people, accused of bias, are forced to sell or rent their property against their will or in which they evade the restrictions of the law by subterfuge.

Isn't there a logical connection between the "Fair Housing Bill" and the Fair Employment Practices Act of 1949?

Both are anti-discrimination laws and involve similar procedures. It is unnecessary to review the arguments for and against FEPC, because the real effect of that law is quite different, involving the more impersonal categories of the labor market rather than the individual relationships of the home and family.

It should also be remembered that real estate transactions are usually more complex and many-sided than job applications. More than one interested purchaser and his broker may be involved, as well as banks and title companies. In the variety of considerations which influence an owner's decision may be an exacting time schedule, as when the family breadwinner is transferred to a new job outside the State. Yet all these things, affecting the time and money of many people, could be thrown into confusion by the charge of an aggrieved individual or pressure group under the proposed law. What happens to the property in the meantime? What happens if a deed has already been delivered to a party whom the Commmission deems the wrong party? These and many other questions are left unanswered.

But doesn't the experience with FEPC prove that people have nothing to fear from the "Fair Housing Bill", since the same Commission against Discrimination would administer the law?

No. Just because the Commission has shown restraint in the use of its broad powers does not mean that it will always continue to do so. Many considerations, political and otherwise, can influence the Commission's activities, and the subject of housing is a more personal and sensitive matter and more likely to involve controversy.

There is a great deal of talk about conciliation and persuasion and the lack of need for Court enforcement. If the enforcement provisions are unnecessary, why have them?

Why aren't the endorsements of the Bill by leading citizens and organizations, civic and religious, a good indication of its soundness?

They have been attracted by an appeal for brotherhood rather than by what the Bill actually provides.

With sincere conviction, many well meaning people have endorsed the Bill. In a stream of letters to the press, they are trying to impress on the public (1) that the issue raised by the Bill is simply a moral issue, which opponents will not meet, (2) that opposition to the Bill is based on prejudice against colored people, and (3) that the argument is between property rights and human rights.

These contentions are misleading and untrue, as already pointed out. The issue is not so simple. Many rights and interests are involved — moral, legal, social and economic, which effect **all** our people. Alleged wrongs are being exaggerated far out of proportion to what is being sought by this Bill.

Don't some people think that fair housing legislation is an inevitable part of Rhode Island's historic record of freedom and tolerance?

No type of legislation is inevitable. The historic record of Rhode Island is that of people from many lands who overcame difficulties and earned a respected place for themselves and their children, unaided by police power legislation. By a natural and orderly development, they have acquired homes of their choice in every community of the State, without the intervention of Commissions and Courts and without high level planning to integrate them by force.

Who are the opponents of the "Fair Housing Bill"?

The great majority of us — all kinds of people from every community and in every sort of occupation. We include civic leaders, businessmen, lawyers, the Rhode Island State Association of Real Estate Boards and its five member boards, The Home Builders Association of Rhode Island, and, most important, thousands of ordinary men and women who value the human rights and privileges of home ownership. In other words, the opponents represent at least 9/10 of the STATE'S POPULATION.

Why are people opposed to the Bill?

Because it would take away basic human rights which belong to them in any free society — the right to enjoy the benefits of property ownership and the right to choose for themselves the persons with whom they would freely associate in connection with their own property.

What can people do to oppose the Bill?

An unorganized majority is at a disadvantage as compared to an organized pressure group, with a ready-made program and an inner circle of devotees. But bad laws do not have to pass by default.

You can help in this important fight by (1) informing yourself about the real nature of the so-called "Fair Housing Bill"; (2) passing on information to others; (3) contacting your State Senator and Representative (and getting your friends to do likewise) so that they will know how you feel; (4) joining in and circulating petitions in opposition to the Bill; and (5) encouraging other people, through letters to the press and by other means, to stand up for the rights of everybody against the Bill.

DO IT NOW — TODAY!

HURRY!

This material has been prepared jointly by The Rhode Island State Association of Real Estate Boards and The Home Builders Association of Rhode Island.

#1

★ ★

IS THIS A

FAIR HOUSING BILL?

QUESTIONS AND ANSWERS ON THE SO-CALLED "FAIR HOUSING BILL"

What is the "Fair Housing Bill"?

In January, 1959, identical bills (S. 31, H. 1037) were introduced in the Senate and House of Representatives of the Rhode Island General Assembly. The professed purpose of each bill is to prohibit discrimination because of race, color, religion or national origin in the sale or rental of housing accommodations or land or in making loans with respect to such property.

If the Bill becomes law, to whom will it apply?

To everybody in the State, and his agent, who has a house, an apartment or land for sale or rent, except a religious body or a person renting rooms in the house where he lives. Mortgagees and financial institutions are also involved.

How will it actually affect the ordinary citizen who wants to sell or rent his property?

Until now, the ordinary citizen has been free to make his own choice as to whether he will sell or rent his property to a particular person. There may be many good reasons why he prefers to sell or rent to one person instead of another. But, under the proposed law, if the disappointed party contends that the owner's choice was based on race, color, religion or national origin, he (or an organization in his behalf) can complain to the Commission against Discrimination and subject the owner or agent to an investigation and the burden of justifying his choice.

Who will enforce the law?

A politically appointed State agency, the Rhode Island Commission against Discrimiation.

How will complaints get started?

The Bill provides that whenever an aggrieved individual or an anti-discrimination group (e.g., The National Association For The Advancement of Colored People or similar organization) makes a charge that someone has violated the law, the Commission may start an investigation. The Commission may also do this on its own initiative.

What specific acts would violate the law?

Unlawful practices would include making any inquiry about the race, color, religion or national origin of any prospective purchaser or tenant; refusing to sell or rent to any person because of race, color, religion or national origin; discriminating against any person for the same reasons in the terms, conditions or privileges of sale or lease; etc.

How about mortgagees and financial institutions?

Banks and other mortgagees and lenders would be involved in this way. The Bill provides that no person to whom application is made for a loan or other form of financial assistance, secured or unsecured, in connection with acquiring, constructing, repairing, etc. any housing accommodation, may inquire about the race, color, religion or national origin of the applicant or of any existing or prospective occupants or tenants. Nor may such person discriminate in the terms, conditions or privileges relating to such financial assistance.

It should be noted that the term "person", when used in the Bill, includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees or other fiduciaries.

Do these violations relate only to Negroes?

No. This is a common misconception. All races and religions are involved, so that if the owner of a house with two or more apartments (whether he be white, colored, Protestant, Catholic, Jewish, Irish, French, Yankee or Italian) wishes to rent an apartment to someone of his own background, he does so at the risk of having someone else of a different background charge him with discrimination.

Then what happens?

The Commission is supposed to begin with informal methods to "conciliate" the complaint. If these methods don't work to its satisfaction, it can serve a formal complaint upon the offender, with notice of hearing. At the hearing the Commission is not bound by the rules of evidence prevailing in the Courts. After the hearing it can issue an order requiring the offender to cease and desist from his unlawful practices and to take such further action as will carry out the purposes of the law.

How are the Commission's orders enforced?

By decree of the Superior Court. Disobedience of a decree is punishable by fine or imprisonment, or both.

Are there rights of appeal?

Yes. Any party to proceedings before the Commission may obtain judicial review of its final orders by the Superior Court. This applies to the complainant (including any anti-discrimination group which might have made charges or intervened in the proceedings), as well as to the property owner or agent, so that the latter, even if successful before the Commmission, could be subjected to further trouble and expense in the Courts.

Would such a law be Constitutional?

No one can predict with certainty what the Supreme Court of Rhode Island or the Supreme Court of the United States would do if the question of constitutionality came before it. The result ought to be that such an extreme and unwarranted interference with basic individual rights is unconstitutional. Certainly the background of our laws and institutions fully supports this position. Even if such a law were held constitutional, as being within the police power of the State, that would not make it a good law.

But the present issue is not so much constitutionality as fairness and common sense. We are not now so much concerned with what the General Assembly can do as we are with what it ought to do, as a matter of legislative policy in the interest of ALL the people of Rhode Island.

Why do the Bill's supporters claim that such a law is necessary?

In order to aid in the correction of certain evils, they say (in the preamble of their Bill), it is necessary to safeguard the right of all individuals to equal opportunity in obtaining housing accommodations free of discrimination.

What are these evils? They are the discriminatory practices which, it is claimed, "tend unjustly to condemn large groups of inhabitants to dwell in segregated districts under depressed living conditions in crowded, unsanitary, substandard and unhealthful accommodations."

Naturally, any such conditions would arouse sympathy and a desire to find a remedy. Are the discriminatory practices of property owners in general primarily to blame, or are there other important causes, social, administrative and economic? And does "THE PUNISHMENT FIT THE CRIME"? These are proper questions. They deserve complete and unbiased answers.

During the past year there has been a well-organized effort to build up public support for this Bill by exaggeration of every alleged instance of housing discrimination and by repeated newspaper publicity. The problems of relocation affecting the residents of Lippitt Hill have been used to the fullest extent. But the actual situation does not justify any law of this kind.

What about Lippitt Hill?

The relocation of three or four hundred families is a difficult problem under most circumstances, as the Providence authorities were aware when they planned the project. But the problem can be handled through existing channels for housing accommodations, private and public, if it is not blown up all out of proportion to what it really is and used as an excuse to saddle the ENTIRE POPULATION of the state with the burdens of this unjust, unnecessary law.

Isn't any protection which can be given to human rights worth some additional restriction on property rights?

There are no rights but human rights. What are spoken of as property rights are only the human rights of individuals to property. The man who puts his savings into a two or three-family house to provide his family a home and some rental income is typical of thousands of hard-working people in this State. Real estate is their basic investment. Is it not their human right to exercise free choice as to occupants of their property?

Supporters of the Bill are trying to dress up the issue as conflict between human values and property values. This is nonsense. While opponents of the Bill may properly call attention to its adverse effect upon the owneship of real estate and upon the stability of real estate values, the most important thing is the LOSS OF HUMAN FREEDOM.

But, in modern society, isn't a property owner already restricted by zoning and other regulations?

Yes, but for the mutual benefit of himself and other property owners. To argue that the "Fair Housing Bill" is just an extension of this kind of regulation and that it is for the mutual benefit of all, because it will create "healthy communities",

More About The So-Called "FAIR HOUSING BILL"

by ROBERT B. DRESSER

Among the letters to the editor supporting the so-called "Fair Housing Bill,"—more correctly called "A Bill to Destroy Individual Liberty and Create Disunity in the U.S.A."—is a letter published in The Evening Bulletin for Monday, March 2, 1959, and signed by a minister of the Methodist Church with an editor's note stating that the letter was signed also by 11 other Rhode Island citizens.

I quote from the letter as follows:

> "One of the opening sentences of the Declaration of Independence affirms as a self-evident truth that 'all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness." These are the rights of every American citizen regardless of his race, color, creed, or country of ancestral origin. The enjoyment of these rights is the heart of the American way of life. Their abridgement anywhere is a blow to American democracy everywhere.
>
> "Those unalienable rights affirmed in the Declaration of Independence and guaranteed by the Constitution of the United States are the primary civil rights of every individual citizen. Without them life is meaningless, and upon them depends the vitality of our free society. The compromise of the democratic ideal anywhere weakens the national structure everywhere. Only free men have anything worth defending. The unfree life is not worth living.
>
> "The right to acquire private property is a valid expression of the unalienable rights of the Declaration of Independence. Without the right to private ownership of property, those unalienable civil rights exist in a social vacuum and have no concrete reality. **The most fundamental form of private property is a man's home. This is the center of his world, the veritable castle of privacy in which his life finds fulfillment, his liberty comes to its profoundest expression, and his highest happiness is achieved. Such a home is the basic bulwark of our free society."** (Emphasis supplied).

After thus admirably stating the case **against** the Housing Bill, the letter proceeds to the surprising and wholly irrational and illogical conclusion that the Bill is a good bill and should be passed, and a number of our most prominent citizens are named as supporters of the Bill.

Through some strange quirk of reasoning on the part of the authors of this letter, the rights of the owner of a home suddenly become subordinate to the "unalienable" right of someone else to buy or rent that home in whole or in part—a right which the authors say must now be recognized by statute. The man who thought he was free and that his home was his own now discovers that he was wrong.

What a shock it would be to the author and signers of the Declaration of Independence to know that their great declaration of freedom had been so distorted!

The Declaration of Independence was not a demand for more governmental interference in the lives of the citizens, but less. The Revolutionary War was fought to secure liberty, not to destroy or restrict it.

In the words of Samuel B. Pettingill in "Jefferson, The Forgotten Man" (pp. 17-18):

> "The Revolutionary War * * * was a war of independence **against too much government.** * * * It was to free themselves from the restrictions placed upon them and upon their business and commerce by the government of England that our fathers declared their independence * * * The Declaration declared war **against these restrictions."** (Emphasis supplied).

I wonder how many of the supporters of the Housing Bill have carefully studied the Bill, or even read it, and how many fully understand its provisions and their consequences. The Bill incorporates by reference thirty-nine (39) sections of the Rhode Island General Laws of 1956, which do not appear in the Bill itself.

The public mention of the high business and professional positions which these men hold is doubtless intended to create in the minds of the public the impression that the directors, stockholders or members of the corporations or institutions which they represent also support the Bill, an impression which, I am confident, is in most cases contrary to fact.

Signatures to the "Petition in Opposition to the 'Fair Housing Bill'" continue to come in. A fourth batch of signatures to the petition, numbering 955, was mailed to Governor Del Sesto and all members of the General Assembly under date of March 5, 1959. Up to that date a total of 3409 such signatures had been received, and more are coming in daily.

If you wish to join in recording your opposition, please sign the attached coupon and mail it to . . .

B. I. Park,

1103 Hospital Trust Building,

Providence, Rhode Island

ROBERT B. DRESSER

March 12, 1959.

COUPON

I am opposed to the passage of the so-called "Fair Housing Bill" in any form whatsoever and desire to join in the petition against it.

Name .....

Address .....

Notice To The Many Thousand Opponents Of So-Called
FAIR HOUSING LEGISLATION

It is reported that plans are being made to introduce again the so-called Fair Housing Bill in the coming Session of the Rhode Island General Assembly.

It is rumored that the Bill may be "watered down" or "less drastic" than the one introduced in the last Session. The terms "watered down" and "less drastic" mean merely that the Bill applies to fewer persons, not that it is in any sense less objectionable. The purpose is, of course, to reduce the opposition by leading those not covered by the Bill to believe that they are going to remain permanently immune.

This was the strategy used in Massachusetts where a "watered down" form of bill was passed earlier this year by the legislature of that State. In commenting upon the bill the Evening Bulletin commended the clever way in which the matter was handled by the proponents of the measure.

Credit for their success was attributed in large measure to the "quiet, gradualist approach." By "quiet" was meant evidently that as little publicity as possible was given to the matter. By "gradualist approach" was meant accepting as a beginning a less drastic bill than desired, with the expectation of more later. This is the usual course of legislation of this character—a small beginning, with further expansion later until the ultimate objective is fully achieved. *Such legislation must be stopped at the beginning. It must not be passed in any form, however harmless it may appear.*

The movement to enact this legislation is nation-wide. Already it has been passed in several states.

As an example of what is in store for us if this movement is not checked, we call your attention to an order issued by the New York State Commission Against Discrimination on July 18, 1957, excerpts from which appear below. We strongly urge you to read these passages most carefully.

ORDERED

* * *

"ORDERED, by the New York State Commission against Discrimination,

"That the Respondents, Pelham Hall Apartments, Inc., its officers, directors, agents, successors, and assigns shall:

* * *

"2. Take the following affirmative action which, in the judgment of the State Commission Against Discrimination, will effectuate the purposes of the New York State Law Against Discrimination:

"a. With regard to the housing accommodations sought by complainant:

"(i) Set aside for, and offer to lease forthwith to the complainant the four and one half room apartment at Rochelle Arms for which he applied or a substantially similar four and one half room apartment at a rental of $158 a month, for a period of not less than two years from the date of execution of the lease. The complainant shall have a reasonable period of time within which to accept or reject said offer to lease.

"(ii) If the complainant accepts such offer to lease, the respondents shall within five (5) days after receipt of written notice of such acceptance provide complainant with a lease. The terms and conditions of such lease shall be substantially similar to the terms and conditions of leases executed by tenants of other apartments at Rochelle Arms during the period January 1, 1957 to June 30, 1957; and the complainant shall be accorded substantially the same privileges, services, benefits and rental concessions accorded to the most favored tenant or tenants in Rochelle Arms, whether such privileges, services, benefits or rental concessions, have been granted by terms of lease or otherwise to such tenant or tenants.

"(iii) If the complainant accepts the apartment and executes a lease therefor as aforesaid, respondents shall make said apartment available to the complainant fully ready for occupancy within ten (10) days after the execution of the lease.

* * *

"e. Transmit to the Commission forthwith a statement listing each of the apartments at Rochelle Arms, which on the date of this order, was not rented or leased, giving the designation of the apartment, the number of rooms, and the rental being asked.

"f. For a period of one year from the date of this order, transmit to the Commission by the 10th day of each month, a record of the following information for the preceding month with respect to the housing accommodations at Rochelle Arms:

"(i) The total number of apartments rented; the total number of apartments vacant; and as to each apartment vacant, the number of rooms and the rental being asked.

"(ii) The names and addresses of all persons who have applied for apartments.

"(iii) The names and addresses of all applicants who have been accepted (and the names and addresses of all persons who have been rejected), specifying as to each person accepted, the designation of the apartment, the number of rooms and the rental; and specifying as to each person rejected, the reason for rejection."

* * *

While the above order was issued in the case of an apartment house on which there was an FHA insured mortgage that was used by the Commission as the basis for its jurisdiction, there can be no doubt that the purpose is to extend the power ultimately to cases where no government aid of any sort is involved. This, in fact, was the case with respect to the bill introduced in the Rhode Island General Assembly during its last Session.

The line of distinction between private housing with a federal insured mortgage and private housing without such a mortgage is too thin to be permanent.

The issue is clear. Are individual liberty and the right of private property to be preserved, or are they not?

The issue is not whether relief should be afforded those who have been dispossessed of their homes by the government as in the case of Lippitt Hill. Of course it should be provided where necessary, but through the usual public channels, and not by the people who own houses.

Certainly we want no such law in Rhode Island, and we must all do everything in our power to prevent it, fully realizing that any bill, however "watered down" it may be, would be only an entering wedge.

COMMITTEE FOR INDIVIDUAL LIBERTY

Robert B. Dresser, Chairman
Charles H. Lawton, Vice-Chairman
Frank A. Martin, Jr., Vice-Chairman

Excerpt from letter of Robert B. Dresser,
dated November 23, 1959.

"This country was founded by those seeking individual liberty. The Revolutionary War was fought for that purpose, and the Constitution of the United States expressly provides for the protection of individual liberty.

"There are no more sacred rights than the right of private property and the right to choose one's own associates. No person can be said to be free if these rights are denied.

"To substitute government coercion for freedom of choice should be abhorrent to every freedom-loving American. That is the issue involved in the controversy over so-called "Fair Housing" legislation,--and the only issue. It is the issue that has aroused thousands of people about the State to oppose and protest vigorously against this outrageous legislation. I am confident that if the proposal were submitted to the people it would be overwhelmingly defeated.

"This is an issue that is far more fundamental than any other issue before the people today. It is the sort of issue that cannot be compromised, and it will be the endeavor of our organization to use every lawful means at our disposal to prevent the enactment of <u>any</u> such legislation."

COMMITTEE FOR INDIVIDUAL LIBERTY
1103 HOSPITAL TRUST BUILDING
PROVIDENCE 3, RHODE ISLAND

December 24, 1959

Dear Sir:

Re: So-called "Fair Housing" Legislation.

There is a nationwide movement to secure the enactment by state legislatures of so-called "fair housing" legislation to prohibit discrimination because of race, color, religion or national origin in the sale or rental of housing accommodations or land, or in making loans with respect to such property. The story is told in the enclosed documents. It is of such fundamental importance that we are taking the liberty of calling your attention to it in the hope that you may see fit to take some action to prevent its enactment in your state.

A very competent judge of such matters in our nation's capital, commenting upon the Rhode Island Fair Housing Bill last winter, wrote as follows:

> "I had heard that similar legislation was pending in several of the states. It is, of course, completely destructive of the right of property and is a form of nationalization of private property.
>
> "This assault upon the right of property in this country has prevailed in some areas and I predict that it will be quickly followed by other efforts which can but eventuate in a nationalization of property and a dictatorship akin to that which prevails in Soviet Russia."

Very sincerely yours,

P. B. Dresser,
Chairman.

#14

7th BATCH - 210 signatures

Total signatures to date - 5414

Robert B. Dresser

June 4, 1959

PETITION IN OPPOSITION TO
"FAIR HOUSING BILL"

His Excellency, Christopher DelSesto,
Governor of the State of Rhode Island,
and Honorable Members of the General Assembly.

We urge you to oppose the passage of the so-called "Fair Housing Bill" (S.31,H.1037).

The professed purpose of the bill is to prohibit discrimination because of race, color, religion or national origin in the sale or rental of housing accommodations or land or in making loans with respect to such property. This kind of discrimination on the part of any citizen wishing to sell or rent his own property could become the subject of an order to cease and desist issued by the Commission against Discrimination, enforced by Court decree, with the penalty of fine or imprisonment for disobedience.

Regardless of the social objectives claimed by supporters of the bill, and regardless of their emotional, high-sounding arguments, what is the real effect of this bill? It is to deprive the individual of basic rights which belong to him in any free society -- the right to enjoy the benefits of property ownership and the right to choose for himself the persons with whom he associates in connection with his own property.

Passage of any bill of this nature will represent an extreme and unwarranted interference with basic individual rights. We urge you to do everything in your power to oppose it.

Respectfully submitted,

Name Address

#13

SO-CALLED FAIR HOUSING BILL

Comments on Proponents' Announced Intention to Press for Passage Next Year

Recent press reports indicate that the proponents of the so-called Fair Housing Bill are "more determined than ever" to push for its passage next year.

This is most unfortunate, since it is bound to stir up still further discord and strife.

The thing that has amazed me most about this unfortunate controversy is the persistent refusal on the part of the proponents of the Bill to recognize the real issue. It is not, as I have time and time again said, whether housing relief should be provided for those who are in need of it, but rather by whom such relief should be provided.

It is difficult for me to understand how any fair-minded person can contend that the portion of the public that happen to own houses should be compelled to provide this relief. If the City sees fit to tear down houses accommodating over 400 families, as it is proposing to do in the case of the Lippitt Hill Redevelopment Project, is it reasonable for the City to dump in the laps of the other property-owners the job of providing accommodations for the displaced families?

Moreover, how can any reasonable person who believes in individual freedom insist that a person shall not be permitted to choose those with whom he associates in connection with his own property?

It has been made to appear that the present controversy is purely a Negro question. This is not the fact. If the members of **any** race wish to live together in a house or a community, whether they are English, Irish, Italian, Yankee, Negro, or any other race, who can reasonably contend that they should not be permitted to do so?

And likewise, if individuals prefer living in **mixed** racial households or communities they should be allowed to do so. The rule should work both ways.

The thing that concerns me most about this proposal is the trend which it indicates—a trend toward the ultimate abolition of the right of private property, which is an extreme form of Socialism.

One wonders what will be the next move of the social planners. There can be no doubt that this is not the final step.

Are we to sit idly by and allow our nation, which has led the world in the struggle for individual liberty, to become a nation of robots subject to the complete domination and control of government bureaucrats? That certainly is the trend, as is evidenced in many directions.

The proponents of this bill are, I am sure, sincere and conscientious American citizens. Do they realize what they are doing?

If a person is to be deprived by government order of the right to choose his own associates and to have full enjoyment of his own property may he not eventually be deprived of freedom of speech and other rights which he now enjoys on the plea that the exercise of these rights is against the public interest? Where is the line to be drawn?

No, the issue is much broader than that of housing. It is whether we shall have (1) liberty or (2) serfdom imposed by a government dictatorship.

May I add a personal note. I have thus far refrained from paying any attention to the charges leveled against me of racial antagonism and bigotry. These charges are utterly false. Neither race, creed nor color affects in the slightest degree the respect and regard in which I hold an individual.

June 3, 1959

ROBERT B. DRESSER.

Opponents of the So-Called "FAIR HOUSING BILL"

Permanent Organization To Be Formed

Nature of Opposition

There appears to be a misunderstanding on the part of some of our citizens as to the nature of the opposition to the so-called "Fair Housing Bill." **It is not in any sense a matter of emotion that will disappear with the passage of time.**

The opposition is based upon a firm conviction that the real issue is the preservation of individual liberty. This was the issue that prompted the Declaration of Independence. It was the cause for which the Revolutionary War was fought.

That people should be indignant at an assault upon their freedom should cause no surprise. A burglar who tries to break into a house will be resisted by any red-blooded owner with all the power at his command. Further attempts will be met with like resistance. It is not a matter of emotion, but a matter of self defense.

Misleading Title of Housing Bill

In these days when there are so many important and complicated issues before the country, it is understandable that persons, misled by the appealing title of a proposal, such as "Fair Housing", should endorse it without a full examination of its terms. It is to be hoped, however, that all such persons, when they have become fully aware of the facts, will withdraw their endorsement, as many have already done.

Property Rights versus Human Rights

The proponents of the Housing Bill still continue to declare that "human rights" are "more sacred than property rights," despite the absurdity of the distinction. Property itself has neither rights nor value, save only as human interests are involved. There are no rights but human rights, and what are spoken of as property rights are only the human rights of individuals to property.

> "The ownership of property is the right for which, above all others, the common man has struggled in his slow ascent from serfdom.
>
> * * * * * * *
>
> "A man without property rights—without the right to the product of his own labor—is not a free man. He can exist only through the generosity or forbearance of others" (Essay by Paul L. Poirot, of the Foundation for Economic Education).

Integration in Housing

On the subject of housing integration, as I have stated in earlier articles, the government should neither **forbid** people living together nor **compel** them to do so against their will. Any such legislation would be a gross violation of individual liberty.

Influence Behind "Fair Housing" Movement

I am convinced that somewhere behind the "Fair Housing" movement now in progress about the Country there is a sinister influence. I am further convinced that in due time the nature of that influence and those exerting it will be determined beyond a reasonable doubt.

Permanent Organization

The American people will never knowingly permit their liberty to be taken from them. The people of this State are aware of the serious menace posed by the Housing Bill. Over 5,000 of them have signified their opposition to it by signing petitions to that effect.

Many have expressed a desire to form a permanent organization to safeguard individual liberty and to oppose the passage of legislation designed to destroy or restrict that liberty. **The Housing Bill in its present or any other form is a measure of this character.**

Such an organization should be formed. It would, I am confident, attract the support of thousands of our citizens who would on all occasions and without regard to political affiliations make the preservation of individual liberty paramount to all other issues.

It is my intention to submit for consideration a plan for such an organization.

ROBERT B. DRESSER

The Case Against The So-Called
"FAIR HOUSING BILL"

Further Statement
By ROBERT B. DRESSER

As the session of the General Assembly draws to a close, the proponents of the so-called "Fair Housing Bill" are increasing their efforts to secure support by wholly irrelevant arguments which tend to obscure the real issue and confuse the public.

Massachusetts Bill.

An instance of this is the recent passage by the Massachusetts Legislature of a housing bill which is much weaker than the Rhode Island Bill and is the weakest of several bills in Massachusetts. In articles published in the Providence Evening Bulletin on April 22 and 24, the story is told of how the bill was passed by the Massachusetts Legislature on a voice vote without debate, with no recorded opposition and with little or no public opposition. The strategy used by the proponents, the Massachusetts Committee for Fair Housing Practices Legislation, was similar to that used by its counterpart in Rhode Island. The passage of the bill in Massachusetts is hailed by the proponents of the Rhode Island Bill as a great victory and as establishing a precedent that should be followed here.

Of course the bill passed, and the reason was that the Massachusetts public did not understand its real nature and its consequences. Had they understood, the bill never would have been enacted.

The Bulletin articles commend the clever way in which the matter was handled by the proponents. Credit for the success is attributed in large measure to the "quiet gradualist approach." By "quiet" is meant, I suppose, that as little publicity as possible was given to the matter. By "gradualist approach" is meant the acceptance of a less drastic bill than desired as a beginning with the expectation of more later. As I have pointed out in earlier articles, this is the usual course of legislation of this sort, — a small beginning with further expansion from time to time until the ultimate objective is fully achieved. **Such legislation must be stopped at the beginning. It must not be accepted in any form, however harmless it may appear.**

All that is required to prevent the enactment of such legislation is for the people to understand its nature and effect. What has happened in Massachusetts and earlier in Colorado could not, I am convinced, happen here, for the reason that the public of this state are aware of the evil nature and consequences of the proposed legislation and are overwhelmingly opposed to its passage **in any form.**

Incidentally, it should be noted that similar legislation failed to pass in New York this year.

Resignations from "Citizens United for a Fair Housing Law".

In view of the recent advertisement of "Citizens United" listing its members, it may not be inappropriate to observe, that apparently a number of the members have resigned. A comparison of an earlier list with that recently published indicates that there have been as many as twelve resignations.

Real Issue.

To repeat what I have said in earlier statements, the issue and the only issue involved in this controversy is

Integration in Housing.

The proponents' continued insistance on **forced** integration in housing displays a callous disregard for individual freedom. To **force** people to live together against their wishes is a gross violation of a basic right without which a person cannot be said to be free.

Loss of Freedom.

For some years we have seen the rights of the individual in this country being steadily whittled away and the powers of government increased. And now we have this major assault on the right of private property. Unless this trend is promptly checked, the inevitable outcome will be the abolition of the right of private property, loss of the people's liberty and the establishment of a fully socialized state with its autocratic government.

What an end this would be to the greatest experiment in individual liberty ever tried by man!

Seven and a half centuries ago, the Barons at Runnymede wrung from King John the Magna Carta, regarded as the beginning of individual liberty among the English-speaking people. During the centuries following, a continual struggle was waged to free the individual from the domination of the state and make the people, not the government, the master.

Our Declaration of Independence was a demand for less governmental interference in the lives of the citizens, and the Revolutionary War was fought for the purpose of enforcing this demand.

But now in the last several decades we have witnessed the amazing and distressing spectacle of a trend back toward autocratic government advocated and promoted by persons who call themselves "Liberals" and who denounce their opponents as "Reactionaries." Had anyone prior to this recent period suggested that King John was a "Liberal" and that the Barons at Runnymede and those who have since carried on the struggle to limit the power of the state were "Reactionaries," he would have been regarded as a fit subject for an insanse asylum. How easily are the people fooled by mere titles!

Socialism has never worked. It will ruin any nation that adopts it.

Freedom, the antithesis of socialism, has been well defined as "the right of the individual to work out his destiny, with whatever capacities he possesses, without interference from government beyond that necessary to prevent him from interfering with the freedom of others." (The Freeman, September, 1954.)

"Americans will not vote themselves out of freedom with their eyes open. But with their eyes half open they can be fooled and bit by bit the right of private ownership can be pulled gently away from them." (Dr. George S. Benson, President of Harding College.)

This must not be allowed to happen here.

If you wish to join in recording your opposition to the so-called "Fair Housing Bill," please sign the attached coupon and mail it to:

10

COMMITTEE against THE SO-CALLED "FAIR HOUSING BILL"

49 Westminster Street, Room 104
Providence 3, Rhode Island
Tel: GA 1-5078

April 2, 1959

Dear Friends:

It is extremely important that you come to the State House in Providence on Tuesday, April 7th, at 12:30 P.M.

Go to the House of Representatives (2nd floor, west side) and ask for your own Representative. (If you don't remember his name, ask for a Representative from your city or town.) Also visit the Senate (2nd floor, east side) and see your Senator. There will be people at the State House who can answer your inquiries.

Make it clear to your Senator and Representative, and to everyone else, that you are OPPOSED to the passage of the so-called "Fair Housing Bill" in any form.

Great pressure is being put on our legislators by a small, well-organized group to impose on the people of Rhode Island this unwise and unfair Bill to control private housing. Join with other citizens at the State House on Tuesday, April 7th, rain or shine, to convince our legislators that the vast majority of the people are against this Bill. Don't leave the job to someone else.

Your help is needed. It won't take much time on Tuesday, although, if you can, I hope you will be with us for an hour.

COME TO THE STATE HOUSE ON APRIL 7th AND BRING YOUR FRIENDS

Very sincerely yours,

R. B. Dresser

Chairman.

#6

The Real Issue in the So-Called "Fair Housing Bill"

Efforts are still being made to confuse the real issue involved in the controversy over the so-called "Fair Housing Bill."

In an editorial published in the Providence Sunday Journal for February 22nd, under the heading "Lippitt Hill Challenges Opponents of the Housing Bill," it is stated that "Finding housing for 450 Negro families displaced by the Lippitt Hill redevelopment project will not be an easy job."

After observing that it is unlikely that the Fair Housing Bill will be passed in time to meet the emergency, the editorial continues: "This fact provides an exce lent op portunity for opponents of the bill to prove by their own action their thesis that the Negro housing problem can be licked without a law."

What an amazing statement!

The great mass of opponents of the Bill are people of modest means—the owners and occupants of sma.l homes, many of them two and three family houses. A goodly portion of these people have invested their life savings in these houses, and are dependent upon the rents for their support. These are the people who the Journal says must provide the housing for the displaced Negroes, and not the supporters of the Bill whose names appear in the literature of the "Citizens United For a Fair Housing Law" as the members or supporters of that organization. These include some of our leading citizens—persons of substantial means with large single homes, who no doubt feel certain that the Bill will not affect them. I wonder how many of them have read the Bill.

I wonder too if they were not induced to join the organization by its appealing title—"Citizens United For a **Fair Housing Law,**" without realizing what they were getting into. Who could be so depraved as not to be in favor of Fair Housing? It is, of course, always open to a person to resign from such an organization if he feels he has made a mistake.

It is about time that this Bill be called by its right name—"A Bill To Destroy Individual Liberty and create disunity in the U.S.A."

As I have again and again pointed out, the issue is not whether relief should be afforded the unfortunate people who need it. Of course it should be provided—but by the usual government and charitable channels, and not by the people who own houses.

The issue, and the only issue, is whether the individual should be deprived of rights which are essential to his freedom, the loss of which would constitute a major step toward the establishment of a fully socialist state.

If an owner, regardless of his wishes, must under penalty of fine and imprisonment accept as a purchaser or tenant a person he does not want, how can it be said that such a person is free? **This is the one and only issue, and people should not be misled by all the propaganda to the contrary.**

Signatures to the "Petition In Opposition To The 'Fair Housing Bill' " continue to pour in. Up to Saturday, February 21st, 2,454 such signatures had been received, and more are coming in daily.

If you wish to join in recording your opposition, please sign the attached coupon and mail it to . . .

B. I. Park,

1103 Hospital Trust Building,
Providence, Rhode Island

ROBERT B. DRESSER

February 23, 1959.

---------- COUPON ----------

I am opposed to the passage of the so-called "Fair Housing Bill" in any form whatsoever and desire to join in the petition against it.

Name .....

#9

(Postcard)

URGENT:

OPPONENTS OF "FAIR HOUSING BILL":

Please WRITE and PHONE your State Senator and Representative without delay. (If you don't have their names, CALL GAspee 1-5078.)

Tell them that you are strongly opposed to passage of the "Fair Housing Bill" in any form, and urge them to vote against it. (If possible, send copy of letter to Speaker Harry Curvin, House of Representatives.)

Organized pressure to force passage of this Bill will not

Notice To The Many Thousand Opponents Of So-Called "Fair Housing" Legislation

On January 6 a so-called "Fair Housing" Bill (S.27) was introduced in the Senate of the Rhode Island General Assembly.

Like the misnamed "Fair Housing" Bill of last year, which died in Committee, this Bill (S.27) would deny the right of people in this State to sell or rent **private** housing accomodations to anyone of their own choosing. The Bill seeks to accomplish this result through the amendment of an existing criminal statute (Chapter 24, of Title 11) of the General Laws, which prohibits discrimination on account of race, color, religion or ancestral origin with respect to **"places of public accommodation,"** by simply enlarging the statutory definition of **"places of public accommodation** so as to include "any housing accommodation offered for sale or rent which is one of five or more housing accommodations all of which are located on a single parcel of land or parcels of land that are contiguous without regard to highways or streets, and all of which any person owns or otherwise controls the sale or rental".

Enforcement is placed in the hands of the Commission against Discrimination, which is empowered to act on its own initiative or on complaint of an aggrieved individual or an anti-bias organization. Failure to obey a decree of the Court entered to enforce an order of the Commission is punishable by fine or imprisonment, or both.

This is no "compromise proposal"! This Bill (S.27), cleverly camouflaged and under a new label, is essentially the same "Fair Housing" Bill, so-called, which we fought last year, except that it applies to fewer persons. **The objectives and the methods are unchanged.**

In other words, the Bill is of the "watered down" or "less drastic" variety of which we warned you in our notice published as an advertisement in the Providence Journal on October 22, 1959.

The terms "watered down" and "less drastic" merely mean that the Bill applies to fewer persons, not that it is in any sense less objectionable. The purpose, of course, is to reduce opposition by leading those not immediately affected by the Bill to believe that they are going to remain immune. This is an old trick, well known to those versed in such matters,—a small beginning, with further expansion later until the ultimate objective (that is, control by the State of **all** private housing) is fully achieved.

Such legislation must be stopped at the beginning. It must not be passed in any form.

The present Bill (S.27) is, of course, class legislation of the rankest sort. Why limit the Bill to owners and occupants of property containing five units (for example, apartments or new plats)? Is it not apparent that the only purpose is to eliminate the opposition of those whose property contains a smaller number of units? There can be no other purpose.

But let no one for a moment think that the legislation will end here. The ultimate goal of the proponents was and still is to include **all** housing accommodations. This was amply demonstrated by the Bill which they sponsored last year. Having failed in that attempt, they are now seeking to accomplish the same thing in a quieter, more subtle manner, by installments. The present Bill (S.27) is but a beginning.

This Bill is an outrageous assault on individual liberty that any freedom-loving American, acquainted with its terms, will oppose. All of us must do everything in our power to defeat it.

COMMITTEE FOR INDIVIDUAL LIBERTY

Robert B. Dresser, Chairman
Charles H. Lawton, Vice-Chairman
Frank A. Martin, Jr., Vice-Chairman
John V. Kean, Vice-Chairman
Frank S. Shy, Treasurer
Edwin T. Scallon, Secretary

January 7, 1960.

ECONOMIC COUNCIL LETTER

August 1, 1959 1930—1959 Letter No. 460

SO-CALLED FAIR HOUSING LEGISLATION

The Rhode Island Story

By Robert B. Dresser

Foreword

This is one of the most important Council Letters we have ever published.

A "liberal" combine has set out to take away the property rights of every American by dictating to the owner to whom he may rent or sell his property. It is being attempted through the soft-sounding title of a "Fair Housing Bill," violation of which is a crime punishable by fine or imprisonment.

The American people have only to be alerted in order to stop this tyrannical scheme in its tracks.

Four States fell for this Bill this year—Colorado, Connecticut, Massachusetts and Oregon.

The Bill was introduced in the Rhode Island Legislature and was backed by a large committee of prominent citizens. But one man, Robert B. Dresser of Providence, a nationally known lawyer and patriot and a director of the National Economic Council, realized the dangers involved and aroused the people of the State. As a result the Bill never even got out of committee.

This measure is a threat to personal liberty in every State of the Union. On July 13, Governor Rockefeller of New York, addressing the National Association for the Advancement of Colored People, promised that, at the 1960 Legislative Session, he would recommend and push a "Fair Housing Bill."

If we want to retain our liberty, someone in every State must take the leadership against this measure, as Mr. Dresser did in Rhode Island. And it isn't too soon to start now.

Further information regarding the Rhode Island experience, including reprints of certain of the advertisements and other papers used, may be obtained by writing Robert B. Dresser, 15 Westminster Street, Providence, R. I.

NATIONAL ECONOMIC COUNCIL, INC.

EARLY last January leaders of both political Parties in the Rhode Island Legislature introduced in both branches a so-called "Fair Housing Bill" prohibiting discrimination because of race, color, religion or national origin in the sale or rental of housing accommodations or land, or in making loans with respect to such property.

Under the Bill an owner is forbidden (1) to make any written or oral inquiry concerning the race, color, religion or national origin of a prospective purchaser or tenant, (2) to refuse to sell or rent his property for any such reason, or (3) to discriminate against an individual on any such ground in the terms of sale or lease. There are similar provisions regarding loans. Enforcement of the Act is placed in the hands of the Commission against Discrimination, which is empowered to act on its own initiative or on complaint of an aggrieved individual or an organization chartered for the purpose of combatting discrimination or racism, or of safeguarding civil liberties. Failure to obey a decree of the Court entered to enforce an order of the Commission is punishable by "fine or imprisonment, or both."

In short, the Bill deprives a property owner of the right to enjoy the benefits of property ownership, and the right to choose for himself the persons with whom he associates in connection with his own property—both of them basic rights in any free society.

The Bill was sponsored and promoted by an organization called "Citizens United for a Fair Housing Law in Rhode Island," of which Irving Jay Fain is the Chairman. Members of the organi-

zation include the leaders of both political Parties, prominent bankers, educators, and many of the clergy of all faiths.

A substantial number of the members have since resigned.

The Bill has had the vigorous support of Rhode Island's leading newspaper, the *Providence Journal*, which has by far the largest circulation of any paper in the State.

During the legislative Session editorials supporting the Bill were published by the *Providence Journal*, as well as a considerable number of news articles declaring the need of better housing facilities for Negroes and calling for an end of discrimination in the sale or renting of houses because of race, color, religion or national origin and for the passage of the so-called "Fair Housing Bill."

Also, numerous letters were written to the Editor of the *Providence Journal* and *Evening Bulletin* regarding the Bill. A majority of them supported the Bill, doubtless because the proponents were well organized and had the support of many of the clergy of all faiths.

THE movement is nationwide. A bill of this character has been introduced in some 13 or more States. It indicates a trend toward the ultimate abolition of the right of private property, which is the aim of Socialism.

While it has been made to appear by the proponents of the measure that the controversy is purely a Negro question, this is not the fact. The Bill applies to all races, and they are forbidden to discriminate against one another under penalty of fine or imprisonment.

The opponents of the measure take the position that if *any* race wishes to live together in a house or community, whether they are English, Irish, Italian, Jewish, Yankee, Negro, or any other race, they should be permitted to do so. They likewise hold that if individuals prefer living in *mixed* racial households or communities they should be allowed to do so. The rule, they say, should work both ways. *It is government compulsion to which they object.*

The opponents of the measure say that if a person is to be deprived by government order of the right to choose his own associates and to have full enjoyment of his own property it is entirely logical to expect that he may eventually be deprived of freedom of speech and other rights which he now enjoys on the plea that the exercise of these rights is against the public interest. They ask, "Where is the line to be drawn?"

In their view the issue is much broader than that of housing. It is whether the American people shall have liberty or eventual serfdom imposed by government dictatorship.

The first opposition to the Bill appeared in a letter written by me to the Editor of the *Providence Journal*, which was published on January 11, 1959, from which the following is quoted:

> "This, I submit, is an outrageous and unconstitutional interference with the right of private property and personal freedom. These rights, guaranteed by the Constitution of the United States, constitute the basic difference between a free society and a Socialistic or Communistic society in which the government dictates and the people obey.
>
> "If a law of this sort can be passed, it is but a short step to extend it to owners who rent rooms or take in boarders. Or does the bill apply to those who rent rooms? (This paragraph was stricken from the letter as published by the *Journal.*)
>
> "Is there no longer any respect for the Constitution or for the concept of private property and personal freedom?
>
> "Have we at last reached a stage in our country's history when a person is no longer allowed to choose his own associates,—no longer master of his own house and undisputed owner of his own property?
>
> "If so, a major step has been taken toward the destruction of the great American experiment in individual liberty.
>
> "The issue is not whether any racial or religious group is superior or inferior to another. The issue is whether a person, regardless of his race or religion, is to be free to exercise certain fundamental rights guaranteed by the Constitution. On this there should be no difference of opinion."

THIS was followed by a series of articles which I had published as advertisements in the *Providence Journal* and *Evening Bulletin*, from certain of which I quote as follows:

1. *Advertisement dated January 26, 1959, and published February 3 and 8.*

> "The so-called 'Fair Housing Bill' is based upon the premise that there are many people in Rhode Island who are living under depressed or sub-standard housing conditions, and that this situation can and should be cured by prohibiting discrimination because of race, color, religion or national origin in the sale or rental of housing accommodations or land, or the taking of mortgages on such property.
>
> * * * *
>
> "The only offense committed by the unfortunate owner is the exercise of what has heretofore been regarded as inviolable personal rights, namely (1) the right to choose one's own associates and (2) the right to enjoy the benefits of property ownership.
>
> "If these are not rights protected by the Constitution of the United States, I am certain that it is a very different Constitution from what its authors intended and students of the Constitution have for generations supposed. It is not surprising that, in the words of the *Providence Journal*, 'No other State in the Union has such a law.'
>
> "And let there be no mistake, if this breach in the wall of Constitutional protection is permitted, it will

be only a beginning. It would be but a short step to extend the law to owners who rent rooms in their own homes or take in boarders. The history of legislation of this character is that it seldom ends with the original act. This is but a beginning.

"The restrictions upon the use of private property cited by the proponents of the Bill, such as zoning legislation and the forbidding of nuisances, are obviously of a very different character.

"Who would have thought that in this land of much-vaunted freedom serious consideration would ever be given to a proposal to deprive a person of the right to sell or rent his house, or an apartment in his house, to a respectable, law-abiding citizen of his own choice, and to put him in jail if he did so? And yet this is precisely what this Bill does.

"I wonder if all those who have endorsed the Bill have fully understood its provisions and its possible consequences. Have they by any chance felt that they were not in a position, or not likely to be in a position, where the law would affect them?"

2. *Advertisement dated February 23, 1959, and published February 25 and 26.*

"Efforts are still being made to confuse the real issue involved in the controversy over the so-called 'Fair Housing Bill.'

"In an editorial published in the *Providence Sunday Journal* for February 22nd under the heading 'Lippitt Hill Challenges Opponents of the Housing Bill,' it is stated that 'Finding housing for 450 Negro families displaced by the Lippitt Hill redevelopment project will not be an easy job.'

"After observing that it is unlikely that the Fair Housing Bill will be passed in time to meet the emergency, the editorial continues: 'This fact provides an excellent opportunity for opponents of the Bill to prove by their own action their thesis that the Negro housing problem can be licked without a law.'

"WHAT AN AMAZING STATEMENT!

"The great mass of opponents of the Bill are people of modest means—the owners and occupants of small homes, many of them two and three family houses. A goodly portion of these people have invested their life savings in these houses, and are dependent upon the rents for their support. These are the people who the *Journal* says must provide the housing for the displaced Negroes, and not the supporters of the Bill whose names appear in the literature of the 'Citizens United for a Fair Housing Law' as the members or supporters of that organization. These include some of our leading citizens—persons of substantial means with large single homes, who no doubt feel certain that the Bill will not affect them. I wonder how many of them have read the Bill.

"I wonder too if they were not induced to join the organization by its appealing title—'Citizens United For a *Fair Housing Law*,' without realizing what they were getting into. Who could be so depraved as not to be in favor of Fair Housing? It is, of course, always open to a person to resign from such an organization if he feels he has made a mistake.

"It is about time that this Bill be called by its right name—'A Bill To Destroy Individual Liberty and Create Disunity in the U.S.A.'

"As I have again and again pointed out, the issue is not whether relief should be afforded the unfortunate people who need it. Of course it should be provided—but by the usual government and charitable channels, and not by the people who own houses.

"The issue, and the only issue, is whether the individual should be deprived of rights which are essential to his freedom, the loss of which would constitute a major step toward the establishment of a fully socialist state.

"If an owner, regardless of his wishes, must under penalty of fine and imprisonment accept as a purchaser or tenant a person he does not want, how can it be said that such a person is free? *This is the one and only issue, and people should not be misled by all the propaganda to the contrary.*"

3. *Advertisement dated March 17, 1959, and published March 22.*

"Letters to the editor continue to be published urging the passage of the so-called 'Fair Housing Bill' and denouncing its opponents. These letters persist in ignoring the real issue, which is the right of private property and individual freedom. They continue to harp on the plight of the Negroes and the need of providing better housing conditions for them, which is not the issue at all. They further insist on integration in housing which means forcing people to live together whether they want to or not. If people wish to live together, they should be permitted to do so, but they should not be forced to do so against their will.

"The same old line that 'human rights' are 'more sacred than property rights' is continually stressed, although a moment's thought would reveal the utter absurdity of such a distinction.

* * * *

"The Housing Bill strikes at the right of private property which is the keystone of our economic system of private enterprise and of our system of constitutional government. Destroy that right and we descend to the degradation and despair of the despotic socialist state.

"Don't think that this is just a figment of my imagination. A very competent judge of such matters in our nation's capital, commenting upon the Rhode Island Bill, recently wrote as follows:

> 'I had heard that similar legislation was pending in several of the states. It is, of course, completely destructive of the right of property and is a form of nationalization of private property.
>
> 'This assault upon the right of property in this country has prevailed in some areas and I predict that it will be quickly followed by other efforts which can but eventuate in a nationalization of property and a dictatorship akin to that which prevails in Soviet Russia.'

* * * *

"The issue involved in the present controversy is far greater than the impact of this legislation upon the people of Rhode Island. As a country-wide movement it constitutes a serious threat to our entire economic system and our system of constitutional government under which the United States has become the richest and most prosperous country in the world with the

widest distribution of wealth among its people that the world has ever known.

"Are we going to scrap this system or preserve it? Those who believe it should be preserved will oppose the Housing Bill, *in any form whatsoever, no matter how 'watered down' it may be.*

"It is unthinkable that any legislature composed of conscientious, patriotic Americans would ever pass the Housing Bill, *whether in its present form or any other form.* Even though 'watered down,' it would constitute but a beginning and the pressure would be continually renewed in the future to extend it to the utmost limits."

4. *Advertisement dated April 2, 1959, and published April 5.*

"An article in the *Providence Sunday Journal* for March 15 states:

> 'Rhode Island, which is considering Fair Housing legislation, is only one of 13 states in which similar legislation is pending.'

"And the states are named.

"It is significant that in Colorado and Massachusetts, two States in which legislative action has been taken, there was little or no opposition. The reason undoubtedly was that the real purpose and effect of the measure were not understood and that the legislation was slipped through without the people or the members of the legislature being aware of its true character. There is grave danger that this will happen in other States."

5. *Advertisement dated April 27, 1959, and published April 29 and May 3.*

"MASSACHUSETTS BILL.

"In articles published in the *Providence Evening Bulletin* on April 22 and 24, the story is told of how the Bill was passed by the Massachusetts Legislature on a voice vote without debate, with no recorded opposition and with little or no public opposition. The strategy used by the proponents, the Massachusetts Committee for Fair Housing Practices Legislation, was similar to that used by its counterpart in Rhode Island. The passage of the Bill in Massachusetts is hailed by the proponents of the Rhode Island Bill as a great victory and as establishing a precedent that should be followed here.

"Of course the Bill passed, and the reason was that the Massachusetts public did not understand its real nature and its consequences. Had they understood, the Bill never would have been enacted.

"The *Bulletin* articles commend the clever way in which the matter was handled by the proponents. Credit for the success is attributed in large measure to the 'quiet gradualist approach.' By 'quiet' is meant, I suppose, that as little publicity as possible was given to the matter. By 'gradualist approach' is meant the acceptance of a less drastic Bill than desired as a beginning with the expectation of more later. As I have pointed out in earlier articles, this is the usual course of legislation of this sort,—a small beginning with further expansion from time to time until the ultimate objective is fully achieved. *Such legislation must be stopped at the beginning. It must not be accepted in any form, however harmless it may appear.*

"All that is required to prevent the enactment of such legislation is for the people to understand its nature and effect. What has happened in Massachusetts and earlier in Colorado could not, I am convinced, happen here, for the reason that the public of this State are aware of the evil nature and consequences of the proposed legislation and are overwhelmingly opposed to its passage *in any form.*

"Incidentally, it should be noted that similar legislation failed to pass in New York this year.

* * * *

"INTEGRATION IN HOUSING.

"The proponents' continued insistence on *forced* integration in housing displays a callous disregard for individual freedom. To *force* people to live together against their wishes is a gross violation of a basic right without which a person cannot be said to be free.

"LOSS OF FREEDOM.

"For some years we have seen the rights of the individual in this country being steadily whittled away and the powers of government increased. And now we have this major assault on the right of private property. Unless this trend is promptly checked, the inevitable outcome will be the abolition of the right of private property, loss of the people's liberty and the establishment of a fully socialized state with its autocratic government.

"What an end this would be to the greatest experiment in individual liberty ever tried by man!

"Seven and a half centuries ago, the Barons at Runnymede wrung from King John the Magna Carta, regarded as the beginning of individual liberty among the English-speaking people. During the centuries following, a continual struggle was waged to free the individual from the domination of the state and make the people, not the government, the master.

"Our Declaration of Independence was a demand for less governmental interference in the lives of the citizens, and the Revolutionary War was fought for the purpose of enforcing this demand.

"But now in the last several decades we have witnessed the amazing and distressing spectacle of a trend back toward autocratic government advocated and promoted by persons who call themselves 'Liberals' and who denounce their opponents as 'Reactionaries.' Had anyone prior to this recent period suggested that King John was a 'Liberal' and that the Barons at Runnymede and those who have since carried on the struggle to limit the power of the state were 'Reactionaries,' he would have been regarded as a fit subject for an insane asylum. How easily are the people fooled by mere titles!

"Socialism has never worked. It will ruin any nation that adopts it.

"Freedom, the antithesis of socialism, has been well defined as 'the right of the individual to work out his destiny, with whatever capacities he possesses, without interference from government beyond that necessary to prevent him from interfering with the freedom of others.' (The Freeman, September, 1954.)

" 'Americans will not vote themselves out of freedom with their eyes open. But with their eyes half open they can be fooled and bit by bit the right of private ownership can be pulled gently away from them.' (Dr. George S. Benson, President of Harding College.)

"THIS MUST NOT BE ALLOWED TO HAPPEN HERE."

6. *Advertisement dated May 7, 1959, and published May 10.*

"NATURE OF OPPOSITION.

"There appears to be a misunderstanding on the part of some of our citizens as to the nature of the opposition to the so-called 'Fair Housing Bill.' *It is not in any sense a matter of emotion that will disappear with the passage of time.*

"The opposition is based upon a firm conviction that the real issue is the preservation of individual liberty. This was the issue that prompted the Declaration of Independence. It was the cause for which the Revolutionary War was fought.

"That people should be indignant at an assault upon their freedom should cause no surprise. A burglar who tries to break into a house will be resisted by any redblooded owner with all the power at his command. Further attempts will be met with like resistance. It is not a matter of emotion, but a matter of self defense.

"MISLEADING TITLE OF HOUSING BILL.

"In these days when there are so many important and complicated issues before the country, it is understandable that persons, misled by the appealing title of a proposal, such as 'Fair Housing,' should endorse it without a full examination of its terms. It is to be hoped, however, that all such persons, when they have become fully aware of the facts, will withdraw their endorsement, as many have already done.

"PROPERTY RIGHTS VERSUS HUMAN RIGHTS.

"The proponents of the Housing Bill still continue to declare that 'human rights' are 'more sacred than property rights,' despite the absurdity of the distinction. Property itself has neither rights nor value, save only as human interests are involved. There are no rights but human rights, and what are spoken of as property rights are only the human rights of individuals to property.

'The ownership of property is the right for which, above all others, the common man has struggled in his slow ascent from serfdom.

* * * *

'A man without property rights—without the right to the product of his own labor—is not a free man. He can exist only through the generosity or forbearance of others.'" (Essay by Paul L. Poirot, of the Foundation for Economic Education.)

"PERMANENT ORGANIZATION.

* * * *

"Many have expressed a desire to form a permanent organization to safeguard individual liberty and to oppose the passage of legislation designed to destroy or restrict that liberty. *The Housing Bill in its present or any other form is a measure of this character.*

"Such an organization should be formed. It would, I am confident, attract the support of thousands of our citizens who would on all occasions and without regard to political affiliations make the preservation of individual liberty paramount to all other issues.

"It is my intention to submit for consideration a plan for such an organization."

DURING the legislative session a petition opposing passage of the so-called "Fair Housing Bill" in any form whatsoever was circulated, and coupons were attached to newspaper advertisements expressing the individual's opposition to the Bill and his desire to join in the petition against it. By means of the petitions and coupons over 5400 signatures were secured. Mimeographed copies of the petition with the signatures obtained from time to time were sent to the Governor of the State, to the members of the General Assembly, and to certain other individuals. In all, seven batches of signatures were mailed to this list.

Also, an excellent pamphlet containing a list of "Questions and Answers on the so-called 'Fair Housing Bill'" was prepared for The Rhode Island State Association of Real Estate Boards and The Home Builders Association of Rhode Island by John V. Kean, a law partner of mine. This was published as an advertisement during March, and was also widely distributed.

On May 26, 1959, the General Assembly ended its Session without the Bill being reported out of either the Senate or House committee to which it had been referred.

The proponents, however, have publicly stated that they "are more determined than ever" to push for its passage next year.

During the legislative Session the proponents were given two hearings before the House Judiciary Committee.

The opponents were given a hearing before that Committee on February 20. It was an evening hearing, held in the House Chamber, and was attended by more than 500 persons, the largest number ever to attend a legislative committee hearing in the State of Rhode Island. Twenty persons spoke against the measure.

On February 10, the Pawtucket Real Estate Board voted 26-2 to oppose the Bill. Frank A. Martin, Jr., the President, and Charles H. Lawton, Jr., a prominent member, with a number of other associates, became greatly interested, and with John V. Kean played a prominent part in defeating the legislation. One of the highlights of the campaign was a mass meeting at the Tolman High School in Pawtucket on the evening of March 25, arranged by them, which was attended by about 500 persons.

Throughout the controversy very effective work against the Bill was done by Edwin T. Scallon of Providence.

THE proponents of this legislation are well organized, apparently well financed, and determined to secure the enactment of this legislation throughout the country.

An organization called "National Committee Against Discrimination in Housing," located at 35 West 32nd Street, New York City, appears to be taking a leading part in the movement.

The following is quoted from a letter sent out by that organization under date of May 26, 1959, signed by "Eleanor Roosevelt" and "Jackie Robinson":

"Dear Friend:

"Have you heard the good news? Colorado, Massachusetts, Oregon, and Connecticut have just joined New York City and Pittsburgh in passing state laws barring discrimination in private housing. Ten years ago even the most starry-eyed would not have predicted this.

"Today communities across the nation are stirring, neighbors are organizing, articles are appearing in national magazines. There is a coast-to-coast movement to break down the barriers.

"The National Committee Against Discrimination in Housing has for ten years played a key roll in alerting, educating, informing, and stimulating communities over the nation to combat residential segregation.

* * * *

"We believe the NCDH program is basic to the whole Civil Rights Challenge."

On the reverse side of this letter appears the following list of the Committee's "Member Organizations":

Amalgamated Clothing Workers of America, AFL-CIO; American Civil Liberties Union; American Council on Human Rights; American Ethical Union; American Friends Service Committee; American Jewish Committee; American Jewish Congress; American Newspaper Guild, AFL-CIO; American Veterans Committee; Americans for Democratic Action; Anti-Defamation League of B'nai B'rith; Congregational Christian Churches, Council of Social Action and Race Relations Department, Board of Home Missions; Cooperative League of the USA; Friendship House; International Ladies' Garment Workers' Union, AFL-CIO; International Union of Electrical, Radio and Machine Workers, AFL-CIO; Jewish Labor Committee; League for Industrial Democracy; The Methodist Church, Woman's Division of Christian Service; Migration Division, Puerto Rican Department of Labor; National Association for the Advancement of Colored People; National Association of Intergroup Relations Officials; National Council of Negro Women; National Council of Churches of Christ, Race Relations Department; National Urban League; Presbyterian Church, USA, Department of Social Education and Action; United Auto Workers of America, AFL-CIO; United Steel Workers of America, AFL-CIO.

This legislation is also supported by the National Lawyers Guild, as appears from the Spring 1958 Edition of its publication, the Lawyers Guild Review, "Special Issue on Integration in Housing."

AN organization called the "Committee for Individual Liberty" has just been formed in Rhode Island, having as its initial objective "to prevent the passage of any measure prohibiting discrimination because of race, color, religion, or national origin in the sale or renting of housing accommodations or land, or in making loans with respect to such property."

The issue is one of the most important before the country today. It involves no less than the preservation of individual liberty.

This legislation can be defeated if a sufficient effort to inform and arouse the people is promptly made. Otherwise, its passage is inevitable.

Certainly there must be enough people in the various States to provide the leadership and organization necessary to check this movement.

NATIONAL ECONOMIC COUNCIL, INC., established in 1930, is a non-profit, non-partisan membership corporation organized under New York State law. It publishes the semi-monthly ECONOMIC COUNCIL LETTER and occasional ECONOMIC COUNCIL PAPERS.

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SO-CALLED

"FAIR HOUSING LEGISLATION"

Letter to the Editor of the Providence Journal

August 17, 1959

Dear Sir:

My attention has been called to an article appearing in the Sunday Journal for yesterday, August 16, at page N-24, bearing the title "R.I. Fair Housing Defeat Cited as Model."

Your article deals with an article written by me appearing in the August 1st issue of the Economic Council Letter, which is published by the National Economic Council, located in New York City. In my article I attempt to tell the story of the so-called Fair Housing Bill in Rhode Island. The purpose of the article was to acquaint the people of other states with the nature of the apparently country-wide movement to secure the passage of such legislation by the various state legislatures,—a purpose which you evidently consider an unworthy one.

While your article appears as a news item, it should have been published as an editorial, for it is grossly and maliciously slanted against my article and the cause for which I speak.

Let me cite a few examples:

National Economic Council "controversial" and "anti-Semitic"

Your article states:

"The council letter is published by the controversial National Economic Council, of which Mr. Dresser is a director and Merwin K. Hart is president. The National Economic Council has been accused of anti-Semitism and other defamatory activity by a congressional investigating committee."

By this I assume you wish your readers to understand that Mr. Hart and the Directors of the National Economic Council, of which I am one, are "controversial" characters and that we are guilty of "anti-Semitism." Among the controversial and much-to-be-despised characters are Lt. Gen. P. A. del Valle, U.S.M.C., retired, who had a distinguished combat record as a commander of Marines in World War II, and Vice Adm. C. S. Freeman, U.S.N., retired, who likewise had a distinguished record in World War II. Both of them are Vice-Presidents and Directors, and their names appear in the Economic Council Letter which you are criticizing. I might also add the name of Major General Charles A. Willoughby, U.S.A., retired, a Director of the Council, who played such a prominent part in the Pacific war.

"Controversial" is a term frequently used by those who resort to the low and contemptible practice of "smearing"; and the same is true of "anti-Semitism." I assume you mean by the latter term "anti-Jewish", —or do you also include the Arabs and other Semitic races?

Let me say right here and now that neither Mr. Hart nor I am anti-Jewish. The same, I am confident, is true of the other officers and directors. We are pro-American, regardless of race, creed or color, and are opposed to those who are against true Americanism.

Mr. Hart, a graduate of Harvard College, is an intelligent, able man, of unimpeachable integrity, and is one of the most patriotic persons I know. It is regrettable that he has to spend so much of his time trying to counteract the harm that such newspapers as yours are doing.

But why, after all, are you concerned with the character of Mr. Hart and the other officers and directors of the National Economic Council? Grant that we are all scoundrels, what has that got to do with so-called "Fair Housing Legislation?"

Why not stick for a moment to the issue of whether so-called "Fair Housing Legislation" is good legislation, and stop trying to mislead your readers by irrelevant smears?

Dresser Born in Savannah, Georgia

You state that I was born in Savannah, Georgia. Just what has that to do with the question at issue? Perhaps you seek to convey the impression that having been born in the South I am anti-Negro. If such is your purpose, it is a malicious, contemptible falsehood.

Not that it is of any relevance, but to keep the record straight, my parents came from Massachusetts, I left Georgia when I was four years old, and I have lived in New England ever since.

Charges of Communism

Your comments about my charges of Communism and the National Lawyers Guild are misleading, and apparently intended to be such. The language which you quote about the Guild was not my language, but that of the Un-American Activities Committee of the House of Representatives.

text of the letter of the United States Department of Justice to the Lawyers Guild advising the latter of the Attorney General's decision to discontinue the proceeding to designate the Guild as subversive.

Backers of Fair Housing Legislation

If you consider the character and reputation of the National Economic Council and its officers and directors of such great importance and you desire to be fair and impartial, why don't you tell us something about the organizations that are backing the "Fair Housing Legislation" on a national level and whether you consider any of them "controversial?" They are listed in the Economic Council Letter of which you are so critical.

Let me quote from the Council Letter the following paragraphs:

"The proponents of this legislation are well organized, apparently well financed, and determined to secure the enactment of this legislation throughout the country.

"An organization called 'National Committee Against Discrimination in Housing,' located at 35 West 32nd Street, New York City, appears to be taking a leading part in the movement.

"The following is quoted from a letter sent out by that organization under date of May 26, 1959, signed by 'Eleanor Roosevelt' and 'Jackie Robinson':

" 'Dear Friend:

" 'Have you heard the good news? Colorado, Massachusetts, Oregon, and Connecticut have just joined New York City and Pittsburgh in passing state laws barring discrimination in private housing. Ten years ago even the most starry-eyed would not have predicted this.

" 'Today communities across the nation are stirring, neighbors are organizing, articles are appearing in national magazines. There is a coast-to-coast movement to break down the barriers.

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* * * *

" 'We believe the NCDH program is basic to the whole Civil Rights Challenge.'

"On the reverse side of this letter appears the following list of the Committee's 'Member Organizations':

" 'Amalgamated Clothing Workers of America, AFL-CIO; American Civil Liberties Union; American Council on Human Rights; American Ethical Union; American Friends Service Committee; American Jewish Committee; American Jewish Congress; American Newspaper Guild, AFL-CIO; American Veterans Committee; Americans for Democratic Action; Anti-Defamation League of B'nai B'rith; Congregational Christian Churches, Council of Social Action and Race Relations Department, Board of Home Missions; Cooperative League of the USA; Friendship House; International Ladies' Garment Workers' Union, AFL-CIO; International Union of Electrical, Radio and Machine Workers, AFL-CIO; Jewish Labor Committee; League for Industrial Democracy; The Methodist Church, Woman's Division of Christian Service; Migration Division, Puerto Rican Department of Labor; National Association for the Advancement of Colored People; National Association of Intergroup Relations Officials; National Council of Negro Women; National Council of Churches of Christ, Race Relations Department; National Urban League; Presbyterian Church, USA, Department of Social Education and Action; United Auto Workers of America, AFL-CIO; United Steel Workers of America, AFL-CIO.'

"This legislation is also supported by the National Lawyers Guild, as appears from the Spring 1958 Edition of its publication, the Lawyers Guild Review, 'Special Issue on Integration in Housing.' "

Conclusion

In closing may I quote from an editorial published in the Sunday Journal for January 18, 1959, under the title "The Fair Housing Law Would Benefit R.I.":

"Precisely because it is unique in its scope, the proposed bill is certain to provoke controversy. This is as it should be, because no new departure in public policy ought to be undertaken without thoroughgoing democratic debate. We have no doubt that all of the reputable citizens who endorse the plan have done so with good will and in good faith. By the same token, they should be prepared to accept honorable and open opposition to the bill in the spirit in which it is offered. To oppose the bill in good faith will no more mark a man as a bigot than lip-service to integration converts a hypocrite into an honest man."

Apparently you regard as outmoded the maxim that one should practice what he preaches.