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Frederick D. Braid

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DISCRIMINATION IN EMPLOYMENT, HOUSING, AND EDUCATION: CONSTITUTIONAL CONCEPTS AND SOCIAL THEORIES[†]

*"Some years ago a famous novelist died. Among his papers was found a list of suggested plots for future stories, the most prominently underscored being this one: 'A widely separated family inherits a house in which they have to live together.' This is the great new problem of mankind."*¹

*What the rioters appeared to be seeking was fuller participation in the social order and the material benefits enjoyed by the majority of American citizens. Rather than rejecting the American system they were anxious to obtain a place for themselves in it.*²

Introduction

Three hundred years ago the Negro was brought to this country as a slave. For the next two hundred years he was oppressed and treated as a chattel. With his emancipation during the Civil War period, the Negro began his struggle to establish himself in American society, while segregationists continued their struggle to keep him "in his place." During the Reconstruction Era, a proliferation of civil rights legislation and three amendments to the Constitution were passed to secure permanently the freedom of the Negro and the personal rights commensurate therewith.

[†] This article is a student work prepared by Frederick D. Braid, a member of the ST. JOHN'S LAW REVIEW and the St. Thomas More Institute for Legal Research. Research was completed in January 1970.

¹ Alexander, *Civil Rights, the Negro Protest and the War on Poverty: Efforts to Cure America's Social Ills*, 41 N.Y.S.B.J. 90 (1969) (quoting Martin Luther King).

² REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 4 (1968) [hereinafter REPORT].

Aimed, in many instances, at proscribing private as well as state initiated or supported discrimination, the legislation represented a revolution in the concept of federalism, and, as such, met with considerable opposition. Reflecting the concern of states' rights advocates, the Supreme Court construed the newly adopted thirteenth and fourteenth amendments narrowly, stripping them of their intended effect and rendering much of their enabling legislation nugatory. Since then, the "house" has been divided and we have lived the hypocrisy that the Negro is free. Only recently, as a result of "racial" disorders, has there been considerable concern over the reality that the "family" is going to *have* to live together if the Negro is to be truly free—*i.e.*, to have the same opportunities as the majority to share in the benefits of our society—and if we are to avoid schism in the future as uncorrected disparities grow even wider. Once again there has been a proliferation of civil rights legislation, and once again civil rights issues preoccupy the courts, with many of the restrictions initially placed on the construction of the post-Civil War amendments and legislation gradually eroding. The problem remains the same—inability to freely exercise one's personal rights due to discrimination—but the means used to perpetuate it have, in some instances, become more sophisticated as the efforts to circumvent the spirit of the law continue. In other instances, the deep-rooted nature of the problem renders the mere removal of discriminatory barriers insufficient to provide the Negro with equal opportunity. In addition, the interrelation of many areas and the resultant impact on progress toward an equal-opportunity society preclude a continued piecemeal ap-

proach to the problem and demand a coordinated attack on all aspects of the problem simultaneously.³ Attention in this note will be focused on the employment, housing, and educational fields,⁴ where such an interrelationship perpetuates conditions which confine the Negro to the lower socio-economic strata of our society.⁵

Perhaps both symptomatic and causative of the Negro's plight today is his inability to secure socially and financially rewarding

³ See Larson, *The New Law of Race Relations*, 1969 Wis. L. Rev. 470, 473.

⁴ In its recent study of civil disorders, the National Advisory Commission (Kerner Commission) categorized Negro grievances toward employment and housing as being of "first level intensity," and those toward education as being of "second level intensity."

⁵ It is important to emphasize at the outset that the problems to be discussed in this note are not peculiar to the Negro. Although the "underclass" of our society contains a higher percentage of Negroes than any other racial group, at least two-thirds of its members are not Negroes and more than one half the Negro population does not belong to this "underclass." See Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363, 374 (1966). In fact, the majority may be whites. See Alexander, *supra* note 1, at 95. However, the well documented history of racial discrimination against the Negro, as well as the fact that the Negro is better organized in pressing for reform than any other group, makes analysis of the Negro problem more practicable, but may very well serve to foretell the history of events with other minority groups if the problem is narrowly defined as a Negro one. The problems confronting the Negro typify those of the underprivileged generally. The problem is essentially socio-economic—initiated and perpetuated by racial discrimination in some instances—the solutions for which will benefit the Puerto Rican, Mexican-American, Appalachian white, and the American Indian, as well as the Negro. See Kaplan, *supra*, at 373.

employment. Generally, the Negro unemployment rate is about twice that of the rest of the population and is concentrated most heavily among the young.⁶ But the problem reaches beyond unemployment to what is known as underemployment—*i.e.*, restriction of Negro employment to low class, low paying jobs.⁷ Even where efforts are made to correct un- and underemployment, the effects of past racial discrimination may be perpetuated through the use of such devices as standardized tests for selecting employees or seniority systems initiated during periods of discrimination to determine promotion to better jobs. In addition, the historically discriminatory racial policies of unions—the champion of workers' rights—have likewise deprived the Negro of many of the benefits of membership therein.

The primary result of the employment problem is to deny the Negro economic equality with the majority of the population. This, in turn, has its greatest impact on the availability of housing for the Negro. His residential choices are necessarily limited and confined to inadequate facilities concentrated in segregated areas—usually

ghettos or slums.⁸ Moreover, recent attempts to provide federally subsidized, low-rent housing in “white” areas have, in some instances, met with opposition in the form of legislators' refusals to rezone single-family residential areas to allow the construction of multiple dwelling units. Be-

Cahn, *Racial-Religious Designations, Preferential Hiring and Fair Employment Practices Commissions*, 20 LAB. L.J. 357, 358 (1969). Among the employed, Negroes receive 50 percent less in income. Kaplan, *supra* note 5, at 367. In fact, congressional testimony has indicated that the average nonwhite with four years of college can expect to earn less over a lifetime than a white with no more than an eighth grade education. Hill, *Twenty Years of State Fair Employment Practices Commissions: A Critical Analysis with Recommendations*, 14 BUFFALO L. REV. 22, 28 (citing *Hearings on S. 773, S. 1210, S. 1211, and S. 1397 Before the Subcomm. on Employment and Manpower of the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. 325 (1963)).

⁸ There are 163 ghettos in America today. T. CROSS, *BLACK CAPITALISM: STRATEGY FOR BUSINESS IN THE GHETTO* 5 (1969) [hereinafter *BLACK CAPITALISM*]. They continue to fill at a rate of about 500,000 people per year, *id.* at 6, and more than one half of the Negro families belonging to the “underclass” live in them, *id.* at 31. One projection estimates that, if present trends continue, within fifteen years nearly 75 percent of all nonwhites will be living in slum areas. See Gibson, *New Ways of Giving Non-Whites the Business*, CIVIL RIGHTS DIGEST, Spring 1969, at 13. To exemplify the seriousness of this problem, it was once estimated that if the population density of some of Harlem's worst blocks extended to all of New York City, the entire population of the United States could have fit into three of New York's boroughs. Kaplan, *supra* note 5, at 390 (citing REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 367 (1959)). Moreover, the ghetto economy is isolated and unresponsive to the national economy, as reflected by the absence of normal flows of capital and credit and unemployment rates. See *BLACK CAPITALISM* 35-36.

⁶ See, *e.g.*, REPORT 7; Kaplan, *supra* note 5, at 367. In addition, the employment problem is particularly urgent because of the impact it has on the stability of the Negro family structure. Evidence indicates that periods of low employment may result in increased desertions among Negro males. D. MOYNIHAN, *THE CASE FOR NATIONAL ACTION* 22 (1965). With respect to criminal activities, large numbers of idle youngsters have provided a volatile base for the recent racial disorders in the country. See REPORT 4.

⁷ Employment discrimination has been manifested in two ways: difficulty in securing employment and a disproportionate relegation of Negroes to low-status, low-wage jobs. See Garfinkel &

yond this, even where low-cost housing is made available in white areas, the reluctance of whites to stay for fear of diminishing property values and the possibility of becoming a minority in the area frustrates attempts at integration.⁹ One possible solution to this problem lies in the utilization of the "benevolent quota"—*i.e.*, the establishment of a fixed ratio between white and Negro residents in a given area—to alleviate fears of an "invasion" of large numbers of Negroes and diminishing property values.

Without the adoption of some such affirmative measures, housing patterns will remain segregated, and, as a result, so will many school districts, inasmuch as their attendance zones are generally determined geographically.¹⁰ Segregated educational facilities in turn have several disadvantages. To begin with, they may very well result in serious psychological harm to the Negro student, manifested by decreased motivation and various forms of antisocial behavior.¹¹ Secondly, racially imbalanced

schools are academically inadequate, at least to the extent that students do not receive the benefits to be derived from exchanging ideas and developing personal relationships in a racially and socially heterogeneous atmosphere.¹² Consequently, segregated schools perpetuate social barriers by impeding understanding between the races and intensifying the inability to communicate.¹³ However, even where the

generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

Brown v. Board of Educ., 347 U.S. 483, 494 (1954). There may in fact be a significant correlation between equal educational opportunity and the commission of a disproportionate amount of violent crimes—*e.g.*, robbery, burglary, or looting—by Negroes. This is not to say that Negroes commit more crimes, but merely to demonstrate the significant distinction to be made between these violent, property seeking crimes and "white collar" crimes—*e.g.*, embezzlement and tax fraud—which require a somewhat more sophisticated person. See Clark & Clark, *Denial of Rights to Black Citizens—A Speculation on the Relation to Violence and Civil Disorders*, 46 DENVER L.J. 63, 79-80 (1969); Morgenthau, *Equal Justice and the Problem of White Collar Crime*, THE CONFERENCE BOARD RECORD, Aug. 1969, at 20. ¹² Resistance to integration on the ground that it will lower the academic performance of white students appears to be unfounded inasmuch as there is social science evidence which does not support such contentions. See Sullivan, *Implementing Equal Educational Opportunity*, 38 HARV. EDUC. REV. 148, 150-51 (1968). On the other hand, experimental data indicates that underprivileged children in middle-class schools tend to perform at a higher level than they would in lower class schools. Kaplan, *supra* note 5, at 400.

⁹ Fostering the development of integrated residential areas is an important and necessary step toward achieving racial harmony and understanding. Interracial contact reduces prejudice and results in more favorable attitudes on the part of both races, and would probably be most successful if it occurred on a continuous personal basis rather than merely on a working or educational basis. See Navasky, *The Benevolent Housing Quota*, 6 HOW. L.J. 30, 36 (1960).

¹⁰ This is *de facto* or "fortuitous" segregation, in contrast to *de jure* segregation where the separation of races is due purposefully to legal compulsion.

¹¹ See Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 568 (1965). The Supreme Court expressed its concern in the following manner:

To separate them from others of similar age and qualifications solely because of their race

¹³ The educational function of the school is perhaps more completely realized if it serves as the great meeting place; few other social institutions can so easily serve this purpose, especially when children of elementary school age are involved. Segregation may give Negroes

school system is integrated, the use of standardized tests to determine the level of educational exposure to be given to each child may discriminate against the Negro because of the inherent disadvantage arising out of his pre-school exposure to an underprivileged cultural milieu inasmuch as such tests are generally geared to a middle class cultural norm.¹⁴

Thus, failure to make corrections in each of these areas increases the likelihood that social mobility will be impeded—under- or unemployment will prevent the Negro from moving out of the slum, which will in turn reduce the equal educational opportunities of his children, who will in turn be unqualified for the better jobs and forced to live in the ghetto where their children will be deprived of equal educational opportunities which will confine them to the poorer jobs, which in turn

Reconstruction—Up from Slavery?

Prior to the Civil War, Negroes were considered to be neither citizens of the states they inhabited nor citizens within the meaning of the Constitution, and, consequently, were not entitled to the personal rights commensurate with such status.¹⁵ While President Lincoln's sole aim during

the Civil War is contended to have been preservation of the Union, and not the abolition of slavery,¹⁶ political pressures forced the issuance of the Emancipation Proclamation,¹⁷ and slavery's fate was thereafter clearly dependent upon the outcome of the War. Following the Union victory, the thirteenth amendment was adopted to assure the permanent abolition of slavery and to secure for the Negro the personal rights denied thereby.¹⁸ The

¹⁶ See, e.g., Kohl, *Civil Rights Act of 1866, Its Hour Come Round at Last: Jones v. Alfred H. Mayer Co.*, 55 VA. L. REV. 272, 273 (1969).

¹⁷ 12 Stat. 1268 (1863), providing in pertinent part:

. . . I do order and declare that all persons held as slaves . . . are, and henceforward shall be, free; and that the Executive Government of the United States . . . will recognize and maintain the freedom of said persons.

At this time, Congress had already abolished slavery in the District of Columbia. Act of April 16, 1862, ch. 54, § 1, 12 Stat. 376.

¹⁸ U.S. CONST. amend. XIII. The sponsors of the amendment based their draft on the language of article VI of the Northwest Ordinance of 1787, 1 U.S.C. xxxix (1964). Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 138 (1950). Section one's proscription of slavery and involuntary servitude—slavery in its narrowest and strictest sense—nullified the fugitive slave, art. IV, § 2, cl. 3, and three-fifths, art. I, § 2, cl. 3, provisions of the Constitution. Section two was intended to empower Congress to enact legislation proscribing the "badges"—i.e., infringement of the Negro's natural rights through government failure to protect them—and "incidents"—i.e., terrorization of friendly and sympathizing whites—of slavery. See tenBroek, *Thirteenth Amendment to the Constitution of the United States*, 39 CALIF. L. REV. 171, 179-80 (1951). The potential scope of such enabling power, inasmuch as it was intended to reach private acts, threatened traditional concepts of federalism and was the primary target for opponents to passage of the amendment. *Id.* at 179.

and whites the comfort that comes from avoiding the daily confrontation of racial hostility, but this simply perpetuates a circle that is vicious and ultimately unworkable in a society as interdependent as America's.

Fiss, *supra* note 11, at 570.

¹⁴ See, e.g., Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691, 701 (1968).

¹⁵ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

Southern states responded by enacting the Black Codes, making it clear that enabling legislation would be needed to implement the ideal expressed in the thirteenth amendment.¹⁹

Among the proposals introduced in the Thirty-ninth Congress was a civil rights bill aimed at correcting the inequalities of the Black Codes through nationalization of the civil or natural rights of all persons.²⁰ Enacted as the Civil Rights Act of 1866,²¹ its guarantee to "the full and equal benefit of all laws" was intended to include pro-

¹⁹ The practical effect of this Southern legislation was to keep the Negro enslaved. Discriminations were either perpetuated or created in the criminal law, and civil rights were severely restricted. Frank & Munro, *supra* note 18, at 144. For example, statutory provisions made labor contracts specifically enforceable against freedmen; they made it a misdemeanor for a Negro to be without a long-term contract of employment, conviction to be followed by a fine payable by a white man who could then have the criminal work for him until his generosity had been repaid; they made minors subject to compulsory apprenticeship laws. *Id.* The history of this brief period reveals that private acts of discrimination and terrorism were a prime source of trouble, Kohl, *supra* note 16, at 278, for white sympathizers as well as the Negro, Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1329-30 (1952); tenBroek, *supra* note 18, at 188.

²⁰ tenBroek, *supra* note 18, at 187.

²¹ Act of April 9, 1866, ch. 31, 14 Stat. 27, providing in pertinent part:

citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens

Id. § 1 (emphasis added).

tection from state inaction as well as state action, thereby providing an opportunity to reach private acts of discrimination.²² Federal court dispositions upholding the Act's constitutionality²³ contrasted with unfavorable dispositions in the state courts as to the efficacy of the new legislation²⁴ clearly indicated the federalism controversy, causing concern among the abolitionists as to the longevity of the Act and prompting plans to secure its provisions permanently.²⁵ Under these circumstances, the fourteenth amendment was adopted, and it was intended to incorporate the provisions and implications of the 1866 Act.²⁶ The framers relied primarily on the privileges and immunities clause²⁷ to secure the rights of all citizens,²⁸ with the equal protection and due process clauses considered to be of secondary importance.²⁹ Subsequently, the

²² See, e.g., Gressman, *supra* note 19, at 1332; Kohl, *supra* note 16, at 293; tenBroek, *supra* note 18, at 188.

²³ E.g., *United States v. Rhodes*, 27 F. Cas. 785, 794 (No. 16,151) (C.C.D. Ky. 1866); *In re Turner*, 24 F. Cas. 337, 339 (No. 14,247) (C.C.D. Md. 1867).

²⁴ E.g., *People v. Brady*, 40 Cal. 198 (1870); *Bowlin v. Commonwealth*, 65 Ky. (2 Bush) 5 (1867).

²⁵ Gressman, *supra* note 19, at 1328-29.

²⁶ See, e.g., *id.* at 1329; Kohl, *supra* note 16, at 293; tenBroek, *supra* note 18, at 200.

²⁷ U.S. CONST. amend. XIV, § 1. See Gressman, *supra* note 19, at 1333. Earlier, the "privileges and immunities of citizens," U.S. CONST. art. IV, § 2, cl. 1, had been held to include all fundamental rights. *Corfield v. Coryell*, 6 F. Cas. 546, 551 (No. 3230) (C.C.D. Pa. 1823).

²⁸ U.S. CONST. amend. XIV, § 1, also secured Negro citizenship by providing that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

²⁹ In fact, during the course of adoption, the

Civil Rights Act of 1866 was reenacted to assure that it would be protected under the fourteenth amendment,³⁰ and the Civil Rights Act of 1875³¹ was passed.

Thus, in a very brief period, abolitionist legislators had revolutionized the concept of federalism in order to secure the rights of the country's new citizens. Unfortunately, however, this shining moment in the Reconstruction Era was short-lived as the Supreme Court, concerned with the growing centralization of federal power, refused to construe the fourteenth amendment so as to increase the federal sphere of influence. Initially, the *Slaughter House Cases*³² emasculated the privileges and immunities clause by drawing a distinction between national and state citizenship and holding that only those rights inherent in the relationship between the citizen and the national government—which it stated did not encompass an individual's fundamental rights—were protected by the amendment.³³ Subsequently, the *Civil Rights Cases*³⁴ declared those sections of the Civil Rights Act of 1875 aimed at private acts of racial discrimination in public accommodations to be an unconstitutional exercise of legislative power, holding

that Congress could only legislate to redress wrongs resulting from affirmative state action infringing the rights of its citizens.³⁵ Eventually, the thirteenth amendment was restrictively interpreted to be inapplicable to individual rights unrelated to the institution of slavery.³⁶ The result of these decisions was to reinvest the states with the responsibility of protecting civil rights, a result which the legislators of the post-Civil War era expressly sought to prevent.

Although the atmosphere for segregation was favorable, it was not until the close of the nineteenth century that this institution received the sanction of the Supreme Court when it adopted the infamous "separate but equal" doctrine in *Plessy v. Ferguson*.³⁷ The result was the enactment of a rash of statutes in the Southern states *requiring* segre-

due process clause was almost entirely ignored. Frank & Munro, *supra* note 18, at 132, 141 & n.45.

³⁰ Enforcement Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144.

³¹ Act of March 1, 1875, 18 Stat. 335, proscribing, *inter alia*, private racial discrimination in the enjoyment of public accommodations. *Id.* § 1. Section two of the Act prescribed penalties for violations of section one.

³² 83 U.S. (16 Wall.) 36 (1873).

³³ *Id.* at 73-79.

³⁴ 109 U.S. 3 (1883).

³⁵ *Id.* at 13. Earlier cases pointed to this result. See, e.g., *Virginia v. Rives*, 100 U.S. 313, 318 (1879); *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 543, 554-55 (1876).

³⁶ *Hodges v. United States*, 203 U.S. 1, 16-17 (1906). In the *Civil Rights Cases*, the Court had found the activities to be proscribed without the ambit of "badges and incidents" of slavery which could be prohibited by federal legislation enacted pursuant to the thirteenth amendment.

³⁷ 163 U.S. 537 (1896). Earlier the Court had rejected the "separate but equal" doctrine on similar facts. *Railroad Co. v. Brown*, 84 U.S. (17 Wall.) 445 (1873). Stating that laws permitting or requiring segregation were within the scope of the states' police power, the Court pointed to the establishment of separate schools as the most common example of its exercise. 163 U.S. at 544. However, it was quite some time before the Court specifically considered the separation of races in public schools and indicated that a state might constitutionally require separate facilities. See *Gong Lum v. Rice*, 275 U.S. 78, 87 (1927).

gation in public facilities.³⁸ This was to have its most profound effect on the Negro's educational opportunities, while the inability of Congress to reach private acts of discrimination was to have its most profound effect on his employment and housing opportunities.³⁹ Practically speaking, freedom for the Negro meant the "opportunity" to work on a "hired last, paid less, laid-off first" basis, and to live in a ghetto and send his children to a Negro school.

Toward Freedom?

For nearly sixty years following the Civil Rights Act of 1875, the plight of the Negro was unaided by any significant civil rights developments. The creation of the Civil Rights Section of the Department of Justice in 1939⁴⁰ was evidence of an awareness that all was not well, if nothing else.⁴¹ Eventually, changes in the employment and housing areas were initiated through executive and legislative action while judicial action was the source of reform in the educational sphere. While developments in each of these fields are somewhat interrelated, progress in each area will be examined separately for the convenience of analysis.

³⁸ Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 40 N.Y.U.L. Rev. 285, 287 (1965).

³⁹ The legality and enforceability of private racially restrictive covenants, *Corrigan v. Buckley*, 271 U.S. 323 (1926), had the effect of creating segregated housing patterns. However, governmental action aimed at achieving this effect was proscribed. *Buchanan v. Warley*, 245 U.S. 60 (1917).

⁴⁰ Order of the Att'y Gen. No. 3204, Feb. 3, 1939.

⁴¹ Concerned primarily with the enforcement of criminal sanctions, the Section was not a large one. See Gressman, *supra* note 19, at 1343.

Employment

In 1941, the first fair employment practices commission was established by executive order, proscribing discrimination by employers holding government contracts.⁴² Since then, each president has availed himself of this mode of legislation to deal with discriminatory employment practices,⁴³ but, until recently, their effectiveness was minimal.⁴⁴ Following the Government's lead,

⁴² Exec. Order No. 8802, 3 C.F.R. 957 (1938-43 Comp.).

⁴³ Exec. Order No. 9346, 3 C.F.R. 1280 (1938-43 Comp.), expanded the scope of authority to industries affecting the war effort. Exec. Order No. 9980, 3 C.F.R. 720 (1943-48 Comp.), extended the proscription to federal employment. Exec. Order No. 10308, 3 C.F.R. 837 (1949-53 Comp.) and Exec. Order No. 10479, 3 C.F.R. 961 (1949-53 Comp.), were directed at private industry. Exec. Order No. 10925, 3 C.F.R. 448 (1959-63 Comp.), granted, for the first time, authority to an executive agency to initiate complaints against contractors and to withhold future awards from guilty parties, and was supplemented by Exec. Order No. 11114, 3 C.F.R. 774 (1959-63 Comp.), which was directed at construction trade unions deliberately keeping Negroes in unskilled jobs. Exec. Order No. 11246, 3 C.F.R. 339 (1964-65 Comp.), abolished the President's Commission on Equal Employment Opportunity and assigned the Secretary of Labor the task of administering the contract compliance program, but preserved many of the provisions of Exec. Order No. 10925.

⁴⁴ The Office of Federal Contract Compliance (OFCC), for example, created by Exec. Order No. 11246 to supersede the President's Commission on Equal Employment Opportunity, has taken steps to maintain a constant surveillance over employment practices of federal contractors, and has begun to exert its influence without having to wait for a complaint or to initiate a complaint itself as the EEOC was required to do. See notes 59 & 70 *infra*. Many of the earlier executive agencies were even more restricted in the scope of their powers than was the EEOC. Another shortcoming of this method of dealing

the states soon established similar commissions.⁴⁵ Unfortunately, however, the history of fair employment practices legislation has not been a successful one for several reasons. In the first place, the neutral character of antidiscrimination legislation is often insufficient to overcome the inertia which many years of discrimination has brought about.⁴⁶ Secondly, in most states corrective

action must be initiated by a complainant and not by the commission. Finally, when coupled with the fact that the remedial process is a relatively slow one, nearly always involving an attempt at conciliation, many acts are never reported or never followed up by those who already have another job and are disinterested in the past discrimination.⁴⁷

Passage of the Civil Rights Act of 1964⁴⁸ with its comprehensive provisions for equal employment opportunities,⁴⁹ gave the Government a much more significant role in

with the problem is that it typically provides administrative relief only, and does not give the aggrieved party a private right of action. See Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691, 720 (1968) [hereinafter *Standardized Ability Tests*].

⁴⁵ New York established the first fair employment practices commission in 1945. Ives-Quinn Act, L. 1945, ch. 118, § 1 [1945] N.Y. Laws, 168th Sess. 456, as amended, N.Y. EXEC. LAW § 290 *et seq.* (McKinney Supp. 1970). Today, about forty states have adopted fair employment practices legislation. See Kovarsky, *The Negro and Fair Employment*, 56 KY. L.J. 757, 800 (1968); Lucas, *Ending Discrimination: Positive Approaches for Government*, 15 CATHOLIC LAW. 189, 190 (1969). The constitutionality of the New York Fair Employment Practices Law was upheld in *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945), when the Supreme Court rejected a union's argument that the fourteenth amendment guaranteed its right to discriminatorily select its members. However, it has been suggested that, as applied to personal service occupations, there may be a conflict with the thirteenth amendment's proscription of involuntary servitude. See Avins, *Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Antidiscrimination Legislation*, 49 CORNELL L.Q. 228 (1964). In answer to the argument that freedom to go into another line of work precludes involuntary servitude in personal service occupations, it is pointed out that inasmuch as the fourteenth amendment protects the right to earn a livelihood through any lawful means, to force one to choose between his thirteenth and fourteenth amendment rights is unconstitutional. *Id.* at 246-47.

⁴⁶ See, e.g., Kidder, *Paths from Poverty to Em-*

ployment: Job Search Among Negroes, 19 LAB. L.J. 482, 487 (1968); Spitz, *Tailoring the Techniques to Eliminate and Prevent Employment Discrimination*, 14 BUFFALO L. REV. 79 (1964). As an illustration, active recruitment of qualified Negroes may be required to overcome the image that a previously racially discriminating employer may have made with the black community, who no longer seek employment at his firm because of the reputation that it has acquired, or to overcome the Negroes' reluctance to persevere in the search for a job as a result of the many unsuccessful attempts to secure employment in the past.

⁴⁷ See Hill, *supra* note 7, at 33-34.

⁴⁸ 42 U.S.C. §§ 2000-2000h-6 (1964).

⁴⁹ *Id.* §§ 2000e-2000e-15 [hereinafter title VII]. Inasmuch as the Act was based upon the commerce clause prior to the recent expansion of the scope of the thirteenth and fourteenth amendments, it applies to only those employers in interstate commerce who employ twenty-five or more. Other significant exclusions from the compass of the Act are the United States and its wholly owned corporations, state and local governments, and educational institutions with respect to employment of individuals to perform work connected with the educational activities of the institution. See 42 U.S.C. § 2000e-1 (1964). It has been estimated that these exclusions leave 92 percent of the employers outside the Act's coverage. See Comment, *Racial Discrimination in Employment Under the Civil Rights Act of 1866*, 36 U. CHI. L. REV. 615, 624 & n.42 (1969).

the employment area. In addition to proscribing racial discrimination and segregation by employers and labor organizations,⁵⁰ the Act takes cognizance of standardized tests and seniority systems, two areas where discrimination is more subtle than an outright refusal by an employer to hire or by a union to admit a Negro to membership.⁵¹ Both play a significant role in labor today,⁵² providing an

⁵⁰ 42 U.S.C. §§ 2000-e (a)&(c).

⁵¹ *Id.* § 2000e-2(h) provides that

it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a *bona fide seniority or merit system* . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any *professionally developed ability test* provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin.

(Emphasis added.) Most state laws have no provisions concerning testing. See Kovarsky, *supra* note 45, at 813; *Standardized Ability Tests* at 722.

⁵² Employers rely on tests as a basis for hiring, promoting, and assigning jobs. Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1637 (1969). They can be used on a competitive basis to seek the highest scorer, or they can be used as a screening device to select those who achieve a predetermined score for further consideration. *Id.* One study indicated that there had been an increase in the use of personnel tests by the firms represented from 64 percent in 1958 to 84 percent in 1963. *Standardized Ability Tests* at 696. With respect to seniority systems, their use is widespread in significantly sized businesses in which employees are organized, and generally play some role in the determination of work allocation. Cooper & Sobol, *supra*, at 1602 & 1604. It has been estimated that 90 per-

centage of all employment contracts provide for seniority. See 2 BNA COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS 75:1 (1967).

cent of all employment contracts provide for seniority. See 2 BNA COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS 75:1 (1967).⁵³ Fifteen to twenty percent of all charges filed under title VII involve a testing issue. Cooper & Sobol, *supra* note 52, at 1637.⁵⁴ *Id.* at 1639; see also *Standardized Ability Tests* at 701. Thus, the discrimination may even be inadvertent where an employer is using standard tests in good faith. To date, there has been no scientifically proven correlation between race and intelligence, and, although there is some controversy, it is generally presumed that the inherent ability of Negroes and whites is equal. See *id.* at 695. Two possible corrective measures to this problem are the development of "culture free" tests, *id.* at 704, and the recognition of different score levels for qualification, *id.* at 705.⁵⁵ While it has been suggested that a test which does not accurately predict job performance is not necessarily invalid with respect to equal employment opportunity inasmuch as it affects whites and Negroes alike, Cooper & Sobol, *supra* note 52, at 1660, it is submitted that the burden will fall most heavily on the Negro inasmuch as his generally inferior performance on such tests will result in a correspondingly smaller percentage of Negroes achieving the test's qualification score,

opportunity for more sophisticated forms of racial discrimination,⁵³ and their discriminatory effects are somewhat interrelated insofar as testing is used in conjunction with seniority systems.

The most essential problem with respect to standardized employment tests is that Negroes and other disadvantaged groups score substantially lower than whites on general intelligence or aptitude tests because their inferior educational background and culturally deprived environment create inherent disadvantages.⁵⁴ This inequity is compounded by the fact that "test score-job performance" correlations are usually very low⁵⁵—*i.e.*, tests are invalid predictors of

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job performance. While test validation is by no means foolproof,⁵⁶ making it a prerequisite to the use of any test would help to alleviate intentional discrimination through testing.⁵⁷ In addition, the possibility

unless, of course, any of the corrective measures discussed in note 54 *supra* have been taken. *E.g.*, in *Hicks v. Crown Zellerbach Corp.*, 69 LRRM 2005 (E.D. La. 1968), applicants for all jobs, including janitorial positions, were required to pass a test battery which was shown to be valid for only the top 8 percent of the jobs in the plant. Naturally there would be a greater percentage of whites capable of passing the test; but there would most likely be an equal percentage of whites and Negroes capable of performing a janitor's functions.

⁵⁶ See, *e.g.*, Kovarsky, *Some Social and Legal Aspects of Testing Under the Civil Rights Act*, 20 LAB. L.J. 346 (1969). Test validation is essentially a two-step process involving, first, determination of the skills and personality traits requisite for successful job performance and the development of measures to accurately assess these requirements, and, second, correlation of test results to on-the-job performance. *Standardized Ability Tests* at 696-97. The problem lies where the initial determination of requisites for successful job performance contains irrelevant requirements, inasmuch as some who could successfully perform the job will not make the grade even though the test predicts accurately among "qualifying" applicants. *Id.* at 698.

⁵⁷ The Equal Employment Opportunity Commission's *Guidelines on Employment Testing Procedures* announced the Commission's interpretation of title VII's reference to "professionally developed ability test," see note 51 *supra*, as one fairly measuring the requisite knowledge or skill for a particular job, or one fairly affording an employer a chance to measure the applicant's ability to perform a particular job. See CCH EMPL. PRAC. GUIDE ¶ 16,904 (1967). These guidelines have been adopted by some courts, *e.g.*, *United States v. H. K. Porter Co.*, 296 F. Supp. 40, 78 (N.D. Ala. 1968), and rejected by others, *e.g.*, *Griggs v. Duke Power Co.*, 292 F. Supp. 243, 250 (M.D.N.C. 1968). In addition, it was suggested that the tests be used as only one of the

of holding a union responsible for discriminatory testing practices where, as the elected bargaining agent, it agrees with an employer to the use of an invalid or inherently discriminatory test might provide aid in this direction.⁵⁸ Growing concern, at any rate, is evidenced by increasing federal pressures in this area.⁵⁹

To the extent that tests are used in conjunction with a seniority system to determine promotions, their invalidity is no less an invidious means of discrimination.⁶⁰ However, aside from testing, improperly administered seniority systems are primarily repugnant to equal employment opportunity insofar as they, like testing, perpetuate the effects of previous discriminatory practices by keeping Negroes con-

determinants in the selection process. See CCH EMPL. PRAC. GUIDE ¶ 16,904 (1967).

⁵⁸ See Kovarsky, *supra* note 45, at 814. Liability would be predicated upon breach of the union's duty to represent all members of the bargaining unit fairly, whether or not they are members of the union. This duty was first established under the Railway Labor Act in *Steele v. Louisville N.R.R.*, 323 U.S. 192 (1944), and then under the National Labor Relations Act in *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944). Even if the union did not actively encourage an employer to use a discriminatory test, its inaction with knowledge that one is being used may be actionable. See *Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12, 18 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967), *reh'g denied*, 389 U.S. 1060 (1968).

⁵⁹ The OFCC, *e.g.*, issued an order requiring government contractors regularly using tests to have evidence available to indicate the validity of the tests with respect to their intended purpose, except for tests used at the management, technical, and professional levels. 33 Fed. Reg. 14,392 (1968).

⁶⁰ See Cooper & Sobol, *supra* note 52, at 1648-49 & 1656.

fined to low paying, undesirable jobs.⁶¹ Although seniority rights are not vested property rights and can be altered,⁶² where the existing nondiscriminatory system is related to a valid management function, the benefits of which outweigh the inequities of the perpetuated effects of previous discrimination, it will be left undisturbed.⁶³ On

the other hand, where the adverse racial impact is not sufficiently justified, the system will have to be changed.⁶⁴

In addition to the progress being made with respect to discrimination through testing and seniority, the prospect of substantial penetration of the traditional racial barriers of unions may prove to be the most significant achievement for the Negro.⁶⁵ Al-

⁶¹ See *id.* at 1602-04; Gould, *Seniority and the Black Worker: Reflections on Quarles and Its Implications*, 47 TEXAS L. REV. 1039, 1040 (1969). Discussion will be confined to "competitive status seniority," used to determine priorities among employees for employment advantages like promotion and job security, in contrast to "benefit seniority," which is used without regard to the status of other employers to determine eligibility for fringe benefits. See Cooper & Sobol, *supra* note 52, at 1601 n.1. Its measurement may be in terms of total length of employment with the employer, length of service within a particular department, length of service in a line of progression of interrelated jobs, or length of service in a particular job. *Id.* at 1602. An employer may use different measures for different purposes; e.g., promotion may be governed by job seniority within a line of progression while layoffs are governed by employment seniority. *Id.* at n.4.

⁶² *Humphrey v. Moore*, 375 U.S. 335 (1964).

⁶³ See, e.g., *Whitfield v. Local 2708, United Steelworkers of America*, 263 F.2d 546, cert. denied, 360 U.S. 962 (1959), involving a system of departmental seniority with two segregated lines of progression in each department, the line for whites consisting of the skilled, higher paying jobs. The knowledge acquired in any given job was necessary for efficient performance in the next job in the line of progression, and the fact that a Negro transferring from an advanced position in the unskilled line would have to take a pay cut did not render the system invalid, nor did it entitle the Negro to begin at a position in the skilled progression line at which the salary was comparable to that of his former job. *United States v. H. K. Porter Co.*, 296 F. Supp. 40 (N.D. Ala. 1968), involved a similar situation in which the lines of progression were integrated by using base wage rates as the determinant for placement of jobs in the integrated

line. Demands for unrestricted transfers—i.e., eligibility for all vacant jobs on the basis of total employment or plant seniority—were rejected because the interrelation of jobs within each department necessitated entrance at the initial position and a gradual working up to the higher position. *Id.* at 67. See also *United States v. Hayes Int'l Corp.*, 295 F. Supp. 803 (N.D. Ala. 1968).

⁶⁴ See, e.g., *Quarles v. Phillip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968), involving a system of departmental seniority in which the departments were segregated, with Negroes confined to those departments with unskilled, lower paying jobs. Upon the integration of the departments, the court held that differences in seniority resulting from past discrimination were invalid, pointing out the fact that considerations present in *Whitfield*—i.e., a close interrelation of skills required for progressive jobs—were nonexistent in the case before it. *Id.* at 518. *United States v. Local 189, United Papermakers & Paperworkers*, 282 F. Supp. 39 (E.D. La. 1968), concerning a job seniority system, held that promotion on the basis of job seniority was invalid where Negroes were being permitted to hold jobs from which they had theretofore been excluded. *Id.* at 44.

⁶⁵ At present, Negroes are significantly represented only in industrial unions, in which they generally hold jobs of low pay and skill, and the "mud trades"—e.g., bricklaying—which are increasingly avoided by white workers. *What Unions Are—And Are Not—Doing For Blacks*, TIME, Sept. 26, 1969, at 88. Their absence is particularly conspicuous in the construction, electrical, sheet-metal, and plumbing trades. *Id.* In 1963, e.g., only 300 Negro electricians and plumbers were reported employed throughout the country. Kovarsky, *supra* note 45, at 800 n.206 (citing *Hearings on Civil Rights Before Sub-*

though for the past twenty years unions have been legally obligated to represent Negroes fairly when they are members of the represented bargaining unit,⁶⁶ and to refrain from racial discrimination in the selection of members,⁶⁷ they have been successful in excluding Negroes from membership⁶⁸ and in preventing them from obtaining jobs in their respective trades.⁶⁹ However, recent legislative and executive developments⁷⁰ and decisional law⁷¹ evince

comm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess. 1799 (1963)).

⁶⁶ See note 58 and accompanying text *supra*.

⁶⁷ *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945). This position was codified in title VII, 42 U.S.C. § 2000e-2(c) (1964).

⁶⁸ Rigid control of apprenticeship programs, often making use of invalid qualification tests, has been the primary device for achieving this goal. *TIME*, *supra* note 65, at 88. The proscription against discriminatory testing in title VII applies only to employers. 42 U.S.C. § 2000e-2(h) (1964). See note 51 *supra*.

⁶⁹ Initially achieved through the closed shop, the Taft-Hartley Act's outlawing of that discriminatory device has left exclusive hiring hall or referral arrangements as the major trouble spot. See *Govern, The National Labor Relations Act and Racial Discrimination*, 62 *COLUM. L. REV.* 563, 567 (1962). Under such contractual arrangements, contractors are bound to seek workers in a given trade through the union.

⁷⁰ 42 U.S.C. § 2000e-2(d) (1964) prohibits discrimination in training programs. Active encouragement of full participation by Negroes in such programs may be required to make this provision effective. See *Kovarsky*, *supra* note 45, at 815; see also *Blumrosen, The Duty of Fair Recruitment under the Civil Rights Act of 1964*, 22 *RUTGERS L. REV.* 465 (1968). The OFCC has issued guidelines specifying integration goals to be met in various trades by bidders for Government contracts for the Philadelphia area, and is considering similar programs for other cities. See *Guidelines on Order Amending Philadelphia Plan Relating to Minority Group Employment Goals*, LRX, Sept. 29, 1969 (Supp. No. 270).

⁷¹ See, e.g., *Local 53, Int'l Ass'n of Heat &*

a dogged determination to correct this situation.

Housing

Federal assistance in the provision of low-income housing initiated reform in this area in 1937.⁷² Thereafter, the judiciary's proscription of judicial enforcement of racially restrictive covenants⁷³ and of racial discrimination in the admission of applicants to low-cost housing projects⁷⁴ continued the movement. And in 1962 the executive branch indicated its determina-

Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969), involving a union with membership requirements tending to restrict admission to close relatives and friends of existing members. Since the union had had a history of racial discrimination, the requirements were held to be invalid because they would perpetuate that discrimination. The court ordered the development of objective, trade-related membership criteria and procedures. *Id.* at 1053. In *Etheridge v. Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967), the state was enjoined from entering into a contract with a construction union that discriminated against Negro membership inasmuch as it would be aiding thereby in the deprivation of Negro employment opportunity.

⁷² Housing Act of 1937, 42 U.S.C. §§ 1401-30 (1964).

⁷³ *Shelly v. Kraemer*, 334 U.S. 1 (1948), held that judicial enforcement of racially restrictive covenants was state action within the scope of the fourteenth amendment. *Hurd v. Hodge*, 334 U.S. 24 (1948), held judicial enforcement of these covenants by federal courts of the District of Columbia to be violative of 42 U.S.C. § 1982 (1964), guaranteeing all citizens equal rights in transactions involving real and personal property. In addition, it was subsequently held that a state court's awarding of damages for breach of a restrictive covenant would also be violative of the equal protection clause. *Barrows v. Jackson*, 346 U.S. 249 (1953).

⁷⁴ *Jones v. City of Hamtramck*, 121 F. Supp. 123 (E.D. Mich. 1954).

tion to improve conditions.⁷⁵ However, it was not until 1968, with the passage of the Civil Rights Act⁷⁶ and the decision of *Jones v. Alfred H. Mayer Co.*,⁷⁷ that prospects for the eventual elimination of all racial discrimination in housing appeared.⁷⁸

Essentially, Congress' fair housing legislation prohibits discrimination in transac-

tions involving residential property,⁷⁹ with several exemptions.⁸⁰ It applies to the owner of such property,⁸¹ those who make commercial real estate loans,⁸² and those who provide brokerage services.⁸³ Coverage is estimated to include between 75 and 85 percent of the nation's housing supply.⁸⁴ In contrast, the decision in *Jones* resurrected legislation that lay dormant for many years⁸⁵ and construed it to proscribe, as a

⁷⁵ Exec. Order No. 11063, 3 C.F.R. 652 (1959-63 Comp.), proscribed racial discrimination in federally-assisted housing.

⁷⁶ 42 U.S.C. §§ 3601-31 (Supp. IV 1969) [hereinafter title VIII].

⁷⁷ 392 U.S. 409 (1968).

⁷⁸ At the state level, only twenty-eight states have legislation prohibiting racial discrimination in housing. Lucas, *supra* note 45, at 190. However, such legislation has been the subject of repeated judicial inquiry. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967), in which the passage of an amendment to a state constitution was held unconstitutional insofar as it provided that the state could not interfere with an individual's right to absolute discretion in the choice of persons with whom to enter into transactions involving real property. Inasmuch as the amendment would have repealed two statutes prohibiting racial discrimination in these transactions, the practical effect of the amendment was to authorize private racial discrimination, thereby violating the equal protection clause. Similarly, an amendment to a city charter in *Hunter v. Erickson*, 393 U.S. 385 (1969), providing that approval by popular vote was required for any enactment regulating the control and disposition of real property and, in effect, rendering the state's fair housing law nugatory, was declared unconstitutional. It was held to discriminate against minorities by making it more difficult for them to secure legislation on their behalf concerning racial housing matters. *Id.* at 390-91. Likewise, in *Holmes v. Leadbetter*, 294 F. Supp. 991 (E.D. Mich. 1968), and *Ranjel v. Lansing*, 293 F. Supp. 301 (W.D. Mich. 1968), an attempt to put fair housing legislation to a referendum was enjoined inasmuch as it would involve the state in private racial discrimination to an "unconstitutional degree." *But see Spaulding v. Blair*, 403 F.2d 862

(4th Cir. 1968), in which the subjection of fair housing legislation to a referendum was upheld. Emphasis was placed on the fact that the referendum procedure was an integral part of the state's legislative process. Thus, rejection of the provisions passed by the state legislature through a referendum would not be tantamount to a repeal of an existing law inasmuch as the provisions had never become effective, being dependent upon the referendum for that purpose.

⁷⁹ See 42 U.S.C. § 3602(b) (Supp. IV 1969).

⁸⁰ The sale or rental of single-family housing is without the scope of the Act if the resident homeowner does not own three such single-family houses at any one time, and if he does not make use of sales or rental facilities or sales or rental services of a real estate broker, agent, or salesman. *Id.* § 3603(b)(1). In addition, the Act does not apply to "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence." *Id.* § 3603(b)(2).

⁸¹ *Id.* § 3604. Religious organizations and private clubs, however, are exempt. *Id.* § 3607.

⁸² *Id.* § 3605.

⁸³ *Id.* § 3606.

⁸⁴ See Smedley, *A Comparative Analysis of Title VIII and Section 1982*, 22 VAND. L. REV. 459, 467 (1969).

⁸⁵ 42 U.S.C. § 1982 (1964), derived from section one of the Civil Rights Act of 1866, *cf.* note 21 *supra*, and provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

valid exercise of the enabling power of the thirteenth amendment, *all* racial discrimination in the sale or rental of *any* property.⁸⁶ Thus, title VIII encompasses a broader range of discriminatory conduct and reaches beyond the owner, seller, or lessor, while section 1982 appears to focus on the specific property transactions by which ownership, possession, and use thereof are obtained. However, section 1982 is broader in its transactional application since it applies to all citizens without exception. The resolution of conflicts between these legislative enactments will have to await future determination,⁸⁷ as will the full implications of *Jones*.⁸⁸

⁸⁶ “. . . § 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property. . . .” 392 U.S. at 413. In so finding, the Court cited with approval the view stated in the *Civil Rights Cases* with respect to the enabling clause of the thirteenth amendment, which it said empowered Congress to pass “*all laws necessary and proper for abolishing all badges and incidents of slavery. . . .*” *Id.* at 439. (Emphasis added by *Jones* Court, quoting from 109 U.S. at 20.) See *Lee v. Southern Home Sites Corp.*, 1 R.R.L.S. 131 (S.D. Miss. 1969) (enjoining refusal to sell building lot to Negro solely because of his race); *Jones v. Sciacia*, 297 F. Supp. 165 (E.D. Mo. 1969) (involving racial discrimination in apartment rental). Section 1982 has also provided the basis for an action where white tenants were evicted from their apartment because they had had Negro guests. *Walker v. Pointer*, 304 F. Supp. 56 (N.D. Tex. 1969).

⁸⁷ See, e.g., *Bush v. Kaim*, 297 F. Supp. 151 (N.D. Ohio 1969), holding that exemptions under title VIII were not applicable to litigation under section 1982. Cf. *Berback v. Mangum*, 59 Misc. 2d 41, 297 N.Y.S.2d 853 (Sup. Ct. Monroe County 1969), involving New York Executive Law § 296(5)(a), which contains exemptions for owner-occupied dwellings similar to those of title VIII. The exemptions were challenged as violative of the thirteenth and fourteenth amendments in view of the con-

Despite the fact that these two enactments remove many of the racial barriers in the housing area, the crucial problem has yet to be solved—*i.e.*, the elimination of segregated housing patterns and their pernicious effects.⁸⁹ In an effort to alleviate

struction given to section 1982 in *Jones*, but the court upheld the constitutionality of the exemptions, quoting with approval from the Supreme Court's opinion in *Jones*:

Thus, although § 1982 contains *none* of the exemptions that Congress included in the Civil Rights Act of 1968, it would be a serious mistake to suppose that § 1982 in any way diminishes the significance of the law recently passed by Congress. (Italics supplied). (Footnotes omitted).

Id. at 47, 297 N.Y.S.2d at 860.

⁸⁸ The decision may very well have an impact in the employment area if 42 U.S.C. § 1981 (1964) is revitalized in the same fashion as was section 1982. Although the derivation of section 1982 is often cited as section 16 of the Enforcement Act of 1870, it originated in the Civil Rights Act of 1866. See Comment, *supra* note 49, at 619-20 (1969). Compare the language of the section with that quoted from the 1866 Act in note 21 *supra*. Section 1981 provides, in pertinent part, that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens” Inasmuch as employment is a contractual arrangement, this section could reach all acts of employment discrimination in hiring. In fact, while the civil rights bill was before Congress during the Reconstruction Era, the employment contract was specifically referred to and discussed. Comment, *supra* note 49, at 619 & n.19. Applied in this manner, it could fill the gaps in title VII, see note 49 *supra*, just as section 1982 does with title VIII. There has already been one decision treating section 1981 as a fair employment law. *Dobbins v. Local 212, Int'l Bhd. Elec. Workers*, 292 F. Supp. 413, 442 (S.D. Ohio 1968).

⁸⁹ This has a significant impact on both education, see notes 112-119 and accompanying text *infra*, and employment, see note 8 *supra*.

the problem, the Department of Housing and Urban Development has begun to subsidize low-rent housing in cities with ghetto problems, provided the site for the project is in a nonghetto area.⁹⁰ Problems arise where desirable sites are in areas zoned for single-family residences and the like, but refusal to rezone such an area solely on the basis of racial considerations—e.g., reluctance to have a significant number of Negroes move into the area—has been held unconstitutional as violative of both the

⁹⁰ As was pointed out by the court in *Hicks v. Weaver*, 302 F. Supp. 619, 622 (E.D. La. 1969), The Department of Housing and Urban Development (HUD) has indicated that title VI of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000d-2000d-4 (1964), prohibits construction of federally-financed public housing in all-Negro neighborhoods in the absence of a clear showing that no other acceptable sites are available:

"The aim of a Legal Authority in carrying out its responsibility for site selection should be to select from among sites which are acceptable under the other criteria of this Section those which will afford the greatest opportunity for inclusion of eligible applicants of all groups regardless of race, color, creed, or national origin, thereby affording members of minority groups an opportunity to locate outside of areas of concentration of their own minority group. Any proposal to locate housing only in areas of racial concentration will be *prima facie* unacceptable and will be returned to the Local Authority for further consideration and submission of either (1) alternative or additional sites in other areas so as to provide more balanced distribution of the proposed housing or (2) a clear showing, factually substantial, that no acceptable sites are available outside the areas of racial concentration." (emphasis added) Low-Rent Housing Manual, § 205.1 ¶ 4(g), (February 1967 Revision).

See also *Gautreaux v. Chicago Housing Authority*, 304 F. Supp. 736 (N.D. Ill. 1969).

⁹¹ *Ranjel v. City of Lansing*, 293 F. Supp. 301 (W.D. Mich. 1969).

thirteenth⁹¹ and fourteenth⁹² amendments. Nonetheless, critical housing shortages compounded by inefficiencies of the construction industry,⁹³ which are, in turn, due in part to outmoded building codes,⁹⁴ prevents progress at a desirable pace. Moreover, even though improved conditions may provide the Negro with somewhat more mobility and the cities may be successful in constructing low-rent housing in nonghetto areas in order to maximize the opportunity for integration, the underlying problem still remains—the people of the community.

Unfortunately, attempts at integration in housing are plagued by what is termed the "invasion-succession sequence."⁹⁵ As Negroes move into an area, white families tend to move out, the rate of white departure accelerating as the percentage of Negroes in the area increases.⁹⁶ At some

⁹² *Id.*; *Daly v. City of Lawton*, 296 F. Supp. 266 (W.D. Okla. 1969).

⁹³ One proposal for overcoming this shortage is HUD's Operation Breakthrough, a plan which calls for the development of a housing industry through the use of mass production techniques. See Huxtable, *Assembly Line for that Dream House*, N.Y. Times, Feb. 1, 1970, § 4, at 3, col. 6.

⁹⁴ Not only are the building codes outdated, thereby preventing the use, in some instances, of new materials, but there are also more than 5,000 different building codes throughout the country, thereby making it impossible to make use of standardized equipment and techniques. See Peter, *Housing: From Crisis to Disaster?*, LOOK, Feb. 10, 1970, at 53.

⁹⁵ See Hellerstein, *The Benign Quota, Equal Protection and "The Rule in Shelley's Case,"* 17 RUTGERS L. REV. 531, 533 (1963).

⁹⁶ The process is hastened by the fact that whites, because of color differences, tend to overestimate the number of nonwhites living in a neighborhood by three times the actual num-

point—the “tipping point”⁹⁷—the remaining white families, fearful that a Negro “invasion” is imminent,⁹⁸ depart at a greatly accelerated rate, making the ensuing “invasion” possible. As an expedient, piecemeal device to achieve integration, the benign quota⁹⁹ has proven successful.¹⁰⁰ However, successful widespread use of this device is questionable in view of the decision in *Shelley v. Kraemer*.¹⁰¹

ber. Navasky, *The Benevolent Housing Quota*, 6 How. L.J. 30, 36 (1960).

⁹⁷ Tipping points vary according to the intensity of a community’s prejudicial feeling and the surrounding area’s racial composition. Hellerstein, *supra* note 95, at 534.

⁹⁸ The practice of “block-busting”—*i.e.*, exploitation of a community’s fears of decreasing property values because of the presence of Negroes in the neighborhood by real estate brokers in order to induce a rapid turnover in the sale of houses, thereby increasing commissions—is proscribed by title VIII, 42 U.S.C. § 3604(e) (Supp. IV 1969). The constitutionality of this provision has been upheld in *United States v. Mintzes*, 304 F. Supp. 1305 (D. Md. 1969).

⁹⁹ A maximum limit, just below the tipping point, on the number of Negroes permitted to move into a given area. The variety of intangible factors that determine the tipping point of a particular area create administrative problems in their establishment and in determining whether or not they are being abused. See Kaplan, *supra* note 5, at 393.

¹⁰⁰ Navasky, *supra* note 96, at 37.

¹⁰¹ 334 U.S. 1 (1948). See, *e.g.*, *Progress Dev. Corp. v. Mitchell*, 182 F. Supp. 681 (N.D. Ill. 1960), *rev’d on other grounds*, 286 F.2d 222 (7th Cir. 1961), involving a land developer who was planning to maintain a four-to-one ratio of whites to Negroes in his development through the use of separately executed, unrecorded resale agreements giving him the right to select a purchaser for the property in the event of a resale of the premises. The court held that the discriminatory restrictions, even though aimed at controlled integration, could not be judicially enforced. *Id.* at 707. The court also pointed out that such a quota would be a “straitjacket,”

Education

The seeds of the collapse of *de jure* school segregation were sown at about the same time that reform was beginning in the employment and housing areas.¹⁰² Subsequent developments began to erode the “separate but equal” doctrine as applied to education,¹⁰³ culminating in its outright rejection in the decision of *Brown v. Board of Education*¹⁰⁴ (*Brown I*). However, a year later, the decree in *Brown v. Board of Education*¹⁰⁵ (*Brown II*), implementing the desegregation decision was qualified with

freezing integration efforts at levels that would remain after they had outlived their usefulness and impeding further natural integration.

¹⁰² In 1938, the Supreme Court declared a state statute providing for the payment of Negro tuition fees for attendance at an out-of-state law school, pending the provision of separate legal educational facilities for Negroes within the state, to be violative of the fourteenth amendment. Although the Court did not disturb the “separate but equal” doctrine, it held that as long as there were facilities for whites within the state, the state was bound to provide Negroes with comparable facilities within the state immediately. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

¹⁰³ In 1948, the Court specifically compelled the admission of Negroes to a state’s legal institutions absent similar facilities for Negroes only. *Sipuel v. Board of Regents*, 332 U.S. 631 (1948). Subsequent decisions in *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950), and *Sweatt v. Painter*, 339 U.S. 629 (1950), pointed more in the direction of *Brown I* insofar as they expressed concern for the *quality* of a racially segregated education.

¹⁰⁴ 347 U.S. 483 (1954). In proscribing *de jure* segregation, the Court declared separate educational facilities to be “inherently unequal.” *Id.* at 495. In the companion case of *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Court held segregated public education in the District of Columbia to be violative of the fifth amendment’s due process guarantee.

¹⁰⁵ 349 U.S. 294 (1955).

the infamous "all deliberate speed" requirement.¹⁰⁶ Taking advantage of the leeway given them, Southern states lost no time in initiating plans designed to destroy the efficacy of *Brown I*. These were facilitated by restrictive interpretations of the holding in *Brown I* and the permissible scope of the fourteenth amendment.¹⁰⁷ As racially invidious schemes were struck down, new ones were devised to take their place.

Initially, laws were passed in many states to provide for the reassignment of pupils, purportedly with a view to desegregation.¹⁰⁸ Where there were no standards provided in the laws to guide school officials in exercising their discretion, they were held to be unconstitutional as impliedly having race as the standard of assignment.¹⁰⁹ Other-

wise, standards provided which were prima facie constitutional were judged according to the manner in which they were applied if challenged.¹¹⁰ Moreover, attempts to thwart desegregation by closing public schools were declared unconstitutional also where state support was given to the purportedly private schools.¹¹¹ In addition, transfer plans allowing students upon request to transfer to a school for the purpose of being in a racial majority were likewise proscribed.¹¹² While previous discriminatory practices were, for the most part, short-lived, the freedom-of-choice plan, which removed state involvement from the desegregation scheme by providing, essentially, that all students were to be permitted to attend the school of their own choosing, proved to be the most ingenious device devised to perpetuate dual school systems. With the aid of this device, de jure school segregation was kept intact for more than a decade after the decision of *Brown I*.

Unable to tolerate the conspicuous absence of any significant advancement toward the goal of unitary school systems under the timid, initial approach of *Brown II*, the Fifth Circuit¹¹³ decreed that the

¹⁰⁶ *Id.* at 301. The district courts were to insure good faith compliance with the new constitutional mandate. *Id.* at 299. Although they did not bind the courts, the Department of Health, Education, and Welfare issued guidelines adopted by most courts in evaluating school desegregation plans. See 45 C.F.R. 118.13 (1967). The "all deliberate speed" requirement was early held inapplicable to students at the graduate or professional school level, *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413 (1956) (per curiam), and subsequently at the college, *Meredith v. Fair*, 305 F.2d 343 (5th Cir.), cert. denied, 371 U.S. 828 (1962), and high school levels, *Rogers v. Paul*, 382 U.S. 198 (5th Cir. 1957); *Briggs v. Elliott*, 132 F. Supp. 776 (E.D.S.C. 1955).

¹⁰⁷ Several decisions held that integration was not required. As long as there was no governmentally enforced segregation in a desegregation plan, it mattered not that the school systems retained, for all practical effect, their dual character. See, e.g., *Borders v. Rippey*, 247 F.2d 268 (5th Cir. 1957); *Briggs v. Elliott*, 132 F. Supp. 776 (E.D.S.C. 1955).

¹⁰⁸ See generally Meador, *The Constitution and the Assignment of Pupils to Public Schools*, 45 VA. L. REV. 517 (1959).

¹⁰⁹ See, e.g., *Orleans Parish Sch. Bd. v. Bush*,

242 F.2d 156 (5th Cir.), cert. denied, 354 U.S. 921 (1957).

¹¹⁰ See, e.g., *Carson v. Warlick*, 238 F.2d 724 (4th Cir.), cert. denied, 353 U.S. 910 (1957).

¹¹¹ *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964); *Hall v. St. Helena Parish Sch. Bd.*, 287 F.2d 376 (5th Cir.), aff'd per curiam, 368 U.S. 515 (1962).

¹¹² *Goss v. Board of Educ.*, 373 U.S. 683 (1963).

¹¹³ The Fifth Circuit includes Alabama, Mississippi, Louisiana, and Georgia, which, in addition to South Carolina, have been the most stubborn in resisting desegregation. See *Yes*

fourteenth amendment, as construed in *Brown I*, required integration of students, faculties, facilities, and activities,¹¹⁴ imposing an affirmative duty on school administrators to take corrective action toward the goal of one integrated school system.¹¹⁵ This position was substantially

Virginia, There Is A Constitution, NEWSWEEK, Nov. 10, 1969, at 37.

¹¹⁴ *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 846 (1966), *aff'd en banc on reh'g*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

¹¹⁵ *Id.* at 869. In setting up a guideline the court made its position unmistakable: "The only school desegregation plan that meets constitutional standards is one that works." *Id.* at 847. Freedom-of-choice plans were held to be unacceptable where freedom was illusory, *id.* at 889—*i.e.*, *e.g.*, where overcrowded schools prevented admission, or where lack of sufficient transportation, or lack of integrated faculties and administrative personnel discouraged seeking admission in another school. *See, e.g.*, *Betts v. County Sch. Bd.*, 269 F. Supp. 593, 601 (W.D. Va. 1967). Prior to *Jefferson*, the Supreme Court had decreed that the impact of faculty allocation was to be taken into account in determining the validity of a desegregation plan. *Bradley v. School Bd.*, 382 U.S. 103 (1965). Today, circumstances may even dictate a judicial decree ordering faculty desegregation to approach a goal in which the ratio of white to Negro faculty members is substantially the same in each school as it is throughout the system. *See United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969).

A related problem arising out of closing down formerly Negro schools in moving toward a unitary school system concerns employment problems resulting from reduced job availability. Generally, it has been held that jobs be filled according to objective qualification standards, irrespective of race. *See, e.g.*, *Rolfe v. County Bd. of Educ.*, 391 F.2d 77 (6th Cir. 1968); *Wall v. Stanly County Bd. of Educ.*, 378 F.2d 275 (4th Cir. 1967). This procedure was insisted upon even where a school board had a previously established policy of dismissing teach-

ers from closed schools. *Smith v. Board of Educ.*, 365 F.2d 770 (8th Cir. 1966).¹¹⁶ Most recently, the Court has reaffirmed its position with respect to desegregation in *Alexander v. Holmes County Board of Education*.¹¹⁷ Rejecting the Justice Department's plea on behalf of several Mississippi school districts for more time to implement desegregation plans, the Court denounced "all deliberate speed" as no longer constitutionally permissible, establishing the principle that henceforth all pleas for exceptions to desegregation may be made only after integration is an established fact.¹¹⁸

Nevertheless, an affirmative duty to eliminate de facto school segregation has not yet been imposed on school administrators by the Supreme Court.¹¹⁹ While there are

ers from closed schools. *Smith v. Board of Educ.*, 365 F.2d 770 (8th Cir. 1966).

¹¹⁶ 391 U.S. 430 (1968). And in *Monroe v. Board of Comm'rs*, 391 U.S. 450 (1968), the Court held a desegregationally ineffective free transfer plan to be unconstitutional.

¹¹⁷ 396 U.S. 19 (1969).

¹¹⁸ At the time of the decision, fifteen years after the decision in *Brown I*, only 464 of the South's 1,129 school districts were operating under unitary systems. 'Yes Virginia, There Is A Constitution,' NEWSWEEK, Nov. 10, 1969, at 36.

¹¹⁹ Title IV of the 1964 Civil Rights Act defined desegregation to exclude "the assignment of students to public schools in order to overcome racial imbalance." 42 U.S.C. § 2000c (b) (1964). However, this has been held not to prohibit plans to correct racial imbalance. *See, e.g.*, *Olson v. Board of Educ.*, 250 F. Supp. 1000 (E.D.N.Y.), *appeal dismissed*, 367 F.2d 565 (2d Cir. 1966); *Addabbo v. Donovan*, 16 N.Y.2d 619, 209 N.E.2d 112, 261 N.Y.S.2d 68, *cert. denied*, 382 U.S. 905 (1965).

At least one state has enacted legislation requiring affirmative action to alleviate racial imbalance. *See MASS. GEN. LAWS ANN.*, ch. 71, §§ 37C, 37D (Supp. 1967), which provides for the withholding of state subsidies should local

distinct advantages to school assignments based upon geographical zoning,¹²⁰ alternative plans¹²¹ must be given serious consid-

school authorities fail to keep nonwhite pupil concentrations below the 50 percent level. The statute has survived a constitutional challenge in the state's highest court. *School Comm. v. Board of Educ.*, 352 Mass. 693, 227 N.E.2d 729 (1967). For an informative discussion on the legislative problems involving de facto school segregation, see Bolner, *Legislative Problems Surrounding Racially Balanced Public Schools: A Critical Examination of the Responses and the Prospects*, 22 VAND. L. REV. 1253 (1969).

¹²⁰ For one thing, it avoids the costs, inconveniences, and hazards of daily transportation, and facilitates parent participation in parent-teacher associations. Fiss, *supra* note 11, at 566. Secondly, it enables parents to control their children's associations in the public schools through choice of residence—a somewhat meaningless choice for most Negroes who lack the ability to exercise a relatively free choice over residence. *Id.* at 566-67. Associational objections by whites to imbalanced schools are based, for the most part, on socio-economic class disparities rather than color. *Id.*

¹²¹ Three plans which would seem to offer the most promise in terms of effectiveness and convenience are strategic site selection for new schools, adoption of the Princeton Plan, and redrawing geographic zones to cut across racially segregated areas. Under the first, new schools would be built on the border of ghetto areas rather than within them, so as to draw students from both the ghetto and nonghetto areas. *Id.* at 571-73. While it has been held that a school board has a responsibility to plan school construction so as not to inhibit integration, *Wheeler v. Durham City Bd. of Educ.*, 346 F.2d 768, 774 (4th Cir. 1965); *United States v. School Dist. 151*, 286 F. Supp. 786 (N.D. Ill.), *aff'd*, 404 F.2d 1125 (7th Cir. 1968), it has also been held, in earlier cases, that a school board may choose to construct a school in an area that results in its being racially imbalanced. *See, e.g., Beckett v. School Bd.*, 269 F. Supp. 118, 135 (W.D. Va. 1967); *Henry v. Godsell*, 165 F. Supp. 87, 90 (E.D. Mich. 1958). The Princeton Plan would com-

eration when such zoning results in racially imbalanced schools.¹²² Refusal to require or permit correction of racial imbalance on the ground that there is no constitutional mandate to do so,¹²³ is unacceptable inasmuch as it confuses the real issue—*i.e.*, whether or not there is a constitutional duty to provide everyone with an equal educational opportunity.¹²⁴ And if the real issue is equal educational opportunity, constitutional considerations should be the same whether applied to de jure or de facto segregation.¹²⁵ Nonetheless, a problem sim-

bine two racially diverse schools with contiguous district lines and have each school teach specific grades exclusively, thereby having all students of any particular grade in the same school. *See Wright, supra* note 38, at 304. Rezoning school districts to take racial imbalance into account, perhaps the easiest to implement of the three methods, has been held not to violate a state law providing that race was not to be taken into account in considering admission to schools. *Balaban v. Rubin*, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, 379 U.S. 881 (1964).

¹²² The Fifth Circuit, dealing with a situation resulting from de jure segregation, has already held geographical zoning to be acceptable only if it tends to establish a unitary school system. *United States v. Greenwood Mun. Separate Sch. Dist.*, 406 F.2d 1086 (5th Cir. 1968); *accord, United States v. Indianola Mun. Separate Sch. Dist.*, 410 F.2d 626, 629 (5th Cir. 1969); *Henry v. Clarkesdale Mun. Separate Sch. Dist.*, 409 F.2d 682, 683 (5th Cir. 1969).

¹²³ *See, e.g., Deal v. Board of Educ.*, 369 F.2d 55 (6th Cir.), *cert. denied*, 389 U.S. 847 (1966); *Bell v. School City*, 324 F.2d 209 (7th Cir. 1963).

¹²⁴ *See Barksdale v. Springfield Sch. Comm.*, 237 F. Supp. 543, 546 (D. Mass. 1965).

¹²⁵ De jure school segregation includes gerrymandering of attendance zones pursuant to racial considerations. *See United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 876

ilar to that encountered in the housing area—*i.e.*, departure of whites after arrival of Negroes—is also present here.¹²⁶

(5th Cir. 1966); *Taylor v. Board of Educ.*, 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961); *Clemons v. Board of Educ.*, 228 F.2d 853 (6th Cir.), *cert. denied*, 350 U.S. 1006 (1956). In *Blocker v. Board of Educ.*, 226 F. Supp. 208, 226, *remedy considered on reh'g*, 229 F. Supp. 709 (E.D.N.Y. 1964), the court found that a school board's failure to alleviate racial imbalance in a compulsory public educational system constituted state imposed segregation.

¹²⁶ See Kaplan, *supra* note 5, at 400. In fact, schools will change from white to Negro more quickly than a neighborhood. *Id.* The immediate reaction in Mississippi to the Supreme Court's decision in *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969), would seem to attest to this. Response to the reaffirmation of the nation's policy included threats of cutting off public funds to the public schools and construction of private schools to accommodate those who did not want to attend integrated schools. See Reed, *Full Integration Worries and Angers Mississippi*, *New York Times*, Nov. 24, 1969, at 1, col. 2. Fortunately, such drastic measures have not been taken, as activities indicate a more favorable response to the Supreme Court's unyielding position on this issue. See *Speeding Desegregation*, *TIME*, Jan. 26, 1970, at 14; *The End of an Era*, *TIME*, Jan. 19, 1970, at 14.

However, assuming the threatened response occurred, giving 42 U.S.C. § 1981 (1964) the expansive interpretation it is capable of under *Jones*, see note 88 *supra*, would be an effective means of thwarting such circumvention of the intended effects of the decision inasmuch as failure to admit Negroes to private schools on racial grounds would be a prohibited denial of their right to contract freely. Indeed, it has already been suggested that the role which education plays in national life may preclude there being any such thing as private education. See *Guillory v. Administrators of Tulane Univ.*, 203 F. Supp. 855, 858-59 (E.D. La. 1962).

An alternative means to prevent such an occurrence is to use benevolent quotas to assure

Even if integrated schools are achieved,¹²⁷ some of the most fundamental concepts underlying our educational system may need revamping to make the job complete. Insofar as standardized testing plays a role in determining a child's level of educational exposure, environmental disadvantages may be perpetuated.¹²⁸ Although educational tests are substantially better predictors than are employment tests,¹²⁹ the Negro's inherent disadvantage on such a test may actually make the tests a "self-fulfilling prophecy,"¹³⁰ and the result may well be critical in terms of future job opportunities.¹³¹

parents, initially, that a school will not become predominantly attended by those in the lower socio-economic strata. See Kaplan, *supra* note 5, at 398 & 400.

¹²⁷ And there is not complete agreement that this should be our goal. See generally, *e.g.*, Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583 (1968).

¹²⁸ It has been estimated that 75 to 90 percent of the public school systems in the United States use standardized tests at least once between the first and twelfth grades. See *Standardized Ability Tests* at 736 (citing D. GOSLIN, *THE SEARCH FOR ABILITY* 57 (1963)). Generally, they provide the basis for what is called the "track system" of education, in which children of comparable ability, according to the tests, are grouped together and taught at a level commensurate therewith. See generally *Hobson v. Hansen*, 269 F. Supp. 401, 442-92 (D.D.C. 1967), *aff'd sub nom.* *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969), for an extensive elaboration on the track system and theory—which was rejected as violative of the fifth amendment as practiced in the District of Columbia inasmuch as Negroes were given reduced educations based on intelligence tests standardized on white middle class children. *Id.* at 443.

¹²⁹ *Standardized Ability Tests* at 734.

¹³⁰ The child who scores poorly is placed in a lower class with less challenging work and often less competent teaching. On the next

**The New Equality?
Preferential Treatment, Black Capitalism,
and Benevolent Quotas**

As has been suggested or implied during the course of analysis thus far, merely breaking down racial barriers that have impeded the progress of Negroes to date may be insufficient to provide them with truly equal opportunity.¹³² Recent controversy has touched upon a concept denominated "preferential treatment," which actually may be a misnomer for a situation in which Negroes would be treated according to their needs, or compensated remedially for shortcomings which are the result of past discrimination. One argument for such a position has analogized the situation to a foot race in which one of the runners has been shackled.

We could not simply remove his chains and let the race continue. Not only would he then be far behind in the race, but also, from want of exercise and various other disabilities he would be much less able to continue. . . . [T]he only treatment consistent with equality is one which does not merely allow the foot-race to proceed but

test, instead of having had a chance to catch up with middle class children, he is further behind. At the end of twelve years (if he stays in school) his graduation with a record of bad grades in low courses fulfills the tests' predictions.

Id. at 735.

¹³¹ See notes 54-55 and accompanying text *supra*.

¹³² And to emphasize once again, to the extent that a denial of equal opportunity results more from perpetuation of the effects of socio-economic conditions than from active racial discrimination, the problem is much broader than a strictly Negro one.

which somehow propels the last place runner back into contention.¹³³

It is submitted that programs or activities which are *compensatorily* motivated can be a legitimate, effective means to achieving a society in which there will be greater equal opportunity.

Skepticism and opposition towards such new approaches to the Negro problem primarily center around concern for the divisive effects which they are likely to have.¹³⁴ The problem is viewed to lay primarily among the middle class,¹³⁵ but such a general categorization may be an oversimplified characterization of the problem based upon its most obvious manifestations.¹³⁶ None-

¹³³ Kaplan, *supra* note 5, at 365.

¹³⁴ See, e.g., *id.* at 375 & n.26; Vieira, *Racial Imbalance, Black Separatism, and Permissible Classification by Race*, 67 MICH. L. REV. 1553, 1611 (1969). Merely ending discriminatory practices has already led to threatened strikes. See *What Unions Are—And Are Not—Doing for Blacks*, TIME, Sept. 26, 1969, at 88.

¹³⁵ See, e.g., *The Troubled American*, NEWSWEEK, Oct. 6, 1969, at 32:

With little equity but his mortgaged home and his union card, the white worker is especially resistant to integration efforts that appear to threaten his small stake in the world.

Polls indicated that the middle-class white believed that the Negro has a better chance than he to get well-paying jobs and good housing at a reasonable cost. *Id.* at 45. In addition, he is generally of the opinion that a Negro's educational opportunities are just as good as a white's, and prefers improving Negro schools to moving toward integration. *Id.* The validity of these assumptions is, at best, questionable.

¹³⁶ Such a generalization may be invalid insofar as the better educated, financially influential classes may be better able to disguise their prejudices and insulate themselves from integra-

theless, the factor of overriding importance should be a determination as to the very real necessity for equal opportunity followed by a wholehearted commitment to achieve that goal.¹³⁷ The likelihood that such actions may very naturally have divisive effects initially should not forestall action, thereby leading to increasing racial tensions with concomitantly greater divisiveness. The posture which activities in each of the three areas under analysis might take in this direction is varied.

While it has been recognized that merely putting an end to discrimination in employment may be insufficient in advancing the Negro cause,¹³⁸ preferential treatment has not received legislative sanction as a means for overcoming the inertia which exists.¹³⁹

tion efforts. *See* Kovarsky, *supra* note 45, at 829.

¹³⁷ Emotional considerations, however, should not be entirely overlooked, and may play a significant role in the steps to be taken toward achieving equal opportunity in order to keep divisiveness at a minimum. It may be necessary for legislators and judges to empathize with those who will be most directly affected by decisions in this area, which decisions should be firm and reflect considerations for the interests of all concerned.

¹³⁸ *See* note 46 and accompanying text *supra*.

¹³⁹ 42 U.S.C. § 2000e-2(j) provides in pertinent part:

Nothing contained in this subchapter shall be interpreted to require any employer . . . [or] labor organization . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer referred or classified for employment by any employment agency . . . admitted to membership or

Active recruitment of qualified Negroes equal to that for qualified whites has been suggested as a constitutionally preferable alternative to preferential hiring,¹⁴⁰ but the fact remains that until the Negro has received the education or technical training that racial discrimination has denied him, there will be fewer qualified Negroes to fill these positions than there might otherwise be. Perhaps the most promising course of action would be implementation of the socio-economic theory of "Black Capitalism."

Essentially, the theory of Black Capitalism advocates the initiation and encouragement of Negro entrepreneurship.¹⁴¹ Major

classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race . . . in any community, State, section or other area. . . .

(Emphasis added.) Nor is it likely that state laws advocating preferential hiring, to cover those employers not within the scope of title VII, see note 49 *supra*, will be adopted. *See* Garfinkel & Cahn, *supra* note 7, at 371-72. In fact, while a majority of the nation would like to see the Negroes' position in society improved, preferential job treatment is not, in the eyes of a majority, an acceptable means to that end. *See* Harris & Hopper, *The Real Change Has Just Begun*, LIFE: INTO THE 70's, at 104 (Special Issue, January 1970). Nor are preferential admissions policies at universities viewed favorably according to one poll. *The New Mood On Campus*, NEWSWEEK, Dec. 29, 1969, at 43. However, the statute does not proscribe considerations along these lines, and the OFCC's Philadelphia Plan, see note 71 *supra*, indicates, as one example, conscious efforts at overcoming racial imbalances resulting from past discrimination.

¹⁴⁰ *See, e.g.*, Garfinkel & Cahn, *supra* note 7, at 372.

¹⁴¹ *See generally* BLACK CAPITALISM; McKersie,

obstacles to be overcome in such an endeavor are the lack of available investment capital¹⁴² and the lack of requisite managerial skills due primarily to poorer educational backgrounds.¹⁴³ Successful implementation of such a program will create more jobs which will in turn generate more income within the Negro community, thereby enabling the Negro to improve his own standard of living.¹⁴⁴ Self-improve-

Vitalize Black Enterprise, HARV. BUS. REV., Sept.-Oct. 1968, at 88.

¹⁴² See, e.g., Note, *Tax Exemption for Organizations Investing in Black Businesses*, 78 YALE L.J. 1212, 1214 (1969). In addition to taking advantage of tax exemptions, *id.*, there have been more recent efforts aimed at amassing capital to finance Negro businesses. See, e.g., *FRB Letter on Investment Banker Credit to Black Community*, CCH FED. SEC. L. REP. ¶ 77,734 (1969), announcing a relaxation of Regulation T, section 220.7(c), interpreting section 7 of the Securities and Exchange Act of 1934. Investment bankers, usually not permitted to extend credit without collateral or on any collateral other than securities, acting as brokers in establishing or aiding in establishing new banks located in and operated by members of a black community can make unsecured loans to black entrepreneurs. In addition, the Nixon Administration has initiated Project Enterprise, in which funds pledged by private corporations will be doubled by the Government and used to underwrite black businesses. See Delaney, *Negro Business Is Assured of Aid*, N.Y. Times, Nov. 7, 1969, at 1, col. 5.

¹⁴³ See generally BUSINESS LEADERSHIP AND THE NEGRO CRISIS (E. Ginzberg ed. 1968). Somewhat similar to the Administration's project, see note 142 *supra*, is a program called Capital Formation, which, in addition to providing capital funds, provides sorely needed managerial consulting services. See London *Channeling Business Expertise to Black Entrepreneurs*, MGT. REV., Dec. 1969, at 31.

¹⁴⁴ Negro entrepreneurship does, however, have several limitations on its effectiveness as an economic equalizer. First, the number of jobs created is likely to be small, at least to begin with,

in addition to its economic benefits, will engender a feeling of pride and self-satisfaction, thereby alleviating, to some extent, the attitudinal and motivational problems which presently impede the Negro also.¹⁴⁵

inasmuch as the businesses will probably be small. *Tax Exemption*, *supra* note 143, at 1214. Currently, there are only a dozen Negro businesses in Manhattan that employ ten or more people. BLACK CAPITALISM 60. Second, the income generated will contribute directly to the economic development of the minority community only to the extent that it is spent or reinvested within the community. *Tax Exemption*, *supra* note 143, at 1214. Paradoxically, integration is an impediment here inasmuch as there is sometimes a tendency for Negroes to patronize better establishments outside the Negro community once the opportunity presents itself. See BLACK CAPITALISM 63-64. Third, the profit motive might very well cause Negro, as well as white entrepreneurs, to hire trained, proven, stable employees who may, in all likelihood, already be employed. *Tax Exemption*, *supra* note 143, at 1214. Fourth, such small scale enterprise cannot give these groups the institutional power and economic parity necessary for the social stability of their communities. *Id.* An even more fundamental obstacle to successful business may very well be the lack of purchasing power in the Negro neighborhood to begin with. See Kovarsky, *supra* note 45, at 826. ¹⁴⁵ This is perhaps the greatest attribute of such a proposal. With an initial start, the Negro will thereafter be able to help himself. As one commentator has pointed out, "benefits granted are not nearly so sweet as benefits won and . . . help, even from a benign overlord, is often seen as humiliating and patronizing . . ." Kaplan, *supra* note 5, at 382. Moreover, this is the traditional American way of advancing in our society and should therefore meet with minimal resistance. It provides the Negro with a meaningful opportunity, and would be a departure from past approaches which have been aptly criticized by Mr. Cross:

Since the Negro unemployable is not needed by our economic system, the simple act of providing him with a job must remain a form of charity. Jobs keep the dropout off the

With increased economic power, the Negro will also have increased mobility and, absent discrimination, a broader range of prospective residences. Nevertheless, in order to facilitate a transition to integrated housing, the use of benign quotas may be necessary to prevent the "invasion-succession sequence." Although a quota smacks of discrimination insofar as the Negro or white who seeks housing after his race's quota has been filled will be denied it solely on the ground of race, it is important to keep in mind that this is a benign, and not a malign, quota, the purpose of which is to serve as a temporary transitional measure from segregated to integrated housing patterns.¹⁴⁶ Likewise, the temporary nature of the measure would appear to answer any contentions that quotas will create a "strait-jacket" for Negroes by freezing the ratio beyond the time when such ratio was necessary due to a change in conditions.¹⁴⁷ Accordingly, the place that such a benign quota can play in the role of equal opportunity should be of overriding concern, and,

streets. Free hot dogs, Cokes and country outings keeps the teenagers from rioting—a form of fire insurance. But whose needs do these programs basically satisfy, theirs or ours?

BLACK CAPITALISM 10.

¹⁴⁶ See Navasky, *supra* note 96, at 65 (1960).

¹⁴⁷ See, e.g., Hellerstein, *supra* note 95, at 558. Aside from time lags due to administrative reaction, there does not appear to be any reason why such quotas should prove to be an inflexible handicap. The biggest problem will more likely be determining what the quotas should be for various areas, determined according to the "tipping point" for the area. The difficulty of weighing a number of intangible factors affecting the tipping point is further complicated by the number of racial or ethnic groups to be taken into consideration in any given formulation, and will obviously affect the administrative feasibility of such a plan.

if successful, could help to alleviate some of the current problems of de facto school segregation without abandoning the neighborhood-school concept.

With the elimination of de facto school segregation, the educational problem would be solved insofar as the "inherently unequal" barrier to equal opportunity has been removed. To further close the educational gap, compensatory or remedial education courses may have to be provided for the benefit of the culturally deprived.¹⁴⁸ In addition, faculty selection may have to be made with a view to obtaining those teachers who are both willing and best prepared to cope with the educational challenges of newly integrated education.¹⁴⁹ Along with corrections in the means for

¹⁴⁸ See, e.g., Horowitz, *Unseparate but Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 U.C.L.A.L. REV. 1147, 1148 (1966). Provisions for such courses in desegregation plans have already been required by some courts. See, e.g., *Hobson v. Hansen*, 269 F. Supp. 401, 515 (D.D.C. 1967); *Miller v. School Dist. No. 2*, 256 F. Supp. 370, 377 (D.S.C. 1966).

¹⁴⁹ See *United States v. Indianola Mun. Separate Sch. Dist.*, 410 F.2d 626, 630 (5th Cir. 1969). In fact, a school board's recent decision to temporarily replace its usual system of promotions with one based on "sensitivity" to Negro problems, was upheld as a valid attempt to improve the school performance of the ghetto population, even though Negro teachers were favored thereby. *Porcelli v. Titus*, 302 F. Supp. 726 (D.N.J. 1969). Moreover, provisions in title IV of the 1964 Civil Rights Act appear to lend support to decisions in this direction by authorizing special training to improve the ability of personnel to deal effectively with educational problems that may arise from desegregation. 42 U.S.C. § 2000c-3 (1964), and the making of grants to school boards to reimburse them for similar training programs that they might conduct, *id.* § 2000c-4(a).

ability grouping to take account of the Negroes' inherent disadvantages on standardized tests, conscious efforts made along the lines herein described will have a direct affect on advanced employment opportunities—the key to self-help—and an easing of racial tensions.

A Problem of Racial Classification?

Yet, insofar as any of the corrective measures heretofore mentioned are based upon a consideration of race, opposition is raised in the name of reverse discrimination.¹⁵⁰ Indeed, it is ironic that the fourteenth amendment, originally passed to secure the civil rights of the Negro, should be used to prevent the results of a century of racial discrimination from being corrected. In an effort to provide the Negro with truly equal opportunity, it is difficult to conceive of a means for alleviating racial imbalance or providing an initiative to business without considering race.¹⁵¹ Although we are now striving for Mr. Justice Harlan's "color-blind" Constitution,¹⁵² it should not

be considered to be completely insensitive to color where efforts are being made to overcome problems which developed under the protection of a constitutional construction that abetted schemes founded upon racial considerations. It is submitted that there is a compelling governmental purpose, with means to achieving it reasonably related thereto, which can be upheld constitutionally.¹⁵³

The *Japanese Relocation Cases*¹⁵⁴ exemplify instances where racial classifications have been upheld as reasonable means to a legitimate governmental purpose. Although it might be argued that the classifications were made during extraordinary circumstances, it may be countered that while present circumstances may not appear to command such urgency—a questionable position at best—the classifications here are designed to benefit and not to oppress, as they were in the *Relocation Cases*, a particular group. Contentions that *Brown I* proscribes racial classification altogether seem unwarranted when the companion case is read in conjunction with it. Concerning the position adopted in the *Reloca-*

¹⁵⁰ The problem of racial classification has recently received extensive treatment elsewhere. See generally Vieira, *supra* note 135. Not only is there "reverse discrimination" against whites, but there is also discrimination against other minority groups. See Kaplan, *supra* note 5, at 373-74. This further emphasizes the point made, that the problem not be viewed as peculiar to any race, but rather that it be viewed as the common problem of the underprivileged.

¹⁵¹ See *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 877 (1966); Wright, *supra* note 38, at 297.

¹⁵² In the lone dissent in *Plessy v. Ferguson*, Mr. Justice Harlan's rejection of the "separate but equal" doctrine was predicated on the belief that our Constitution should be "color-blind." 163 U.S. at 559.

¹⁵³ In fact, several cases, each concerned with education, have already either permitted or required corrective action to proceed on a "color-conscious" basis. See, e.g., *United States v. School Dist. 151*, 286 F. Supp. 786, 799 (N.D. Ill. 1968); *Hobson v. Hansen*, 269 F. Supp. 401, 516 (D.D.C. 1967); *Fuller v. Volk*, 230 F. Supp. 25, 34 (D.N.J. 1964).

¹⁵⁴ *Korematsu v. United States*, 323 U.S. 214 (1944), *reh'g denied*, 324 U.S. 885 (1945); *Hirabayashi v. United States*, 320 U.S. 81 (1943). Both cases upheld measures taken with a view to national security during World War II, which deprived individuals of Japanese descent of some of their fundamental rights as citizens of this country.

tion Cases, the Court pointed out in *Bolling v. Sharpe*¹⁵⁵ that racial classifications are "constitutionally suspect" and must be "scrutinized with particular care" to determine the propriety of the motivation underlying them, *and not that they are per se unconstitutional*. This is still the position of the Supreme Court.

Another basis for opposition to these compensatory approaches to the Negro problem and to efforts at integration are recent Negro demands for black separatism.¹⁵⁶ However, demands for segregation are no more acceptable from Negroes than from whites. Moreover, studies have indicated that an overwhelming majority of Negroes disfavor separatism.¹⁵⁷ Inasmuch as these demands are very likely the product of frustration and a response to tokenism, efforts should be directed at alleviating the frustration by approaching the problem in more than a token manner, instead of allowing these demands to be manipulated to further the prejudicial interests of various groups.

The Path from Here

Today, we have come full circle to the position in which this country stood during the Reconstruction Era. The proliferation of civil rights legislation in the past decade reflects the growing concern over an intolerable problem and mirrors the activity during the years following the Civil War.

¹⁵⁵ 347 U.S. 497, 499 (1954); *accord*, *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

¹⁵⁶ See *Vieira*, *supra* note 135, at 1622.

¹⁵⁷ See SUPPLEMENTAL STUDIES FOR THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 15-16 (1968).

While concern at that time was primarily with restoring civil rights denied to Negroes because of racial discrimination, today the civil rights problem is seen in a broader perspective as the concept of civil rights expands to meet changes in society and as the problem is recognized as more than a racial one. It has been pointed out, however, with respect to the racial problem, that

Major civil rights are little more than paper legalities for American citizens who are black. Laws against discrimination in employment, in housing, in education, in voting, and in varied federal programs have scarcely begun to eliminate the exclusion and disadvantages inflicted upon a percentage of the American citizenry who are not white. This failure can mean only that whites continue the acts, established as illegal, that perpetuate the discriminatory patterns.¹⁵⁸

Such an observation encourages responses from individuals who readily contend that changes in the law cannot improve the situation since it is the minds and feelings of men that must be changed. Lest such a view encourage the continuation of a timid or laissez faire approach to the problem, it should be remembered that

[n]ew law, *enforced*, compels new behavior. Behavior repeated daily comes to seem normal, and attitudes change. Illusions tend to vanish.¹⁵⁹

The approach which such a view advocates apparently has been adopted by the execu-

¹⁵⁸ Clark & Clark, *supra* note 11, at 80.

¹⁵⁹ Larson, *supra* note 3, at 514 (quoting Eric Sevareid from *LOOK*, July 9, 1968, at 28) (emphasis added).

tive¹⁶⁰ and judiciary branches¹⁶¹ of the Government, and proposals for stronger legislation have been made to the legislative branch.¹⁶²

The tools for the job are available; they merely have to be used. *Jones* restored the thirteenth amendment to its intended scope. It has given rise to the very real likelihood that other dormant sections of legislation passed during the Reconstruction Era will be revitalized, and that new, stronger legislation will be enacted pursuant to the thirteenth amendment to remove the "badges and incidents" of slavery. As to the fourteenth amendment, the judicially imposed state action limitation has been all

but officially removed.¹⁶³ In deciding *Jones* on thirteenth amendment grounds, the Court explicitly recognized the possibility of using the fourteenth amendment to reach private acts of discrimination, but commented that its decision based upon the thirteenth amendment made it unnecessary to go any further.¹⁶⁴

One thing is clear. Whatever course of action is taken in the future, it must lead

¹⁶⁰ Despite strong opposition, the Administration's Philadelphia Plan, see note 71 *supra*, has weathered several storms. Initially, the Comptroller General issued an opinion declaring it to be an unlawful violation of title VII's proscription against racial quotas. 38 L.W. 2126 (1969). Thereafter, the Attorney General issued an opinion in favor of the Plan's validity. 38 L.W. 2191 (1969). Congressional action was then taken in an attempt to destroy the Plan. Causing the most concern was the Senate's rider to the Supplemental Appropriation Bill, providing that no funds to be appropriated were to be available to finance any agreement held illegal by the Comptroller General. See 38 L.W. 2376 (1970). However, the Administration's successful suasion of Congress preserved the Plan. See *A Narrow Victory for Blacks*, TIME, Jan. 5, 1970, at 49-50. Nonetheless, the Plan has not as yet withstood a test before the Supreme Court as to its constitutionality.

¹⁶¹ The Supreme Court's uncompromising position with respect to desegregation, as manifested in *Alexander v. Holmes County Bd. of Educ.*, has begun to meet with some success as Southern communities yield to the Court's position. See *The End of an Era*, *supra* note 126.

¹⁶² A recent study made by the Commission on Civil Rights has found racial discrimination to be substantial at the state and local governmental

levels, and has recommended that these governmental bodies be removed from the exempt status they now enjoy under title VII, see note 49 *supra*. See U.S. Commission on Civil Rights, News Release, Aug. 12, 1969.

¹⁶³ The gradual erosion of the state action limitation can be traced through the following cases, each of which broadened the scope of state action in some manner in an effort to strike down activities infringing the civil rights of others. *Marsh v. Alabama*, 326 U.S. 501 (1946) (company-owned town performed governmental function and was therefore subject to same constitutional prohibitions as state); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (judicial enforcement of racially restrictive covenant for benefit of third parties constituted state action within purview of fourteenth amendment's proscription); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (activities of state's lessee constituted state action); *United States v. Guest*, 383 U.S. 745 (1966) (false reports made by individuals and leading to the arrest of Negroes held sufficient to sustain conviction of defendants for conspiracy to deprive Negroes of their civil rights under 18 U.S.C. § 241 (1964), enacted pursuant to fourteenth amendment); *United States v. Price*, 383 U.S. 787 (1966) (conviction of private citizens under § 241 for criminal conspiracy upheld where they were acting in concert with state officials). *Guest* and *Price* were the first indication that the state action limitation might no longer be viable. See generally on the subject of state action Horan, *Law and Social Change: The Dynamics of the "State Action" Doctrine*, 17 J. PUB. L. 258 (1968); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961).

¹⁶⁴ 392 U.S. at 413 n.5.

to an equal opportunity society. The Negro problem is real; it is not going to be solved with empty promises, ineffective legislation, or poorly enforced, effective legislation.

It is unfortunate to think that the severe civil disorders of recent years may very well be the only reason for the increased attention being given civil rights today. Such is a sad commentary on the state of affairs in a society of laws. Use of the law to perpetuate selfish, prejudicial interests can no longer be tolerated; it breeds contempt and disrespect for the law, and forces the oppressed to respond by breaking the law. We have reached a point in our na-

tion's history that presents a most difficult challenge. If it is approached with a view to long-range objectives, temporary divisiveness can be tolerated as an incidental to the means to those objectives. If it is approached pragmatically, and we fail to meet the *real* challenge, it is difficult to predict anything favorable for the future. As one commentator has cautioned,

we should understand clearly the nature of the harm. For if this generation is deprived of equity under the guise of civil rights legislation, the bitterness of their children will know no bounds.¹⁶⁵

¹⁶⁵ Gould, *supra* note 61, at 1074.