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Racial Discrimination in USDA Programs in the South: A Problem in Assuring the Integrity of the Welfare State

M. John Bundy

Allen D. Evans

COMMENTS

RACIAL DISCRIMINATION IN USDA PROGRAMS IN THE SOUTH: A PROBLEM IN ASSURING THE INTEGRITY OF THE WELFARE STATE

INTRODUCTION

People are dying today in the South. They die for want of food, clothing, shelter. They die from working terribly long hours on empty stomachs and from using archaic technology to till worn out fields.[1]

Or, many of these people give up and move north into already overcrowded and over-burdened cities.[2] They leave behind weathered shacks, many with no electricity or running water,[3] for nature to absorb and turn to dust. They leave behind their fields for larger, landed interests and incorporated plantations to absorb and turn to profit.[4]

These larger landowners turn the fields to profit with the help of United States Department of Agriculture (USDA) programs.[5] They participate in crop allotment payments administered through the Agricultural Stabilization and Conservation Service (ASCS); they get technological and educational help from the Federal Extension Service (FES); they finance land purchases, new buildings, and new equipment with low cost loans from the Farmers Home Administration (FHA).[6]

Mostly, the plantations are white-owned. Most of the dying, emigrating, hungry people are black. They cannot turn the fields to profit because they are hungry, pain-ridden, debt-burdened, and poorly skilled. They cannot overcome those handicaps largely because the programs of the federal government which were designed to help do not

1. *See, e.g.*, CITIZENS' BOARD OF INQUIRY INTO HUNGER AND MALNUTRITION IN THE UNITED STATES, HUNGER, U.S.A.: A REPORT, *Chapter One: The Mississippi Story—A Case History in Bureaucratic Non-Support* (1968) [hereinafter cited as HUNGER REPORT].
2. *See, e.g.*, UNITED STATES CIVIL RIGHTS COMMISSION, CYCLE TO NOWHERE 17-23 (1968).
3. See notes 16 and 29 *infra*.
4. *See generally* HUNGER REPORT, *supra* note 1, *Chapter Five: Agricultural Policy*.
5. *Id.*
6. *Id.*, and see text accompanying notes 31-87 *infra*.

reach them. They are black and they are discriminated against by the federal agencies.[7]

This comment will explore an assortment of legal theories which could be urged in the pursuit of judicial remedies to end discrimination in the administration of three selected USDA programs. The particular programs selected from among the many administered by USDA have been chosen because (1) they have an important potential for helping the poor black farmer, and (2) they represent three different structural types of governmental welfare programs.[8]

In examining the theme of assuring the integrity of the welfare state,[9] this comment first details the magnitude and character of the social problem and then describes the three USDA programs and the extent to which they fail to reach the black farmer. It then surveys the practical results one might seek in court actions, and, finally, it focuses on the legal problems and theories available for a court attack on the discriminatory practices.

I. LIFE FOR THE SOUTHERN BLACK FARMER AND THE IMPACT OF THREE USDA PROGRAMS

A. Living Conditions

The social problem is large in whatever terms one chooses to measure it. In economic or human terms the conditions are difficult to appreciate, and difficult to believe possible in a nation of wealth and prosperity. Data from the 1960 census indicated that 1.5 million black individuals lived on farms in the South, and another 3.2 million lived

7. HUNGER REPORT, *supra* note 1, *Chapter Five.*

8. Generally speaking, FES is an educational program. It is a federally funded state operation, administered between USDA and state authorities. FHA and ASCS, on the other hand, are more direct federal programs, but their respective administrative schemes are different. FHA provides low cost credit for farm establishment and farm improvement, and operates through agency offices staffed by USDA personnel. ASCS administers crop allotments and other programs. Its offices also are manned by federal employees, but management and policy is determined in large degree by a complicated hierarchy of elected community and county committees and appointive state committees.

9. It should be noted that this is a problem not so much of effecting substantive change in the programs as it is one of assuring fair administration by the agency personnel. Furthermore, this comment deals with racial discrimination, not with the more general problems of the welfare beneficiary. For a discussion of this larger context, which identifies the relative helplessness of the welfare beneficiary seeking redress against agencies, see Cahn & Cahn, *The New Sovereign Immunity*, 81 HARV. L. REV. 929 (1968).

as non-farm residents in the rural areas of the South.[10] Among those rural black families, 62% had less than $2,000 income in 1959.[11] Among their white counterparts, who numbered 4.4 million farm residents and 13.5 million non-farm rural residents, only 26% of the families had incomes less than $2,000.[12] This disparity is further aggravated by the fact that the average rural black family was one-third larger than rural white families.[13]

After full and careful appraisal of services rendered by agencies of the USDA, the United States Civil Rights Commission concluded, among other things, that in both absolute terms and in terms relative to his white neighbor, the rural southern black is losing ground constantly.[14] And, in the summer of 1968, the Civil Rights Commission,

10. 1960 CENSUS OF POPULATION, PC(2)-1C, Nonwhite Population by Race, table 1, p. 1.

11. *See* U.S. COMMISSION ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN FARM PROGRAMS 9-14 (1965) [hereinafter cited as EQUAL OPPORTUNITY IN FARM PROGRAMS].

12. *Id.*

13. *Id.*

14. For decades the general economic, social, and cultural position of the southern Negro farmer and rural resident in relation to his white neighbor has steadily worsened. Whether measured in terms of value of products sold, level of living, land and home ownership, or schooling, most of the 4.7 million Negroes living in southern rural areas are seriously disadvantaged when compared with rural white southerners. . . . Every 10 years the census has reported a widening gap in income, education, and housing between southern rural whites and Negroes.

EQUAL OPPORTUNITY IN FARM PROGRAMS at 99. The basis for this conclusion is established *id.* at 9-18. As an example, the following tables, taken from Cowhig and Beale, *Socio-Economic Differences Between White and Nonwhite Farm Populations of the South*, 42 SOCIAL FORCES 354 (1964), and appearing in EQUAL OPPORTUNITY IN FARM PROGRAMS at 10-13, show some of the information for farm families. The data for non-farm rural families, although better on an absolute scale, shows a similar relative pattern.

Average acreage per farm by race for the South

	1950	1959
White	175.3	249.0
Nonwhite	47.0	52.3
Difference	128.3	196.7

Median income—Rural farm families for the South

	1949	1959
White	$1,366	$2,802
Nonwhite	712	1,259
Difference	654	1,543
Nonwhite as percent of White	52	45

Education—percent of rural farm youth (25-29 years) with 12 or more years of school for the South

	1950	1959
White	24.3	43.8
Nonwhite	7.0	15.8
Difference	17.3	28.0

again conducting a study of the issues of economic security as they affect black people in the state of Alabama, reported no progress:[15]

> Public agencies in Alabama are doing little to break the cycle of poverty and dependency and assure the victims of slavery and discrimination the opportunity to lead decent and productive lives. Black citizens of 16 counties in "black belt" Alabama are not being helped to stay on the land; nor are they being equipped with the education and skills to work in the towns. Left with little choice but to leave rural areas, black citizens are moving to urban areas. In effect, the South has transformed a regional problem into a national one to the extent that it exiles its poor and their problems.

What does an income of less than $2,000 per year mean? First, it means that black farm families are hungry. An extensive study in the summer of 1967 revealed that the typical diet consists of grits, biscuits, and coffee in the morning; vegetables, corn bread, Kool-Aid, for the noon meal, although there is usually no noon meal after the harvest season; and vegetables (sometimes mixed with pork parts), corn bread and Kool-Aid for the evening meal.[16]

Level of living index—farm operators 14 State average (National average for 1959 = 100)

	1950	1959
White	43	89
Nonwhite	19	46
Difference	24	43

Percent of rural farm housing units with 1.01 or more persons per room for the South

	1950	1960
White	25.8	14.6
Nonwhite	47.6	44.4
Difference	21.8	29.8

Percent of rural farm housing units with hot and cold piped water for the South

	1950	1960
White	20.4	60.0
Nonwhite	2.3	9.7
Difference	18.1	50.3

Similarly graphic illustrations of the economic facts of rural life in the South are presented in NATIONAL SHARECROPPERS FUND, A BETTER LIFE FOR FARM FAMILIES 6-7 (1963).

15. *Commission Hearing on Rural Poor*, 1 CIVIL RIGHTS DIGEST 20 (No. 2, Summer 1968).

16. SOUTHERN RURAL RESEARCH PROJECT (SRRP), FIRST ANNUAL REPORT 6 (1968) [hereinafter cited as SRRP ANNUAL REPORT].

The study referred to in the text [hereinafter cited as the Alabama Study] was conducted by a private organization called the Southern Rural Research Project (SRRP)

The Food Stamp Program has helped slightly, but only two of the eight counties in the Alabama Study had accepted the program in 1967.[17] Half of those interviewed said that they had to borrow money to buy stamps and such borrowing rendered the farmers more economically dependent upon white landlords and merchants. Half of the non-participants explained that they could not afford the stamps, while one-third of those who did participate reported unequal treatment by program employees. Two-thirds of the participants reported being called by first names in the food stamp offices, a traditional symptom of racism.[18]

In 1967, the Citizens' Crusade Against Poverty, chaired by Walter Reuther, established an independent board of inquiry to investigate

of Selma, Alabama. The information gathering was done by 14 college students from various parts of the country, and 7 locally trained research assistants. The researchers used a 23 page questionnaire dealing with farm programs, living conditions, and related problems, and interviewed black families representing over 5,000 persons.

The study is divided into two parts: Part I entitled Black Farm Families—Hunger and Malnutrition in Rural Alabama; and Part II, entitled The Extinction of the Black Farmer in Alabama. The reports were released in 1968, and copies are available at the University of Washington Law Library.

As regards living conditions, some of the findings of the Alabama Study, Part I, are as follows:

1. Nearly 25% of the black farm families interviewed eat no fresh meat of any kind at all. Another 25% eat meat only once a week.
2. Fresh milk is not used at all by 30.0% of the households.
3. Fresh fruit never appears in the diet of nearly half of the Negro farm families interviewed.
4. 18.5% never eat eggs at all.
5. Over one third of the children suffer from continuous open sores and scabs.
6. In 14.2% of the farm households visited, SRRP interviewers noted one or more children with very noticeably distended stomachs.
7. 12.7% of the women questioned who had had a pregnancy over the past 5 years had received no prenatal care. A third of the women had suffered at least one miscarriage. Two thirds of the rural Negro babies were born at home with the aid of a midwife.
8. One third of the mothers interviewed had lost one or more children; 68.0% of these children during their first year.
9. During the first year of life 20.4% of rural Negro babies received no medical attention whatsoever.

17. The Alabama Study, Part I, *supra* note 16, at 3 n.2.

18. The Alabama Study, Part I, *supra* note 16, at 3-5. The median distance to the food stamp office was 17.6 miles and half of the families complained of extreme transportational difficulties. Few families had automobiles in operation and the price of a taxi was often in excess of that of the food stamps.

The use of courtesy titles such as Mr. and Mrs. are of course the more common pattern, but the use of first names for black adults in the South historically has indicated the inferior status of blacks.

For a detailed description of health problems related to hunger, the failure of the food stamp program and the political reasons involved, see Drew, *Going Hungry in America*, 222 THE ATLANTIC, December, 1968, at 53.

hunger in the United States.[19] Besides finding that many people were simply hungry, the inquiry found evidence of retarded growth,[20] severe protein diseases (which may cause permanent brain damage),[21] a high incidence of parasitic diseases,[22] lowered resistance to infection,[23] listlessness,[24] apathy,[25] and shortened life expectancy.[26] All such symptoms are attributable to malnutrition.[27] Further, the inquiry suggests that a correlation exists between the results of hunger and social unrest, distrust, alienation, withdrawal, and frustration.[28]

A low annual income for the rural black means also that the[29]

> typical home is an unpainted three-room wood frame shack housing 3-5 adults and 8-12 children—all of whom sleep in three or four double beds. The floors and ceilings remain in disrepair along with loosely fitting wood shutters for the windows, all of which accounts for continual dampness during the rainy season and severe cold during the winter. Cooking and very limited heat are provided by a small wood-burning, pot belly stove.

These substandard conditions, and many others briefly outlined in footnotes, persist even though half the families work an average of 9-10 hours daily, and 17% spend 11-15 hours on daily farm work. A median of 4.7 persons per farm household work the land; one-third of those are children under ten. Nonetheless, two-thirds of the black farmers ended 1967 in debt.[30]

19. HUNGER REPORT, *supra* note 1.
20. *Id.* at 20, 21.
21. *Id.* at 21, 22, 29, 30.
22. *Id.* at 22-24.
23. *Id.* at 30, 31.
24. *Id.* at 31.
25. *Id.*
26. *Id.*
27. *See generally id.* at 16-38.
28. *Id.* at 31-32.
29. SRRP ANNUAL REPORT, *supra* note 16, at 6. The Alabama Study, Part I, *supra* note 16, at 8-12 reports that almost no homes have indoor water, 5% lack electrical service, 92.7% had no indoor toilet, 72.3% were troubled with rats, fleas, or lice, and more than half had floors in bad repair. With respect to furnishings and supplies, the study found 6.1% of the homes had no sheets or pillowcases and almost 2/3 did not have enough for the entire family. When there were sheets and bedding, it was often made of fertilizer sacks sewn together. One-fourth of the families had no blankets and another 1/3 did not have enough. Almost 1/3 of the families had a table too small to eat family meals together, over 1/3 lacked enough chairs, and 39.6% did not have enough dishes and other tableware.
30. Alabama Study, Part II, *supra* note 16, at 1-2. The study also shows that slightly over 55% of the families continue to plow the land with a mule. Credit is usually obtained from a plantation owner or merchant, who is often the same individual, in

B. FES, ASCS, and FHA: Description, Purpose, Structure, and Administration

The regulations covering the multitude of complex, often interrelated programs administered by USDA[31] fill volumes of the *Code of Federal Regulations*. Many of the programs affect the lives of southern black farmers, but this comment will concentrate only on three which are of pivotal importance: Federal Extension Service, Agricultural Stabilization and Conservation Service, and Farmers Home Administration. This subsection sets out the basic purposes and administrative structures of these programs, and the following subsection presents empirical data tending to show the genuine failure of these programs to reach the black farmers.

1. The Federal Extension Service

The FES, as the educational arm of the USDA, has been operating since 1862, when Congress created the Department of Agriculture, its stated purpose being to gather and diffuse information and to establish land grant colleges to teach agriculture and mechanic arts.[32] Extension work formally became a function of the land grant colleges in cooperation with the USDA with passage of the 1914 Smith-Lever Act.[33] The statutory mandate is for FES "to aid in diffusing among the people of the United States useful and practical information on subjects relating to agriculture and home economics, and to encourage the application of the same."[34] This educational aspect makes FES the key of access by the southern black farmer to all relevant USDA programs because, through FES, the individual farmer gains information about the programs and is aided in acquiring the needed technology to use them. The work of FES is carried out through the land grant colleges in co-

order to survive the winter. During spring planting, the farmer must again borrow money, using as collateral his government check and future crops and thus perpetuating his cycle of poverty.

31. For a detailed discussion of the history of the USDA and its many programs and agencies, see USDA, CENTURY OF SERVICE: THE FIRST 100 YEARS OF THE U.S. DEPARTMENT OF AGRICULTURE (1963).

32. Act of May 15, 1862, ch. 72, 12 Stat. 387 (now 5 U.S.C. § 511 (1964)); and The First Morrill Act, ch. 130, 12 Stat. 503 [1862] (now 7 U.S.C. § 301 (1964)).

33. Ch. 79, 38 Stat. 372 (1914), *as amended* 7 U.S.C. § 341 (1964). *See generally* EQUAL OPPORTUNITY IN FARM PROGRAMS, *supra* note 11, at 19-57.

34. 7 U.S.C. § 341 (1964). The basic statutory framework for FES is presently found at 7 U.S.C. § 341 *et seq.* (1964).

operation with the USDA.[35] If a state has two or more such land grant colleges, that state's legislature is empowered to direct the division of the federal FES appropriations between the colleges.[36] However, the federal statute sets general standards for the program, defining "cooperative agricultural extension work" as being the[37]

> giving of instruction and practical demonstrations in agriculture and home economics and subjects relating thereto to persons not attending . . . said colleges . . ., and imparting information on said subjects through demonstrations, publications, and otherwise and for the necessary printing and distribution of information in connection with the foregoing; and this work shall be carried on in such manner as may be mutually agreed upon by the Secretary of Agriculture and the State agricultural college or colleges . . . .

The proper state officials, typically faculty members of land grant colleges, must submit annual plans of work to the Secretary, who, upon approval of the plans, determines the annual appropriation for agricultural extension work for each state.[38] The statute requires the states to supply matching funds and provides an allocation formula, based primarily upon a state's percentage of rural and farm population, which is applied by the Secretary in determining appropriations as between the states.[39] The average federal contribution in 1964 to the 11 southern states[40] was 41.5%.[41]

Each state office staff includes a director, appointed subject to USDA approval. The state extension service develops cooperative financing and administration with the various county governments within the state. This responsibility extends to establishing priorities of work, allocation of time and resources, and assignment of staff. At the local level, the county and home agents are responsible for performing the duties outlined in the federal statute: supplying information to the individual farmer and his household regarding various USDA programs and benefits, methods of farming, and home management. These local

35. Land grant colleges are established pursuant to 7 U.S.C. §§ 301-328 (1964).
36. 7 U.S.C. § 341 (1964).
37. 7 U.S.C. § 342 (1964).
38. 7 U.S.C. § 344 (1964).
39. 7 U.S.C. § 343 (1964).
40. Texas, Arkansas, Louisiana, Mississippi, Alabama, Tennessee, Georgia, Florida, South Carolina, North Carolina, and Virginia.
41. EQUAL OPPORTUNITY IN FARM PROGRAMS, *supra* note 11, at 21.

agents are also assisted by a county advisory committee, selected by the county agent or agents, which drafts a county plan of work.[42]

Traditionally, 17 states maintained legally segregated land grant colleges and FES services.[43] In 1965, after the 1964 Civil Rights Act was passed, the USDA issued regulations requiring that the services be formally integrated.[44]

2. The Farmers Home Administration[45]

The FHA is a program of low-cost credit and supervised farm management. Unlike FES, it administers a direct federal program from Washington through state and county offices staffed by federal employees. Eligibility for assistance is determined at the county level by a committee of three local residents appointed by the state director. A state committee made up of federally appointed state residents advise the state director on matters of policy and procedure.[46]

The purpose of the program is to extend financial credit to owners of farms and other real estate in rural areas to enable them to construct, improve, alter, repair, or replace dwellings, farm buildings, and land, in order to provide them, their tenants, lessees, sharecroppers, and laborers with decent, safe, and sanitary living conditions and adequate farm buildings.[47] To be eligible for a loan, in the case of a farmer, he must show that he is the farm owner and is lacking "decent, safe, and sanitary" dwellings for his family or workers or tenants, or

42. *Id.* at 20-22.

43. UNITED STATES COMMISSION ON CIVIL RIGHTS, EQUAL PROTECTION OF THE LAWS IN PUBLIC HIGHER EDUCATION 278 (1960). The 17 states were: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

44. *See* 7 C.F.R. §§ 15.1 *et seq.* (1970).

45. The basic statutory framework of FHA and its programs is found in 42 U.S.C. §§ 1471-1472 (1964), *as amended*, 42 U.S.C. 1471-72 (Supp. IV, 1969), § 1473 (1964), §§ 1474, 1476 (1964), *as amended*, 42 U.S.C. 1474, 1476 (Supp. IV, 1969), §§ 1478-79 (1964); and in the Consolidated FHA Act of 1961 found in 7 U.S.C. §§ 1013a, 1921-22 (1964), §§ 1923-24 (1964), *as amended*, 7 U.S.C. 1923-24 (Supp. IV, 1969), § 1925 (1964), § 1926 (1964), *as amended*, 7 U.S.C. 1926 (Supp. IV, 1969), § 1927 (1964), §§ 1928-29 (1964), *as amended*, 7 U.S.C. 1928-29 (Supp. IV, 1969), § 1941 (1964), §§ 1942-43 (1964), *as amended*, 7 U.S.C. 1942-43 (Supp. IV, 1969), § 1945 (1964), § 1946 (1964), *as amended*, 7 U.S.C. 1964 (Supp. IV, 1969), §§ 1961-67 (1964), § 1981 (1964), *as amended*, 7 U.S.C. 1981 (Supp. IV, 1969), § 1982 (1964), § 1983 (1964), *as amended*, 7 U.S.C. 1983 (Supp. IV, 1969), §§ 1984-87 (1964), § 1988 (1964), *as amended*, 7 U.S.C. 1988 (Supp. IV, 1969), §§ 1989-90 (1964).

The USDA regulations for FHA are printed in 7 C.F.R. §§ 1823.1-.239 (1970).

46. *See generally* EQUAL OPPORTUNITIES IN FARM PROGRAMS, *supra* note 11, at 57-83.

47. 42 U.S.C. § 1471(a) (1964), *as amended*, 42 U.S.C. 1471(a) (Supp. IV, 1969).

is without other farm buildings adequate for the type of farming in which he is engaged or desires to engage. He must also show that he is without adequate financial resources of his own and that he is unable to secure the credit elsewhere "upon terms . . . which he could reasonably be expected to fulfill."[48] If the applicant is eligible and appears to have the ability to repay with interest, the Secretary, through the FHA, may make the loan for a period of not more than 33 years and at a rate of interest not exceeding 5% per annum on the unpaid balance.[49] All capital improvements so financed are required to be in accordance with approved plans and specifications and must be supervised and inspected as the Secretary directs.[50]

There are also available special loans and grants for minor improvements, up to an amount of $1,500, even though the applicant cannot qualify under the financial security requirements mentioned above. These are available for such purposes as making a farm dwelling safe and sanitary, removing hazards to health, repairing roofs and providing toilet facilities, water supply, structural supports, screens, etc.[51]

Under the Consolidated FHA Act of 1961,[52] a great variety of loans are available and to an expanded class of possible beneficiaries. The Secretary is authorized to make and insure loans to farmers who (1) are citizens, (2) have a farm background and either training or experience which the Secretary determines to be sufficient to assure reasonable prospects of success in the proposed farming operations, (3) are or will become owner-operators of not larger than family farms, and (4) are unable to obtain sufficient credit elsewhere at reasonable terms and rates.[53] Thus, the applicant need not be an owner so long as he plans to become an owner-operator[54] of a family farm. The

48. 42 U.S.C. § 1471(c) (1964), *as amended*, 42 U.S.C. 1471(c) (Supp. IV, 1969).
49. 42 U.S.C. § 1472 (1964), *as amended*, 42 U.S.C. 1472 (Supp. IV, 1969).
50. 42 U.S.C. § 1476 (1964), *as amended*, 42 U.S.C. 1476 (Supp. IV, 1969). Under this provision the Secretary may also provide special technical services to the borrower free of charge. Furthermore, 42 U.S.C. § 1476(b)-(d) (1964), provides for research and study programs to be developed by the Secretary for the purpose of promoting construction of adequate farm buildings, new methods of production, etc., with a view towards reducing costs of farm buildings and adapting and developing fixtures and appurtenances for a more efficient and economical farm operation.
51. 42 U.S.C. § 1474 (1964), *as amended*, 42 U.S.C. 1474 (Supp. IV, 1969).
52. See note 45 *supra*.
53. 7 U.S.C. § 1922 (1964).
54. The Secretary has defined an "owner" as one with legal ownership of farmland, and an "operator" as one who is in general control of farming operations on the particular farm during the program year. 7 C.F.R. § 719.2(o),(p) (1969).

purpose of loans available under the Consolidated Act and the order of preference are as follows: (1) *acquiring* or improving farms, farm buildings, land; water development, use and conservation; (2) recreational uses and facilities; (3) enterprises needed to *supplement* farm income; and (4) refinancing of existing indebtedness.[55] The repayment period for these loans and the interest rates are set by the Secretary, but may not exceed 40 years and 5% per annum on the unpaid balance.[56]

The Consolidated Act also provides for "operating loans" to farmers under the same criteria as above. These include loans for the following purposes: paying costs incident to farm reorganization for a more profitable operation; purchasing livestock, poultry, and farm equipment; paying for farm supplies generally, and essential operating expenses, including cash rent; water and land development, use and conservation; recreational facilities; enterprises needed to supplement farm income; refinancing, and other farm and home needs, including family subsistence.[57] These loans are payable over a period of not more than seven years and at a rate of interest set by the Secretary, who is to take into consideration the economic condition of the applicant and his family.[58]

The administration of the assets, duties and powers under the Consolidated Act and other acts authorizing agricultural credit are assigned by the Secretary to the FHA, which is headed by an administrator appointed by the President, with the consent of the Senate.[59] To aid in the carrying out of these credit programs, the statute directs the Secretary to appoint in each county a county committee, consisting of three

55. 7 U.SC.. § 1923 (1964), *as amended*, 42 U.S.C. 1923 (Supp. IV, 1969). There are also available special loans to farm owners and tenants for the purposes of soil and water conservation and recreational facilities, and water and waste facility loans and grants. 7 U.S.C. §§ 1924, 1926 (1964), *as amended*, 7 U.S.C. 1924 (Supp. IV, 1969).

56. 7 U.S.C. § 1927 (1964).

57. 7 U.S.C. § 1942 (1964), *as amended*, 7 U.S.C. 1942 (Supp. IV, 1969).

58. 7 U.S.C. § 1946 (1964), *as amended*, 7 U.S.C. 1946 (Supp. IV, 1969). The Secretary may, through the FHA, compromise, adjust or reduce claims, adjust and modify terms of mortgages, leases and contracts entered into or administered by the FHA. However, no such compromise or adjustment may be made on terms more favorable to the borrower than recommended by the appropriate county committee. See text *infra* at notes 60, 61 and 62. The Secretary does have the power to release mortgages and contract liens altogether if it appears that they have no present of prospective value. 7 U.S.C. § 1981 (1964), *as amended*, 7 U.S.C. 1981 (Supp. IV, 1969).

59. 7 U.S.C. § 1981 (1964), *as amended*, 7 U.S.C. 1981 (Supp. IV, 1969).

persons residing therein, at least one of whom must be a farmer.[60] The committee members are to serve three-year terms, removable for cause by the Secretary, and at rates of compensation as set by the Secretary.[61] The function of these county committees is to review all applications for credit and to certify whether or not the applicant meets the eligibility requirements.[62]

To summarize the structure of the FHA, each state office is headed by a state director who is immediately responsible to an FHA regional administrator.[63] Each county office is under the direction of a county supervisor, who is responsible to the state director. The local county office is the normal channel through which the public seeks information, makes application for loans, and does business with the FHA. The local committees, composed of three county residents, review the applications, make certifications and recommendations, release from personal liability, and advise on all phases of the FHA programs in the county.[64]

3. The Agricultural Stabilization and Conservation Service

The ASCS is an agency of primary importance to those farmers who grow allotted crops, *e.g.*, cotton, tobacco, and peanuts. Through county offices, it administers crop allotments and price support programs. The state and local offices are manned by federal employees.[65]

In the Soil Conservation and Domestic Allotment Act of 1936,[66] the policy and purposes of Congress were declared to be[67]

> (1) preservation and improvement of soil fertility; (2) promotion of the economic use and conservation of land; (3) diminution of exploitation and wasteful and unscientific use of national soil resources; (4) the protection of rivers and harbors . . . in aid of flood control; and (5) reestablishment, at as rapid a rate as the Secretary of Agriculture determines to be practicable and in the general

60. 7 U.S.C. § 1982 (1964). The implementing regulation specifies that all three members of the county committee must be farmers. 7 C.F.R. § 1800.4 (1970).
61. 7 U.S.C. § 1982 (1964).
62. The committee shall also determine whether the applicant has the "character, industry and ability" to carry out his proposed operations. 7 U.S.C. § 1983(b) (1964), *as amended*, 7 U.S.C. 1983(b) (Supp. IV, 1969).
63. 7 C.F.R. § 1800.3 (1970).
64. 7 C.F.R. § 1800.4 (1970).
65. *See* EQUAL OPPORTUNITY IN FARM PROGRAMS, *supra* note 11, at 89-99.
66. 16 U.S.C. § 590g-p (1964).
67. 16 U.S.C. § 590g(a) (1964).

> public interest, of [parity of purchasing power between farm and non-farm persons].

To carry out the purposes specified, the Secretary received power to make payments and grants of other aid to agricultural producers,[68] including tenants[69] and sharecroppers,[70] in amounts determined by the Secretary.[71] Congress directed the Secretary to employ local and state committees to manage the programs. Each year, farmers within each community elect from their numbers a local committee of three farmers for that area. The local committeemen, at a county convention, nominate and elect a county committee of three farmers who reside in the county. County committeemen serve for three years and cannot serve for more than three consecutive terms.[72]

The local committee elects a secretary and may use the FES county agent for that purpose. The county committee may also use the FES county agent as secretary. If not so elected, the county agent is automatically an ex officio member of the county committee without vote.[73] Each state has a state committee of three to five farmers, resident in the state and appointed by the Secretary. The state director of FES is an ex officio member of the state ASCS committee.[74]

The determination of the boundaries of elective areas (communities) is by the state committee. No community may include more than one county.[75] Those eligible to vote for local committeemen and delegates to the county convention are any person of legal voting age who has

68. A "producer" is an owner, landlord, tenant or sharecropper who is entitled to share in the crops available for marketing, or in the proceeds thereof. 7 C.F.R. § 719.2(s) (1969).

69. A "tenant" is (1) a person, usually called a "cash tenant," "fixed-rent tenant," or "standing rent tenant," who rents land from another for a fixed amount of cash or of a commodity to be paid as rent; or (2) a person, other than a sharecropper, usually called a "share-tenant," who rents land from another and pays a share of the crops or proceeds therefrom as rent. 7 C.F.R. § 719.2(y) (1969).

70. A "sharecropper" is a producer who performs work in connection with the production of a crop under supervision of another and who receives a share of such crop for his labor. 7 C.F.R. § 719.2(w) (1969).

71. 16 U.S.C. § 590h(b) (1964).

72. *Id.*

73. *Id.*

74. *Id.* This section further provides that the Secretary should make such regulations as necessary relating to the selection and exercise of the functions of the respective committees, and to the administration of the programs through such committees. In doing this, the statute expressly directs the Secretary to protect the interests of tenants, sharecroppers and small producers.

75. 7 C.F.R. § 7.7 (1970).

an interest in a farm as an owner, tenant or sharecropper,[76] and any person not of legal voting age who is in charge of the supervision and conduct of the farming operation of an entire farm.[77] County and community elections are called and set by the Deputy Administrator, State and County Operations, ASCS,[78] in such a manner as will, in his judgment, afford full opportunity for participation by all persons eligible.[79] The existing county committee is generally responsible for conducting the community elections in accordance with the Deputy Administrator's instructions, and is also responsible for the conduct of the county convention for the election of a new county committee.[80] The regulations specify many eligibility requirements and causes of removal for community and county committeemen and other ASCS employees.[81] One eligibility requirement for a county or community committeeman, which is important here, is that he not have been removed for refusal to carry out the USDA's policy relating to equal opportunity and civil rights,[82] and that he not have been disqualified from future services as a result of a determination by the state committee that during his previous services as a committeeman or ASCS employee he refused to carry out USDA policy relating to equal opportunity and civil rights.[83]

The duties of the county committee, subject to general direction and supervision of the state committee, are generally to carry out in the county, through the community committeemen, the agricultural con-

76. These terms are defined in notes 54, 69 and 70 *supra.*

77. 7 C.F.R. § 7.5 (1970). Eligibility also assumes that the farm itself is eligible for an allotment payment under at least one of several acts administered by the ASCS Committee structure.

78. 7 C.F.R. § 719.2(i) (1969).

79. 7 C.F.R. § 7.8 (1970). This section goes on to provide that the state committee which is composed of direct appointees of the Secretary may determine that the election did not reflect the views of a substantial number of eligible voters or that such election was not in substantial accordance with instructions of the Deputy Administrator, and declare the election void and call a new one.

80. 7 C.F.R. §§ 7.9, 7.10 (1970). The election of the community committee and delegates to the county convention is by secret ballot with a right to write-in. Each year, three members and two delegates are elected. The three elected are the community committee and also delegates to the county convention. 7 C.F.R. § 7.11 (1970).

81. *See* 7 C.F.R. §§ 7.15-7.17, 7.28-7.31 (1970).

82. The policy is primarily set forth in 7 C.F.R. §§ 15.1 *et seq.* (1970).

83. 7 C.F.R. §§ 7.15(e)-(f) (1970). Refusal to carry out USDA policy relating to equal opportunity and civil rights is also specified as a cause for removal of a community or county committeeman or ASCS employee. Upon removal or suspension for this and other causes, there is a right to review by the state committee and then the Deputy Administrator, but no hearing is specified. 7 C.F.R. §§ 7.28-7.31 (1970).

servation programs, price support programs as assigned, acreage allotment and marketing quota programs, and others.[84] To accomplish this, the county committee is directed to lease office space, employ an office manager and other personnel at compensation set by the Deputy Administrator, direct the activities of community committees, make available to farmers information about the programs administered through the county committee, and recommend desirable program changes to the state committee.[85] The community committee is charged with the duties of assisting the county committee in carrying out the programs assigned, informing the farmers regarding the purposes and provisions of such programs, conducting community meetings and such other duties as assigned by the county committee.[86]

It is important to note that nothing precludes the Secretary, ASCS Administrator, or Deputy Administrator from administering any or all programs and functions delegated to a community committee, county committee, state committee, or any employee. In doing so, the federal official may designate persons of his choice to carry out the programs and other functions for such period as may be necessary.[87]

C. Failure at the Local Level

In large measure, the three agricultural programs described above have failed to reach the southern black farmer and his family at the local level. The causes of that failure are complex, but it is clear that USDA personnel have contributed significantly thereto.[88]

84. 7 C.F.R. § 7.20 (1970).

85. *Id.* The regulation also specifies that there may be no racial discrimination in the hiring of an office manager and that such manager may not be removed by the committee for advocating or carrying out USDA policy on equal opportunity and civil rights.

86. 7 C.F.R. § 7.22 (1970).

87. 7 C.F.R. § 7.37 (1970).

88. "The experience of the staff indicates that poverty in the black South is directly related to active discrimination by southern Federal employees of the USDA and passive acquiescence of the national USDA." SRRP ANNUAL REPORT, *supra* note 16, at 6. Citing the Alabama Study, the SRRP ANNUAL REPORT, at 5-6 found:

1. The vast majority of black farmers *fear* the employees of Federal farm programs, a situation which results in a low level of eligible participants in programs. The black farmer, conditioned by years of experience, views the farm program employee as the southerner who calls him "nigger," "boy," and "grandpa." The black farmer knows that if he goes to one of the agency offices, he will have to wait on a long line and watch while the white man is attended to as soon as he enters. He also knows that if he angers the local agent with his persistence, his credit with the local merchants may be canceled. [Footnotes deleted.]
2. The ASCS cotton allotments and subsidy checks for blacks are lower than those

According to the Alabama Study,[89] the role played by the FES in the counties surveyed is negligible with regard to blacks. Of those who had had contact with the FES office, over half of the black farmers reported that they were called by their first names or something less courteous. Over 60% stated that they were treated as inferior persons by the office personnel.[90] Amazingly, 80% reported that they had never been visited at home, farm, or church by an FES agent. Of those visited, 88% said it was a black agent.[91] Three-quarters had never been visited by a home demonstration lady and of those visited, 94% of the visits were by a black agent.[92] These figures clearly demonstrate that the patterns of rigid racial segregation continue to exist.

An important function of extension agents is to advise the farmer on soil conditions and how to improve them, yet 75% of the farmers interviewed had never had their soil tested, and of the 25% which had, almost half were never told the results.[93] Thus, the black farmer is effectively isolated from knowledge about federal programs and the technical assistance which is necessary to improve his home and farm. He is likely to feel intimidated, unwelcome and discouraged from actively seeking aid in FES offices. Generally, he neither participates in nor benefits from federal farm programs.

The United States Civil Rights Commission has found that the pattern of unequal service to black farmers by FES exists throughout the 11 southern states.[94] It states that the federally assisted extension services are administered through a racially separated structure and generally on a discriminatory basis, often with inferior offices for black staff; that separate plans of work are normally made for services to

for whites. FHA loans for the purchase of land, equipment, and the improvement of farm buildings are virtually unavailable for blacks, and the rejections are rarely recorded. The county agent of the Extension Service, whose job it is to pass on information acquired at the federally supported Land Grant Colleges, rarely does so for black farmers.

89. See note 16 *supra.*

90. Alabama Study, Part II, at 4-5, 8-9.

91. *Id.*

92. *Id.* A study of 12 Alabama counties in 1967 revealed that there were 46 white extension agents and 26 black agents to serve a rural population of approximately 27,000 whites and over 72,000 blacks. *Id.* at 8 n.3, citing oral testimony of William C. Payne, Jr., Program Analyst United States Commission on Civil Rights.

93. Alabama Study, Part II, at 9.

94. EQUAL OPPORTUNITY IN FARM PROGRAMS, *supra* note 11, at 25-57. The 11 states considered were Texas, Louisiana, Arkansas, Mississippi, Alabama, Tennessee, Florida, Georgia, South Carolina, North Carolina, and Virginia.

blacks at the county level and that in counties where both black and white are employed, they generally do not plan programs or otherwise meet together. The result is that black agents generally have inferior training because they are denied access to the training furnished their white co-workers. The responsibility to work with black farm families is typically assigned to black staff, if there is such, and the case load of black workers is too large to permit adequate service.[95]

As a result, thousands of black youth are denied equal benefits, access to national programs of the extension service through 4-H Clubs, and the opportunity to compete with white youth for state and national 4-H awards.[96] Black rural homemakers receive less assistance than whites in the same county and many receive no service whatever in counties where there is no black staff.[97] Black farmers are denied access to services provided to whites which would help them diversify crops, increase production, achieve adequate farming operations, or train for non-farm employment.[98] Furthermore, the Commission found that federal as well as state and local officials have participated in the discriminatory practices. There appears to be a preconception on the part of many federal, state and county extension workers that blacks as a class cannot succeed in agriculture.[99]

The failure of the FHA is also dismal. The Alabama Study shows that about 93% of those black farmers who had been to FHA offices said that they were called by their first names, or something less courteous, and 60.8% replied that they were treated as inferior persons in those offices. Over 95% said that they never had received help or advice from any member of the FHA county committee and 87% had never received any loan or advice from the FHA county supervisor or people in his office. Approximately 85% had never heard of any meeting held by the FHA and 71.6% of the farmers were not even aware that FHA made loans for improvement of soil and water. About two-thirds of the farmers were unaware that FHA loans were available for family or farming costs or that FHA made loans to help buy land, while 57.4%

95. *Id.*
96. *Id.* at 105-106.
97. *Id.*
98. *Id.*
99. *Id.*

were unaware that FHA made loans to build, buy or repair a house or farm building.[100]

The Civil Rights Commission investigations confirm the conclusion that the FHA provides inadequate services to the black farmers in the 11 southern states generally.[101] The commission states that assistance rendered blacks in a given economic class is consistently different from that given to whites in the same economic class. Black borrowers receive smaller amounts, both absolutely and in relation to their net worth. Whites are given careful supervision by the FHA and receive most of their funds for capital investment, while blacks, in the same economic class and with drastically unequal supervision, receive loans primarily for living expenses and annual costs. The reason, concludes the Commission, is probably the preconception that blacks, as a class, are somehow inferior and cannot succeed in farming.[102] The Commission also states that there is a discriminatory pattern against blacks by FHA in employment, advancement and opportunities, and that there are segregated services where there are black personnel.[103]

Similar findings apply to ASCS. The Alabama Study shows that about 94% of the black farmers responding to the questionnaires were called by their first names, or something less courteous, at the ASCS offices, while 55.6% felt that they were not treated equally to whites at those offices. Over 95% reported never having received help or advice from ASCS community committees and 95% had never received help or advice from a county committee. Approximately 75% said they never had been visited by an ASCS representative at farm, home or church, and never had received help or advice from the ASCS office. Two-thirds never had heard of a meeting held by ASCS. It should be recalled that a basic philosophy of ASCS, as FES, is grass roots participation and control by local people of local policy. Two-thirds were unaware that they could appeal the amount of their cotton allotment and the same proportion was unaware of *any* government program to help with water and soil problems.[104]

100. Alabama Study, Part II, at 4-5, 7-8, 10-11.
101. EQUAL OPPORTUNITY IN FARM PROGRAMS, *supra* note 11, at 57-83, 106.
102. *Id.*
103. *Id.* For a thorough discussion of FHA and exhaustive documentation of the discriminatory administration of programs at the local level, see S. Zimmerman, Legal Control of Government Benefit Program, 1967 (unpublished manuscript on file at New York University Law Library).
104. Alabama Study, Part II, at 4-7, 10.

As regards the ASCS, the Civil Rights Commission found that the situation is bleak for the black farmer in southern states generally. Until 1964, blacks had not participated, with rare exception, in the nominations and elections for ASCS community committees, which elections are directly under USDA supervision and jurisdiction.[105] In 1964, of 37,000 community committee members in the South, only 75 blacks were elected and there were no black county committeemen. Furthermore, blacks were not employed in permanent federal or county ASCS positions, nor were they appointed to the important temporary positions filled each year by county committees. The Commission, reporting in 1964, stated that no blacks had ever been appointed by the Secretary to a state ASCS committee in the South.[106]

In June of 1965, Secretary of Agriculture Freeman issued a progress report[107] to the President answering various charges by the United States Civil Rights Commission, some of which are discussed above. The Secretary's report gives the impression of important advances in eliminating discriminatory practices in the administration of farm programs. For example, he states that 37 blacks have been appointed to state ASCS committees in the eleven southern states. However, the Alabama Study, conducted in 1967, and a report of the Commission hearings in Alabama during April of 1968 show, in the words of the Commission staff investigators, that "there has been no significant change in agricultural programs in Alabama."[108] One may reasonably assume that the same conclusion applies to rural areas in the other southern states. The relatively little progress in school desegregation

105. See notes 75-81 *supra* and accompanying text.

106. EQUAL OPPORTUNITY IN FARM PROGRAMS, *supra* note 11, at 89-98, 107-08.

107. DEPARTMENT OF AGRICULTURE, PROGRESS REPORT ON ELIMINATION OF DISCRIMINATION (1965).

108. U.S. CIVIL RIGHTS COMMISSION, CYCLE TO NOWHERE, at 17 (1968). The Commission goes on to state:

> This means that a lot of law is being broken in Alabama with the Federal Government accessory before and after the fact. Many Negroes feel that behind the lawlessness is a systematic effort by white Alabamians to force politically renascent Negroes out of the State by making life on the land untenable. Whether or not this is the intent, the effect . . . is apparent. . . . Thousands have been evicted from tenant farms to drift like flotsam, washing up in Northern ghettos or in Alabama urban centers where the menial jobs are colored black. Rev. William Branch, a civil rights leader . . . , saw nearly 100 families turned out overnight, stunned and penniless in a State that would not help them to shelter infants . . . while the Federal Government looked the other way.

See also HUNGER REPORT, *supra* note 1, *Chapter 5: Agricultural Policy.*

since *Brown v. Board of Education*[109] 16 years ago certainly does not make one optimistic about the prospects for the agriculture welfare programs.

II. TOWARDS JUDICIAL SOLUTIONS

A. Introduction

At least as regards the southern black farmer, the USDA programs designed to help him attain a self-sustaining and dignified status, are intertwined with a racist cultural context and, for that reason, have failed in a wholesale manner.[110] The federal government, through its officials and employees, not only has acquiesced in the discriminatory practices, but has directly contributed to them.[111] For the southern black farmer, there is generally despair, extreme poverty and racial discrimination.[112] His problems are many and their amelioration will require a lengthy and arduous campaign of lawsuits, lobbying, publicity, education and political organization.

In comparison to the problems at hand, the function of this comment is a modest one. It focuses on the various problems of three specific USDA programs and will attempt to develop and identify major legal theories which might be pursued in correcting those problems. For all three programs, the basic problem is how to make use of judicial means to correct a system which is corrupted in a wholesale fashion.

Regarding the FES, which is in many aspects a federally subsidized local program,[113] the basic concern is that the wide variety of technical assistance, information and educational help reach all farmers on an equal basis. Regarding the FHA, a purely federal program,[114] the problem presented is more one of directly attacking federal agencies and officials, and seeking equal treatment for black farmers in receiving loans

109. 347 U.S. 483 (1954).
110. The experience of the staff indicates that poverty in the black South is directly related to active discrimination by southern Federal employees of the national USDA. . . . They also witnessed the fact that in Mississippi and Alabama, and probably elsewhere, a prosperous nation is not feeding starving and near-starving citizens.
SRRP ANNUAL REPORT, *supra* note 16, at 6. *See also* HUNGER REPORT, *supra* note 1, at 77-83.
111. See, *e.g.*, notes 94-99, 101-103, 105-106 and accompanying text *supra*.
112. See, *e.g.*, note 108 *supra*.
113. See notes 32-41 and accompanying text *supra*.
114. See notes 45 and 46 and accompanying text *supra*.

and supervisory assistance. Regarding the ASCS, a more mixed program as regards federal versus local control,[115] the desired goals are equal and free participation by black farmers in the elections, equal and fair administration of programs by ASCS committees and, hopefully as a natural result, more black farmers elected to county and community committees.

B. Legal Theories and Problems

1. FES—Federal Funds and Guidelines to State Agencies

(a). Green v. County Board—Application of School Desegregation Principles. The FES is a program of public education for adult students; they are nonresident students in the sense that they do not attend school at a central place. The underlying rationale and reasons which led to the holdings of *Brown v. Board of Education*[116] and its progeny should require that similar legal remedies be applied to FES to assure equal educational and agricultural services to the southern black farmer. FES, like other school systems, is a federally subsidized state operation.[117] As in the school desegregation cases, the racially discriminatory pattern in which FES programs are administered at the local level is a fruit of legally enforced segregation.[118] Until this decade, 17 states maintained legally segregated FES services.[119]

FES is the educational arm of all agricultural programs benefitting the individual farmer and is administered through the state land-grant colleges in cooperation with the USDA.[120] The Smith-Lever Act of 1914,[121] the basic federal statute creating FES, affords similar treatment to the individual farmer and his family as would be given to a

115. See notes 65-74 and accompanying text *supra.*
116. 347 U.S. 483 (1954).
117. See notes 35-44 and accompanying text *supra.*
118. For example, the state of Mississippi has established two land grant colleges: Alcorn Agricultural and Mechanical College for black students and Mississippi State College for the white. All FES functions are allocated to Mississippi State, and Alcorn, created "for the education of colored youth" is excluded from any responsibility of administering FES programs except as it might be delegated from the white officials at Mississippi State. Hopefully, the black farming population of Mississippi is not entirely excluded from participation in FES benefits. For example, Mississippi law expressly authorizes the agricultural extension service officials at Mississippi State, with the approval of the president of the college, to establish a separate but, one assumes, equal camp for "Negro 4-H Club members." *See* 5 MISS. CODE ANN. §§ 6689-6704 (1952), 3 MISS. CODE ANN. § 2964 (1956).
119. See note 43 *supra.*
120. See text *supra* at notes 37-38.
121. 7 U.S.C. § 342 (1964).

nonresident student. It defines "cooperative agricultural extension work" as being the "giving of instruction and practical demonstrations in agriculture and home economics and subjects related thereto to persons not attending or resident in said colleges."[122]

The first case of *Brown v. Board of Education*[123] declared "the fundamental principle that racial discrimination in public education is unconstitutional"[124] as violative of the equal protection clause of the fourteenth amendment. In reaching its conclusion, the Court relied upon sociological evidence in examining the effect of racial discrimination on black school children.[125] In considering these intangible effects, the Court recognized the necessity of equal access to public educational opportunities if the individual or racial minority is to fully participate in society generally.[126]

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship . . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Surely the holdings of *Brown I* and its progeny would apply with equal force to adult education programs. The rationale of *Brown I* clearly is applicable to the southern black farmer in his relations with FES. The racially discriminatory administration of FES educational programs[127] not only has contributed to the black farmer's failure in farming, his condition of economic and often psychological feelings of inferiority and his poverty, but it continues to reinforce them. The

122. *Id.*
123. 347 U.S. 483 (1954) [hereinafter referred to as *Brown I*].
124. The quote, interpreting *Brown I*, is from the second case of Brown v. Board of Education, 349 U.S. 294, 298 (1955) [hereinafter referred to as *Brown II*].
125. The use of such evidence by the Court has been greatly debated. *See, e.g.*, W. LOCKHART, Y. KAMISAR AND J. CHOPER, CONSTITUTIONAL LAW:—CASES—COMMENTS—QUESTIONS 1243-44 (1964) and materials cited therein.
126. 347 U.S. at 493.
127. See text *supra* at notes 90-99.

black farmer is effectively excluded from benefits of many agricultural programs since he is not educated to their existence and uses. He cannot reasonably be expected to succeed in the business of family farming because he is denied the equal opportunity of that education. Because FES is a public education program and because the evils identified in *Brown I* are present and continue to be reinforced by racially discriminatory patterns of administration, the issue becomes whether the principles of the school desegregation cases extend to protect the southern black farmer.

Brown II declared that the federal district courts would be guided by equitable principles in fashioning and effectuating decrees such as "are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."[128] A significant addition in the line of desegregation cases since *Brown I* is *Green v. County Board*,[129] decided in 1968. The case struck the phrase "with all deliberate speed" from *Brown II* and held that a school system has an affirmative duty to take whatever steps are necessary to convert to a racially unitary system in which racial discrimination is eliminated "root and branch" and to do so by coming forward "with a plan that promises realistically to work, and promises realistically to work *now*."[130]

In *Green*, the defendant board in 1965 had adopted a "freedom-of-choice" plan for desegregation in order to remain eligible for federal

128. 349 U.S. at 301.

129. 391 U.S. 430 (1968). Two similar cases were decided at the same time: Raney v. Board of Education, 391 U.S. 443 (1968) and Monroe v. Board of Commissioners, 391 U.S. 450 (1968).

130. 391 U.S. at 437-39 (Court's emphasis). Many songs and chants of the civil rights movement of the late 1950's and early 1960's contained the plea for "freedom now!" One wonders whether our society would be significantly different today if the Court had said "now" in 1954 rather than "with all deliberate speed."

One significant school desegregation case has been decided by the Court since *Green*: Alexander v. Board of Education, 396 U.S. 19 (1969). Certain Mississippi school districts brought the case, urging that desegregation deadlines be postponed for a limited period of time. Even the Nixon administration favored some form of postponement. However, the Court upheld *Green* and restated the law that "a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible." The Court held that the lower federal court should issue its order, effective immediately, that

> each of the school districts here involved may no longer operate a dual school system based on race or color, and directing that they begin immediately to operate a unitary school system within which no person is to be effectively excluded from any school because of race or color.

396 U.S. at 20.

financial aid.[131] Under this plan, each student could choose at the beginning of each school year which of the two schools he wanted to attend, *i.e.*, the black school or the white school. Those making no choice were assigned to the school previously attended. On its face, the plan seemed eminently fair. However, for whatever reasons, it did not work.[132] In three years of operation, not a single white child had chosen to attend the black school and 85% of all black children in the school system were still in the black school.[133]

Looking to the objective facts, the Court noted that the pattern of separate schools along racial lines was precisely that declared unconstitutional by *Brown I* as denying black children equal protection of the laws. Thus, after 14 years, the defendant school board had failed to accomplish the transition to a "unitary, non-racial system" as *Brown I* had required. The Court concluded:[134]

> [A] plan at this late date which fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is . . . intolerable. "The time for mere 'deliberate speed' has run out." . . . The burden on a school board today is to come forward with a plan that promises realistically to work *now*. (Court's emphasis; citations omitted.)

The Court rejected the defendant's "freedom-of-choice" plan not because it was per se unconstitutional, but because it did not work.[135]

131. The Department of Health, Education and Welfare, pursuant to Title VI of the 1964 Civil Rights Act, issued regulations establishing "guidelines" according to which schools in the process of desegregation could remain qualified for federal funds. One method endorsed by the Department was the "freedom-of-choice" plan. 45 C.F.R §§ 80.1-80.13 (1969).

132. One of the authors has had some personal experience with a similar freedom-of-choice plan adopted by a Mississippi school system. That one also did not work. One obvious reason was that white parents would almost never choose to send their children to the previously all black school. Thus, those schools would remain black. As for black parents and children it took considerable courage to tell the school authorities that they wanted the child to go to the previously all white schools. Some black parents suffered economic reprisals for taking the step and the children were sometimes treated badly by white students and teachers at the white school. Some black parents felt that their children would have to have fine clothing before they could attend the "nice" white schools, which clothing they could not afford. Furthermore, school officials would change deadlines for request forms or seem to lose request forms from black parents which were sent on time. In general, it was simply far easier for the black family to continue in the old patterns.

133. Green v. County Board, 391 U.S. at 441.

134. *Id.* at 438-39.

135. *Id.* at 441. In the course of the opinion by Justice Brennan, the Court twice suggests that zoning might be a good plan for this school district because there were only two schools in the entire system and there was no residential segregation.

Thus, the Court gave full effect to its doctrine of substantive equal protection developed in school desegregation cases by imposing on the school district an affirmative duty to create *now* the desired social result of a unitary, non-racial school system.

Moving to the FES context, the defendant school authorities would be those state officials at the land-grant colleges responsible for FES administration at the state level. Also named as defendants would be the officials of each county office wherein discrimination is alleged. Applying *Green*, the substantive equal protection doctrine would be imposed to require those officials to come forward with a plan which would work *now* to attain the desired social result: equal access to the education, information and aid of agricultural programs available through the FES. The Court should fashion its equitable decree in such a manner as to make the plan work and retain jurisdiction to make sure that it does work.[136]

(*b*). *Title VI, Civil Rights Act of 1964*—Section 601 of Title VI of the 1964 Civil Rights Act provides a clear right to the individual not to be discriminated against on the basis of race by any program which receives federal financial assistance.[137]

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

The provision is aimed at the evil of racial discrimination in non-federal programs which receive federal grants.[138] USDA regulations pursuant to Title VI expressly cover FES, but do not list the direct federal programs of FHA and ASCS.[139] Thus, Title VI presents a possible remedy to the black farmer for the relief from discriminatory administration by the FES at the state and local levels. Two major

136. This has been the method used in *Brown II* and *Green* and the other school desegregation cases generally.

137. 42 U.S.C. § 2000d (1964).

138. *See generally* 67 COLUM. L. REV. 1121, 1132-33 (1967).

139. 7 C.F.R. § 15.12, Appendix (1970). The regulations do cover certain limited programs which involve federal funding of state programs and are administered in part by ASCS and FHA. Generally, however, ASCS and FHA are direct federal programs and are not covered by the regulations issued pursuant to Title VI. The USDA has also issued regulations covering racial discrimination in direct federal programs of the department. They are found at 7 C.F.R. §§ 15.50-15.52 (1970).

problems arising under Title VI are whether an "ultimate beneficiary" must exhaust the remedies specified in Title VI, and whether those remedies are exclusive, *i.e.*, does the "ultimate beneficiary" have standing to sue?

Section 602 of the Act[140] provides that each federal department or agency which extends federal financial assistance to a state or local agency is directed to effectuate the intent of section 601 by issuing rules, regulations or orders which shall become effective upon Presidential approval. Compliance with such rules and regulations may be enforced by termination or refusal of federal funds upon an express finding of noncompliance after opportunity for hearing, or "by any other means authorized by law."[141] Section 603[142] provides for judicial review of any such department or agency action taken pursuant to section 602.

Under section 602, the USDA has adopted regulations providing for nondiscrimination in federally assisted programs of the department.[143] For example, if an individual farmer has a complaint, his administrative remedy is to complain in writing to the Secretary or any USDA agency which he must do within 90 days of the alleged act of discrimination. The complaint is then "promptly" referred to the office of the USDA Inspector General where it is investigated in whatever manner the Inspector General decides and any further action is within the discretion of the agency or Secretary.[144]

The regulations set forth a right to hearing and judicial review if a "recipient" is adversely affected by departmental action.[145] However, this does not include the farmer. A "recipient" means a political entity, institution or individual which received federal financial assistance, and the regulations specifically exclude any "ultimate beneficiary under such program."[146] Therefore, the farmer cannot reach the courts through these USDA regulations and the provided administrative remedy of submitting written complaints obviously is not suited for a direct attack by the "ultimate beneficiary."

140. 42 U.S.C. § 2000d-1 (1964).
141. *Id.*
142. 42 U.S.C. § 2000d-2 (1964).
143. 7 C.F.R. §§ 15.1 *et seq.* (1970).
144. 7 C.F.R. § 15.6 (1970).
145. 7 C.F.R. §§ 15.9-15.11 (1970).
146. 7 C.F.R. § 15.2(e) (1970).

Turning to the question of standing, it is not clear whether Title VI itself allows the farmer a direct judicial remedy. In *Green Street Ass'n v. Daley*,[147] plaintiffs, all black and owners or lessees of realty in the area affected, sued to enjoin a proposed urban renewal project which, they alleged, was actually for the purpose of Negro clearance and reestablishment of white commercial trade and business. Relocation of black families, they charged, would be along racial lines into other black areas and this would be in violation of Title VI. The court conceded that plaintiffs were intended as ultimate beneficiaries of the federal subsidy program to aid local urban renewal projects, but concluded that they were not the direct "recipients" of such funds as referred to in Title VI. Thus, the court reasoned, plaintiffs were not persons suffering "legal wrong" because of agency action and were not entitled to judicial review under section 603 of Title VI or section 10 of the Administrative Procedure Act.[148] They lacked standing and the federal court was without jurisdiction.[149]

The Seventh Circuit Court of Appeals[150] affirmed the decision on other grounds, but it did discuss plaintiffs' theory under Title VI. As to the federal defendants, the court reasoned, the argument ignored sections 602 and 603 which establish the procedure to be followed by federal officials in enforcing the nondiscrimination requirements. Only after that procedure is utilized is judicial review permitted by section 603. If an individual suit for injunction were permitted, the court reasoned, the administrative procedure would be by-passed and, section 601 could not be intended to permit termination of federal participation in a given program by such means. As to the local defendants, the court indicated that individual plaintiffs may have standing for relief under section 601, but assuming this to be true, unlawful discrimination in the relocation plan was held not to be established.[151]

The Fifth Circuit Court of Appeals has taken the opposite view, at least in regard to non-federal defendants. In *Bossier Parish School Board v. Lemon*,[152] parents of black children brought a class action to en-

147. 250 F.Supp. 139 (N.D. Ill. 1966).
148. 5 U.S.C. § 1009 (1964).
149. 250 F. Supp. at 146.
150. 373 F.2d 1 (7th Cir. 1967), *cert denied*, 387 U.S. 932 (1967).
151. *Id.* at 8-9.
152. 370 F.2d 847 (5th Cir. 1967).

force desegregation by defendant school board which had accepted federal financial assistance and had given assurances of nondiscrimination. One of the defenses to the action was that section 601 of Title VI was a mere statement of policy and that section 603's administrative remedies are the only means by which it may be enforced. In holding for the plaintiffs on this point, the court stated:[153]

> Section 601 . . . states the law as laid down in hundreds of decisions, independent of the statute. In this sense, the section is a prohibition, not an admonition. In the absence of a procedure through which the individuals protected by section 601's prohibition may assert their rights under it, violations of the law are cognizable by the courts. . . . The Negro school children as beneficiaries of the Act have standing to assert their section 601 rights.

In *Gautreaux v. Chicago Housing Authority*,[154] the Federal District Court for the Northern District of Illinois reversed the position it had taken in *Green Street Ass'n*. The plaintiffs, all black, were either tenants or applicants for public housing and challenged, in a class action, the constitutional validity of the site selection policy of the defendant housing authority. The allegation was that the defendant selected sites for public housing almost exclusively within all black or nearly all black neighborhoods for the purpose and with the result of maintaining existing patterns of urban residential segregation by race in violation of the fourteenth amendment. The court held that plaintiffs had standing to maintain the action under section 601 of Title VI, citing *Bossier* and adopting that construction.[155] The court noted that when the Seventh Circuit Court of Appeals had an opportunity to disapprove of that construction in *Green Street Ass'n*, it did not do so.[156]

On the basis of *Bossier* and *Gautreaux*, the black farmer has standing under section 601 to challenge, on behalf of himself and others similarly situated, the discriminatory administration of at least

153. *Id.* at 852.
154. 265 F. Supp. 582 (N.D. Ill. 1967).
155. *Id.* at 583.
156. The arguments in favor of standing gained strength from the recent case of Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968). In that case, it was held that black residents of a planned urban renewal area had standing to attack the plan as against both federal and state officials.

the FES, which is a federally assisted state program. A class action by a group of farmers against state FES officials and the county directors, assuming proof of unequal service to black residents, should result in an injunction designed to correct the discriminatory conduct as was done in *Bossier*.

Title VI should not be construed as giving only the restrictive remedy to the "ultimate beneficiary," as was done in *Green Street Ass'n*. As the *Bossier* court stated, section 601 simply articulates a pre-existing right recognized in hundreds of decisions, *i.e.*, the right secured by the equal protection clause not to be discriminated against on account of race. It is quite clearly the intent of Title VI to promote that right, not limit it. Similarly, the same guarantee of equal protection applies to protect the individual as against the federal government, at least where race discrimination is involved.[157] Thus, it should not matter whether the defendant is federal or non-federal for purposes of enforcing the right expressed in section 601. The administrative remedies of Title VI should be construed as controlling relations between the federal agency and the "recipient,"[158] not the relations between either and the "ultimate beneficiary."

2. FHA—Federal Funds to Federal Administrative Agency: The Thirteenth Amendment and Sections 1981 and 1982

FHA is a program of low-cost credit and supervised farm management through which various programs are administered providing loans for many purposes ranging from the purchase of land and construction of farm buildings to living expenses.[159] There is a pervasive pattern of discriminatory treatment of the black farmer by FHA offices and committees. The U.S. Civil Rights Commission has found that economic and supervisory assistance rendered blacks in a given economic class is consistently different and inferior from that given whites in the same economic class.[160]

Section 1982, part of the original Civil Rights Act of 1866,[161] states

157. See text *infra* at notes 192-201.
158. *See generally* Harvith, *Federal Equal Protection and Welfare Assistance*, 31 ALBANY L. REV. 210, 215-219, 223 (1967).
159. See text *supra* at notes 45-64 for a general discussion of the structure and programs of FHA.
160. See text *supra* at notes 101-103.
161. Ch. 31, § 1, 14 Stat. 27 (now 42 U.S.C. § 1982).

simply that "all citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, sell, hold and convey real and personal property."[162] The provision was passed by Congress, over President Andrew Johnson's veto, pursuant to the enabling clause of the thirteenth amendment.[163]

The meaning of the thirteenth amendment and of section 1982 was given an expansive interpretation in the recent case of *Jones v. Alfred H. Mayer Co.*[164] Plaintiffs' complaint alleged that defendant, a private real estate developer, refused to sell them a home for the sole reason that Mr. Jones was black. The plaintiffs relied on section 1982 and sought injunctive and other relief. The district court[165] dismissed on grounds that section 1982 applies only to state action and does not reach private refusals to sell. The Eighth Circuit Court of Appeals affirmed.[166] The Supreme Court reversed, holding "[t]hat section 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment."[167]

The Court stressed that concepts of "state action" and "under color of law" were inapplicable to the thirteenth amendment and section 1982. By its terms, section 1982 grants to all citizens without regard to race "the same right" to purchase and lease property "as is enjoyed by white citizens," and that right can be impaired as effectively by private sellers as by the state. If a black buyer can be turned down solely because of his race, he cannot be said to enjoy "the same right."

162. 42 U.S.C. § 1982 (1964).
163. The thirteenth amendment reads as follows:
Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime . . . , shall exist within the United States . . . .
Section 2. Congress shall have power to enforce this article by appropriate legislation.
164. 392 U.S. 409 (1968). For discussions of the case, its analysis, implications and the legislative history of section 1982, *see* Morris and Powe, *Constitutional and Statutory Rights to Open Housing*, 44 WASH. L. REV. 1, 57-75 (1968); Comment, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294 (1969); Kohl, *The Civil Rights Act of 1866, Its Hour Come Round at Last: Jones v. Alfred H. Mayer Co.*, 55 VA. L. REV. 272 (1969); 53 MINN. L. REV. 641 (1969); 37 FORDHAM L. REV. 277 (1968).
165. 255 F. Supp. 115 (1966).
166. 379 F.2d 33 (1967).
167. 392 U.S. at 413 (1968) (emphasis in original).

Upon consideration of the legislative history, the Court concluded that Congress had intended exactly what it had said, *i.e.*, that section 1982 encompasses every racially motivated refusal to sell or rent property.[168]

On the issue of whether Congress had the power pursuant to the thirteenth amendment to do what section 1982 purports to do, the Court held that Congress' power to enforce that amendment "by appropriate legislation" includes the power to eliminate all racial barriers to acquisition of real and personal property. Citing the *Civil Rights Cases*,[169] the Court stated that section 2 of the thirteenth amendment[170] confers upon Congress the "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery."[171]

> Negro citizens . . . would be left with "a mere paper guarantee" if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man.[172]

The holding of *Jones v. Mayer* does not, however, apply directly to aid the black farmer in his attempt to gain equal service from FHA. The Court expressly noted that section 1982 "does not refer explicitly to discrimination in financing arrangements."[173] The statement was made by way of contrast to the Fair Housing Title (Title VIII) of the 1968 Civil Rights Act[174] because the Court wanted to make clear that section 1982 is not a comprehensive open housing law as is Title

168. *Id.* at 420-22. The legislative history is considered at pages 422-37.
169. 109 U.S. 3, 20 (1883).
170. See note 163 *supra.*
171. 392 U.S. at 438-39. Thus, Congress' power under section 2 of the thirteenth amendment was construed consistently with standards established by Chief Justice Marshall in construing the "necessary and proper" clause in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 321 (1819):

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional . . . .

172. 392 U.S. at 442-43.
See also Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), wherein the principles of *Jones* are applied and even expanded. That case deals with the leasing of real property, and also specifically holds that money damages are available for injury to one's section 1982 rights under 42 U.S.C. § 1988 (1964). Furthermore, the case holds that section 1982 and *Jones* also protect and support the white person who joins the minority person in asserting those rights contained therein.
173. 392 U.S. at 413.
174. *Id.* at 417 n.21.

VIII and that the latter provides wider coverage and easier procedures in many respects. On the other hand, the implication of the above quote from *Jones* is that section 1982 reaches wherever the economy reaches. Obviously the coverage of section 1982 cannot be so extraordinarily broad, otherwise it would reach, for example, the small group of white bigoted friends who gather at the private home of the host who makes the mistake of charging for the drinks. Could they not refuse a black party crasher in light of section 1982?

One writer[175] suggests that the meaning of *Jones* is that section 1982 reaches those limitations upon "freedom" and "relics of slavery" which serve as obstacles to the attainment of "fundamental rights." This analysis is suggested in *Jones* and is borrowed from Mr. Justice Bradley's opinion in the *Civil Rights Cases*.[176] The question becomes: What rights are "fundamental" and thus protected under the thirteenth amendment? It is suggested that the definition of such a right should be those rights "crucial to the capacity of Negroes to throw off the last shackles of slavery and to achieve social mobility"[177] in that the concept of section 1982 is that whites as the dominant class have certain rights and that all others shall have equal rights. The *Jones* holding establishes one such "fundamental" right: "[T]he right to live wherever a white man can live."[178] Under this analysis, the focus is on the narrow interest involved rather than economic activity in general. Equal access, free of racial discrimination, to adequate housing and employment is obviously more important to blacks' capacity for social mobility than membership in any and all private associations.

Before examining the applicability of the principles of *Jones* and section 1982 to the FHA problem, section 1981 should also be considered:[179]

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and

175. Comment, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294, 1310-12 (1969).
176. 109 U.S. 3 (1883).
177. See Comment, *supra* note 175, at 1311-12.
178. 392 U.S. at 443.
179. 42 U.S.C. § 1981 (1964).

> equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, and exactions of every kind, and to no other.

Like section 1982, section 1981 was part of the original Civil Rights Act of 1866, passed pursuant to section 2 of the thirteenth amendment, and contains the concept that black citizens ought to enjoy, equally with white citizens, the rights therein specified. It should be noted that the provision, by its terms, also is not limited by concepts of "state action" and "under color of law," and that it is even broader than section 1982 in that it declares that all citizens have the "same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."

Section 1981 was last considered by the Supreme Court in 1906 in *Hodges v. United States*.[180] In that case the defendants had been indicted for conspiring to prevent certain black citizens from performing their employment contracts. A conviction was obtained under what is now 18 U.S.C. 241.[181] However, the Supreme Court held that the thirteenth amendment did not vest the jurisdiction in federal courts to remedy the injury alleged; that any remedy must be sought through state action and state tribunals. The Court's construction of the thirteenth amendment was that it only gives power to Congress to enforce the denunciation of slavery and involuntary servitude in the very strict sense.

However, the Court in *Jones* held that *Hodges*, to the extent that it is inconsistent with the *Jones* holding, is overruled.[182] Thus, the Court implied its willingness to give substantive content and enforceable remedies under section 1981 as it has under section 1982. In the context of *Hodges* and under the foregoing analysis, this would mean that if freedom from racial discrimination in the contracting of one's labor is a fundamental right crucial to the capacity of blacks to throw off the last shackles of slavery and to achieve social mobility, and if this right outweighs countervailing interests of the state and other individuals, it is protected by both the thirteenth amendment

180. 203 U.S. 1 (1906), Justices Harlan and Day dissenting.
181. See note 267 *infra*.
182. 392 U.S. at 441 n.78.

and section 1981, and is enforceable in a federal court. Freedom from racial discrimination in employment is, of course, already established as the national policy and law.[183]

It is often the case that the southern black farmer does not have the "same right . . . to . . . purchase . . . real and personal property" or the "same right . . . to make and enforce contracts" because of the pattern of discriminatory administration of financial assistance programs by the FHA.[184] The enjoyment of equal access to rights granted under these programs is "fundamental" in the sense that they are necessary to the capacity of the black farmer and his family to throw off the last shackles of slavery and to achieve social mobility. Furthermore, it is inconceivable that the federal government, through its FHA agents and employees, has a legitimate countervailing interest in denying equal benefits under these programs to the black farmer on the basis of race. Therefore, the thirteenth amendment and sections 1981 and 1982 should afford the black farmer a substantive right of equal access to the benefits of FHA programs enforceable in the federal courts.

By their terms, the thirteenth amendment and sections 1981 and 1982 are not limited by concepts of "state action" and "under color of law." They reach purely private conduct as in *Jones v. Mayer*, and conversely should apply as well against the federal government. For example, if within a particular state, agents of the federal government denied to black farmers on account of their race the "same right . . . to make and enforce contracts . . . as is enjoyed by the white citizens," the terms of section 1981 apply with the same force as they would against private action or state action. Thus, if a black farmer went to the FHA office and applied for a loan to purchase a particular piece of farmland that was for sale, and was turned down or given unequal service in terms of the amount or type of a loan or in supervision on account of his race, those FHA agents would be liable under section 1981 and possibly under section 1982. If, in addition, the private seller of the farmland refused to deal with the black farmer because of his race, the seller would be liable under section 1982 and *Jones v. Mayer*.

183. *See, e.g.*, Titles VI and VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000d, 2000e (1964).
184. See text *supra* at notes 100-103.

Jurisdiction to vindicate these rights under section 1981 and 1982 is clearly established by 28 U.S.C. § 1343(4) (1964) and *Jones v. Mayer*. By its terms, section 1343(4) confers jurisdiction on the district court to award "damages or . . . equitable or other relief under any Act of Congress providing for the protection of civil rights" and, in such cases, there is no need for the jurisdictional amount of $10,000.[185] If rights under sections 1981 and 1982 are shown to have been violated, a federal court has power to fashion an effective equitable remedy even though the two provisions themselves provide no explicit method of enforcement.[186] In *Jones v. Mayer*, while not deciding whether money damages are available under section 1982, the Court in effect directed that upon remand the plaintiffs be given injunctive relief and the right to buy the home which they had chosen and at the price prevailing at the time of the wrong.[187] The Court assumed that plaintiffs would then not have suffered any uncompensated injury and left open the question of whether a party injured by violation of section 1982 might have an implied right to compensatory damages in some circumstances.

For the black farmer, an effective attack on pervasive patterns of racial discrimination in FHA programs would necessitate a class action against FHA officials and personnel responsible for large areas. Such defendants might include county offices and officials, state offices and officials, FHA area administrators responsible for one or more states, the chief FHA administrator and perhaps the Secretary of Agriculture. Presumably, upon proof of the patterns of discriminatory administration of programs, the district court would issue a mandatory injunction fashioning an effective equitable remedy as was done in *Jones v. Mayer*.[188]

3. *ASCS—Federal Funds to Federal Programs Governed by Locally Elected Committees*

(*a*). *Federal Equal Protection—Bolling v. Sharpe.* Unlike the FES, the ASCS is generally a direct federal program and is not primarily

185. *See* 392 U.S. at 412 n.1.
186. *Id.* at 414 n.13.
187. *Id.* at 414 n.14.
188. This approach is also well established in reapportionment and desegregation cases. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962) and Green v. Board of Education, 391 U.S. 430 (1968).

educational.[189] Unlike the FHA, the problems of the ASCS do not fit conveniently within the terms of 42 U.S.C. §§ 1981 and 1982,[190] the ASCS problems being primarily that blacks are not represented in the decision making process because the local election system and ASCS employees often discriminate in the administration of their duties.[191] Furthermore, no equal protection clause applies, *in haec verba*, to the central government. Thus, the issue arises: Is there a viable doctrine of federal equal protection which will assure to the black farmer equal treatment at the hands of the ASCS administration?[192]

Bolling v. Sharpe,[193] decided with *Brown I*, makes it clear that the due process clause of the fifth amendment includes an equal protection aspect. In ruling that segregation in the District of Columbia schools was unconstitutional, the Court stated:[194]

> [T]he Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools. . . . [T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive . . . therefore we do not imply that the two are always interchangeable phrases. But . . . discrimination may be so unjustifiable as to be violative of due process. . . .
>
> In view of our decision that the Constitution prohibits the states from maintaining racially segregated schools, *it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.* (Emphasis added.)

The full scope of federal equal protection remains relatively un-

189. ASCS and its programs are described in the text *supra* at notes 65-87.

190. The use of 42 U.S.C. §§ 1981, 1982 (1964), in attacking problems related to FHA is discussed *supra* at notes 161-184.

Both FHA and ASCS do help to administer some programs which might be characterized as indirect, federally subsidized programs. Examples are direct loans and planning advances under the Soil and Water Association Loan Program pursuant to certain sections of the Consolidated FHA Act, 7 U.S.C. §§ 1926, 1944 (1964) and certain assistance to soil conservation districts pursuant to the Soil Conservation Act, 16 U.S.C. § 590 a-f (1964), administered partially by ASCS. The USDA has put these programs in the category of indirect federal programs for purposes of coverage by Title VI of the 1964 Civil Rights Act. *See* 7 C.F.R. Part 15, Appendix (1970).

191. See notes 104-106 and accompanying text *supra*.

192. It should be noted that the same question, and the discussion contained in this part of this comment, apply also to the FHA which is generally a direct federal program.

For a detailed discussion of federal equal protection *see* Harvith, *Federal Equal Protection and Welfare Assistance*, 31 ALBANY L. REV. 210 (1967).

193. 347 U.S. 497 (1954).

194. *Id.* at 498-500.

explored today. In *Colorado Anti-Discrimination Commission v. Continental Air Lines*,[195] the Court cited *Bolling* and *Brown I* in dictum which stated that a state or federal law permitting racial discrimination against job applicants would be invalid under both the fourteenth amendment equal protection clause and the fifth amendment due process clause. A non-racial case, *Schneider v. Rusk*,[196] relied on *Bolling* and the due process clause to hold unconstitutional a federal statute which discriminated against naturalized citizens who lived abroad for three years by revoking their citizenships.[197]

The most recent case to apply *Bolling* is *Shapiro v. Thompson*,[198] which held the one year residency requirements for welfare recipients in the District of Columbia to be unconstitutional congressional denials of equal protection through the fifth amendment due process clause.[199] The case involved appeals from Pennsylvania, Connecticut, and the District of Columbia, and stated that the District of Columbia law violated the fifth amendment due process clause for the same reasons the Pennsylvania and Connecticut laws were invalid.[200] Those reasons, in brief, were that the states had shown no "compelling state interest" to justify the infringement of the constitutional right to travel.[201]

Here there is no necessity to extend the doctrine of federal equal protection into the economic area since it is sufficient to establish the reach of the doctrine in racial matters.[202] It is no doubt safe to assert that federal equal protection will be coextensive with fourteenth amendment equal protection in the racial area.[203] To use what one

195. 372 U.S. 714, 721 (1963). This case dealt with de facto discrimination in employment rather than segregation by law.

196. 377 U.S. 163 (1964).

197. The lower federal courts have relied on the federal equal protection doctrine of *Bolling* for various purposes. *See* Harvith, *supra* note 192, at 221. For example, Simkins v. Cone Memorial Hospital, 323 F.2d 959, 967 (4th Cir. 1963), *cert denied*, 376 U.S. 938 (1964), held that racial discrimination by a private hospital receiving financial help from the "massive use" of state and federal funds under a federal statute violated the equal protection guarantees of the fifth amendment due process clause.

198. 394 U.S. 618 (1969).

199. *Id.* at 642-43. "[T]he Fifth Amendment . . . forbids discrimination that is 'so unjustified as to be violative of due process.'"

200. *Id.*

201. *Id.* at 638.

202. *See* Harvith, *supra* note 192 *passim*, for argument to establish federal equal protection on a broader basis in the welfare rights area.

203. *See* Kinoy, *The Constitutional Right to Negro Freedom*, 21 RUTGERS L. REV. 387 (1967). Also, Harvith, *supra* note 192, at 222, concludes that Bolling v. Sharpe squarely holds that racial discrimination in a direct federal program violates the equal protection guarantees of the fifth amendment.

commentator terms the "method of inference from the structures and relationships created by the constitution in all its parts or in some principal part,"[204] the passage of the thirteenth, fourteenth and fifteenth amendments after the Civil War can have no other purpose than to secure for blacks full and equal participation in governmental programs of either the state or the national levels.

The most reasonable conclusion is that at least where racial discrimination is involved, the equal protection aspects of the fifth amendment will apply with the same force and effect against the federal government as the equal protection clause of the fourteenth amendment does against the states. In the context of the fourteenth amendment, the Supreme Court has declared that any racial classification is constitutionally suspect and that the state faces a heavy burden to justify it.[205] When similar cases arose in the state and federal contexts and involved racial discrimination, they were treated similarly in *Brown I* and *Bolling*. Furthermore, *Bolling* clearly implies that any racial discrimination on the part of the federal government violates the fifth amendment due process clause unless it is related to a "proper governmental objective" and that the burden would be upon the federal government to justify such discrimination.[206] It should also be recalled that the Court in *Bolling* stated the view that since the Constitution prohibits states from maintaining racially segregated schools, it would be "unthinkable" that the Constitution would impose a lesser duty upon the federal government.[207]

The result is that the black farmer has a constitutionally secured right not to be discriminated against on account of race in any manner

204. C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7 (1969).

205. Loving v. Virginia, 388 U.S. 1, 11 (1967):
At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the "most rigid scrutiny," . . . and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective.

206. 347 U.S. at 499-500:
Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus imposes . . . a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.

207. *Id.* at 500. As noted, it is Harvith's conclusion, *supra* note 192, at 222, that Bolling v. Sharpe squarely holds that racial discrimination in a direct federal program violates the equal protection guarantee of the fifth amendment.

by FHA and ASCS officials or employees in the administration of any direct federal program.

(*b*). *ASCS Elections—Federal Equal Protection and the Right to Vote.* Assuming there is secured a right against racial discrimination in the administration of direct federal programs, the question becomes how that right, and the fifteenth amendment right to vote,[208] coalesce to affect the ASCS committee election process.[209] Black farmers do have a right to vote in the elections which is secured by statute[210] and regulations.[211] Therefore, it is submitted that such right to vote is protected against abridgement or denial for reasons of race because of federal equal protection[212] and because the fifteenth amendment prohibits national as well as state action.[213] An additional issue is whether, granting that the right to vote in ASCS elections is protected against racial discrimination, the central government has a duty to take affirmative steps to improve the opportunity for blacks to participate in the election and to protect the right to vote.

In *Terry v. Adams*[214] a voluntary private organization called the Jaybird Democratic Association held primary elections from which blacks were excluded. Invariably, the Jaybird candidate would win the official Democratic Party primary, which candidate, in turn, invariably would win at the general election. The Supreme Court held that such a system violated the fifteenth amendment proscription against denial or abridgement of the right to vote on account of race. The majority of the Court split into three opinions as to the manner in which state action was involved, but eight justices agreed that the state had an affirmative duty to remedy the situation.

208. U.S. Const. amend. XV, § 1:
The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

209. The key to fair administration of programs by ASCS lies in equal access to the committee structure.
The real power in the ASCS program, however, is in the hands of county committees. These committees are usually elected indirectly by vote of community committeemen who are directly elected in their communities.
EQUAL OPPORTUNITY IN FARM PROGRAMS, *supra* note 11, at 91.

210. 16 U.S.C. § 590h(b) (1964).

211. 7 C.F.R. § 7.5 (1970). *See also* notes 75-80 and accompanying text *supra.*

212. See text *supra* at notes 193-207.

213. See note 208 *supra.*

214. 345 U.S. 461 (1953).

Justice Black, joined by Justices Douglas and Burton, found it violative of the fifteenth amendment for a state "to permit within its borders the use of any device that produces an equivalent of the [constitutionally prohibited] election."[215] Justice Frankfurter was of the opinion that state action was present because county election officials participated in the Jaybird primary.[216] Justice Clark, joined by the Chief Justice, and Justices Reed and Jackson, found that the Jaybird Association was "part and parcel of the Democratic Party," which had official status.[217] Justice Clark stated his theory as follows:[218]

> Accordingly, when a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play.

The opinions of Justices Black and Clark thus appear to present a majority view of the Court that a state may not constitutionally permit an election system to operate which has the result of denying the vote to the black population, and therefore has an affirmative duty to alter a system which does so operate.

As regards the ASCS context, there are "elections" involved which fit the definition given by Justice Black in *Terry*. Upon examining the texts of the fifteenth amendment and the enforcing statute,[219] Justice Black stated:[220]

> [T]ogether they show the meaning of "elections." Clearly, the Amendment includes any election in which issues are decided or public officials selected. Just as clearly, the Amendment excludes social or business clubs. And the statute shows the congressional mandate against discrimination whether the voting on public issues and officials is conducted in a community, state or nation. Size is not a standard.

The ASCS elections choose the public officials who sit on the community and county committees and, therefore, the rule of *Terry v.*

215. *Id.* at 469.
216. *Id.* at 476-7.
217. *Id.* at 482.
218. *Id.* at 484.
219. 8 U.S.C. § 31, now codified as 42 U.S.C. § 1971(a)(1) (1964).
220. 345 U.S. at 468-69.

Adams set forth above should apply. The Court has shown a special solicitude for the right to vote and has been ready to place affirmative duties on the government involved.[221] The extreme importance of the committees to successful participation in the programs by blacks and the demonstrable lack of representation for black farmers should compel the courts to find that the central government has a duty to act affirmatively to make the black vote count.

A recent reapportionment case, *Dusch v. Davis*,[222] suggests the governing principle. The dispute arose over the method of election of members to the governing council of a mixed urban-rural area formed when the City of Virginia Beach and Princess Anne County consolidated. The district court had approved a plan, called the Seven-Four Plan, wherein four members of the council were elected at large without regard to residence and the remaining seven members were elected by the entire city, but one had to reside in each of the city's seven boroughs. The Supreme Court upheld the district court's decision.

In the opinion by Justice Douglas, the Court observed that each councilman represents the city, not the borough of his residence. Because of the wide variation in borough population, different conclusions might follow if, in fact, the borough's resident on the council represented only the borough.[223]

In the course of a quotation from the district court opinion, adopted with approval by the Supreme Court, there appears the following passage:[224]

> [T]he 'Seven-Four Plan' is not an evasive scheme to avoid the consequences of reapportionment or to perpetuate certain persons in office. The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for intelligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population. *As the plan becomes effective, if it then operates to minimize or cancel out the voting strength of racial or political elements of the voting population, it will be time enough to*

221. *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953); Reynolds v. Sims, 377 U.S. 533 (1964).
222. 387 U.S. 112 (1967).
223. *Id.* at 115.
224. *Id.* at 116-17.

consider whether the system still passes constitutional muster. (Emphasis added)

It is a reasonable inference from the foregoing quotation that an election system which in fact operates to produce disproportionate representation for some groups within a geographic area, the city in this case, violates the one-man, one-vote requirement of the fourteenth amendment equal protection clause. That would be so even though the election is area wide in form. In the racial discrimination context, the same principles should apply to the ASCS elections under the federal equal protection doctrine.

Besides the problem of whether the elections are conducted under federal auspices, the issue arises whether ASCS elections are of the type to which the established one-man, one-vote requirements attach. In *Avery v. Midland County*,[225] the Court held that local governmental units with general governmental powers over an entire geographic area may not be apportioned among single member districts of substantially unequal population.[226] The Court also held that nonlegislative officers, performing essentially administrative functions, do not necessarily have to be elected. In *Sailors v. Board of Education*,[227] the Court left open the question of whether, if they are elected, the one-man, one-vote principle would apply.[228]

The functions of the ASCS are such as to merit characterizing the committees as possessing legislative powers.[229] They have a substantial

225. 390 U.S. 474 (1968).
226. *Id.* at 485-86.
227. 387 U.S. 105 (1967).
228. *Sailors* concerned a school board's membership which the Court took as being appointed. The Court identified the board's functions as follows:

> The authority of the county board includes the appointment of a county school superintendent, preparation of an annual budget and levy of taxes, distribution of delinquent taxes, furnishing consulting or supervisory services to a constituent school district upon request, conducting cooperative educational programs on behalf of constituent school districts which request such services, and with other intermediate school districts, employment of teachers for special education programs, and establishing, at the direction of the Board of Supervisors, a school for children in the juvenile homes. One of the board's most sensitive functions, and the one giving rise to this litigation, is the power to transfer areas from one school district to another.

387 U.S. 105, 110 n.7.
229. The ASCS committees set acreage allotments, control the release of additional acreage, hear appeals, supervise landlord-tenant agreements, direct the administration of several programs, provide services in the form of information and help to their constituency, the farmers. *See* notes 65-87 and accompanying text *supra*.

and unique affect upon the lives of their constituency. One commentator notes that "in many areas county government operations are dwarfed by ASCS programs as measured in dollar expenditures or impact on residents or both."[230] In spite of the statutory command to protect the interests of the tenant, sharecroppers and small producers, the system has not secured the interests of the black farmer.[231] Therefore, policy arguments, as well as the character of the committees' duties, lead to the conclusion that they be classified as legislative in nature and thus the *Avery* holding and requirements should apply. Alternatively, the Court might resolve the question left open in *Sailors* in favor of reapportionment principles which would apply in those situations where administrative offices are made elective.

To the extent that the lack of black participation in ASCS elections is attributable to agency action, such as failure to mail notices to eligible voters, or discriminatory treatment,[232] or to agency inaction which allows the system to be corrupted by local racists, the Constitution should be held to require whatever affirmative action is necessary on the part of federal personnel to correct the abuses. The desired result might be attained by use of the doctrine of federal equal protection, the application of the fifteenth amendment, or principles to be gathered from the reapportionment cases. Once a court is persuaded to recognize the problem and determines to correct it, it should follow the lead in the school desegregation cases by exercising whatever supervision is necessary to assure fair elections and by insisting that fair elections be conducted now.[233]

4. Traditional Statutory Remedies

(*a*). *Sections 242 and 1983.* These provisions, 18 U.S.C. § 242 (1964), *as amended,* 18 U.S.C. § 242 (Supp. IV, 1969),[234] and 42

230. Morton Grodzins, as reported in EQUAL OPPORTUNITY IN FARM PROGRAMS *supra* note 11, at 89.

231. *See* HUNGER REPORT, *supra* note 1, at 77-81, and EQUAL OPPORTUNITY IN FARM PROGRAMS, *supra* note 11, 93-97.

232. For instance, the state committee can decide whether the election shall be by ballot, meeting, or mail. UNITED STATES DEPARTMENT OF AGRICULTURE, AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE, ASCS HANDBOOK: COUNTY AND COMMUNITY ELECTIONS § 14(A) (1968).

233. See text *supra* at notes 128-136 for the discussion regarding the school desegregation cases.

234. Whoever, under color of any law, statute, ordinance, regulation, or custom,

U.S.C. § 1983 (1964),[235] are derived from post Civil War legislation. Section 242 provides criminal sanctions for certain conduct and is the counterpart of section 1983, which provides a civil remedy for generally the same type of conduct. They are treated here together because the Supreme Court has treated them as parallel provisions and has construed them consistently. Generally, they proscribe conduct "under color of any [state] law" which subjects the victim to a deprivation of any right "secured by the Constitution or laws of the United States." Upon conviction, section 242 provides a maximum fine of $1,000 or imprisonment for one year, or both, and if death results, a maximum of life imprisonment is provided by a 1968 amendment. Section 1983 provides that the defendant shall be liable to the person injured in an action at law or suit in equity.[236]

Screws v. United States[237] is helpful in defining the content of the apparently vague language of section 242.[238] The case dealt with indictments under section 242 and the intent required to constitute a crime thereunder. The petitioners, a sheriff and two other policemen, were charged with needlessly killing a black prisoner and thus depriving him of rights secured by the Constitution, *i.e.*, the fourteenth amendment right not to be deprived of life without due process of law and the right to be tried by due process of law. Their defense was that section 242 is unconstitutional because the fourteenth amendment due process clause contains no ascertainable standard of guilt and often is defined in broad and fluid terms not fit for making conduct criminal.

Adopting an interpretation to preserve the statute's constitutionality,

willfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments . . . on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

The last clause, following the semi-colon, was added by Congress in 1968.

235. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

236. *Id.*

237. 325 U.S. 91 (1945).

238. See note 234 *supra*.

Justice Douglas, writing the plurality opinion,[239] read the word "willfully" in the statute to mean a requirement of a "specific intent." Thus, the plurality opinion held:[240]

> A requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness. . . . One who does act with such specific intent is aware that what he does is precisely that which the statute forbids.

Another section 242 case, *United States v. Price*[241] discussed the meaning of the "under color of law" requirement of sections 242 and 1983. The indictment alleged that three official defendants[242] and fifteen non-official, private individuals participated in a conspiracy with the purpose and result of killing three victims.[243] The theory of the indictment was that the defendants had violated section 242 by "willfully" subjecting the victims to deprivation of their rights secured by the fourteenth amendment not to be summarily punished without due process of law by persons acting under color of Mississippi law.[244]

The district court had dismissed the section 242 charges against the fifteen non-official defendants on the ground that their conduct could not be said to be "under color of law." The Supreme Court reversed the dismissal and held:[245]

239. Justice Douglas was joined by Justices Black and Reed and Chief Justice Stone. Justice Rutledge concurred only for purposes of disposing of the case, but stated that he agreed with the reasoning of the dissent by Justice Murphy. The latter would have affirmed the convictions on the ground that there was no problem with vagueness because the right not to be deprived of life without due process of law is expressly and clearly protected by the fourteenth amendment.

Justices Roberts, Frankfurter and Jackson dissented on the grounds that the crime is punishable by local law only and that section 242 was never designed for such use.

240. 325 U.S. at 103-04. The exact meaning of the *Screws* specific intent requirement is not clear. It may mean that, at the time of the crime, the defendant had the specific intent to deprive the victim of a right secured by the Constitution or laws of the United States. Or it may mean that the defendant knew the circumstances and, if he had been asked, would have known that he was depriving the victim of a secured right, *e.g.*, the right to trial. There is language in the case by Justice Douglas which would support either analysis, and lower federal courts have gone both ways. *See* T. EMERSON, D. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1064-65 and materials cited therein (student ed. 1967).

241. 383 U.S. 787 (1966) (unanimous decision).

242. Sheriff Rainey, Deputy Sheriff Price and Patrolman Willis of Neshoba County, Mississippi.

243. The three were civil rights workers and participants in the 1964 Mississippi Summer Project: Michael Schwerner, James Chaney and Andrew Goodman.

244. Deputy Price had placed the three in his jail for an alleged traffic violation.

245. 383 U.S. at 794.

> [P]rivate persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of [section 242] . . . . It is enough that [the private individual be] a willing participant in joint activity with the State or its agent.

The Court went on to explain[246] that "under color of law" means the same in section 242 as it does in the civil counterpart, section 1983, and that in cases involving the same thing as "state action" required under the fourteenth amendment. For purposes of defining "state action," the Court quoted from its opinion in *Burton v. Wilmington Parking Authority*:[247]

> [There is state action whenever the] state has so far insinuated itself into a position of interdependence with [the otherwise "private person" whose conduct is said to violate the Fourteenth Amendment] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have to be so "purely private" as to fall without the scope of the Fourteenth Amendment.

To complete an understanding of the principles and implications of sections 242 and 1983, consideration must be given to *Monroe v. Pape*,[248] which treats section 1983. Plaintiffs' complaint alleged that thirteen Chicago policemen, without a search warrant, broke into their home, routed them from bed, ransacked the house and destroyed property, and held one of them for ten hours without taking him before a magistrate and without permitting him access to an attorney or his family. The theory of their cause of action was that the defendants, acting under color of state law, had violated plaintiffs' rights, among others, against unreasonable search and seizure contained in the fourth amendment and made applicable to the states through the due process clause of the fourteenth amendment in *Wolf v. Colo-*

246. *Id.* at 794 n.7.

247. 365 U.S. 715, 725 (1961). A private restaurant leased from a state agency and located in a publicly owned parking garage refused to serve appellant because of his race. Claiming a violation of his rights under the equal protection clause, appellant sued for declaratory and injunctive relief against the restaurant and state agency. Taking into consideration the facts that the restaurant was physically and financially a part of a public building devoted to public use and operated by a state agency, the Court held that the state is deemed a joint operator of the restaurant and that the latter's refusal to serve appellant violated the equal protection clause.

248. 365 U.S. 167 (1961). Jurisdiction was asserted under 28 U.S.C. §§ 1331, 1343 (1964).

rado.[249] The Court held, as to the individual defendants, that the complaint stated a cause of action and that Congress in section 1983 had intended to give a remedy to parties deprived of constitutional rights by an official's abuse of his position.[250]

The Court also made clear that the federal remedy is independent and, therefore, it was not relevant that a remedy under state law was available and had not been pursued by plaintiffs.[251] In the circumstances of this case, "under color of law" was defined as the "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[252] Furthermore, because section 1983 provides a civil remedy, the specific intent requirement applied in *Screws* to section 242[253] would not be applied to section 1983. Rather, section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his action."[254]

Applying the principles of the above cases, consideration is now given to some possible causes of action available to the black farmer to assure equal treatment by the administration of FES, FHA and ASCS and access to the benefits and rights under those programs. First, it should be noted that section 1983 applies to instances of persons acting under color of *state law*, while section 242 includes those acting under federal authority.[255] Thus, for purposes of civil actions against individuals administering FHA and ASCS, which are generally direct federal programs,[256] section 1983 will not be useful unless sufficient state involvement can be found.

FES is generally a federally subsidized state program.[257] Black farmers have a right not to be discriminated against on the basis of race in the benefits of that program, a right founded and secured in the equal protection clause of the fourteenth amendment. More

249. 338 U.S. 25 (1949).
250. 365 U.S. at 172. The Court upheld dismissal of the complaint as against the City of Chicago on the ground that Congress did not intend to bring municipal corporations within the ambit of section 1983.
251. *Id.* at 183.
252. *Id.* at 184, citing United States v. Classic, 313 U.S. 299 (1941).
253. See note 240 and accompanying text *supra*.
254. 365 U.S. at 187.
255. See text at note 246 *supra*. *See also* Norton v. McShane, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965).
256. See text *supra* at notes 45-50, 65-87.
257. See text *supra* at notes 32-36.

specifically, the black farmer is also entitled to the rights provided by federal statute creating FES, *e.g.*, demonstrations in agriculture and home economics and access to publications on improving his farm and information about aid under other agricultural programs.[258] To the extent that the black farmer is denied these rights by the local FES administration, he is denied rights secured by the Constitution and laws of the United States by persons acting under color of state law.

Perhaps the most effective remedy in the FES context would be for several farmers across a given state to bring a class action under section 1983. For example, defendants named might be officials at the land grant colleges responsible for state operation, the state office director and county FES officials. The suit would be for damages and injunctive relief.[259] Hopefully, the school desegregation theory of *Green* would be applied and that doctrine of substantive equal protection would impose on these officials an affirmative duty to formulate a plan which would work now to attain the goal of equal access to FES benefits.[260] Furthermore, the district court should retain equitable jurisdiction to see that the plan does work.

Section 1983 would also apply to any state officials, and those operating in concert with them,[261] whose conduct denied to the black farmer benefits under FHA and ASCS. For example, there have been cases of hotly contested ASCS elections where black farmers have organized to get one of their numbers elected to a community or county committee. The black farmer's right to vote in ASCS elections is secured by federal statute[262] and expressly protected by USDA regulation.[263] Thus, attempts by local officials to deny that right on the basis of race would be conduct under color of state law in deprivation of the federally secured rights to equal protection and to vote in ASCS elections. It should be noted also that federal officials and employees would be liable under section 1983 to the extent that they acted jointly with local officials in the denial of these rights.

258. 7 U.S.C. § 342 (1964). See also note 37 and accompanying text *supra*.
259. Section 1983 provides for both. See note 235 *supra*.
260. See text *supra* at notes 128-136.
261. *See* United States v. Price, 383 U.S. 787 (1966) and text *supra* at note 245.
262. 16 U.S.C. § 590h(b) (1964).
263. 7 C.F.R. § 7.5 (1970).

It is also important that the Supreme Court has construed the concept of under color of law consistently with its concept of state action.[264] Thus, for example, if a county FHA office were housed in a state building, and if the FHA office generally discriminated against black farmers in their loan applications, the rationale of *Burton v. Wilmington Parking Authority*[265] should apply to find state action and, consequently, that the FHA officials and employees would be acting under color of state law such as to be liable to damages and an injunction under section 1983.

The possibility of relief under section 242, obviously, is at best indirect in that it depends upon the initiative of the United States Attorney in bringing the criminal prosecution. If there were such initiative, the above examples should also result in criminal sanctions, providing the specific intent of *Screws* was proved.[266]

(*b*). *Sections 241 and 1985(3).* These sections, 18 U.S.C. § 241 (1964)[267] and 42 U.S.C. § 1985(3) (1964),[268] also are derived from post Civil War legislation and are treated together because each proscribes generally the same kind of conduct, section 241 on the criminal side and section 1985(3) on the civil. Both are conspiracy statutes and generally apply against two or more persons who act jointly to

264. *See* United States v. Price, 383 U.S. 787, 794 n.7. See text *supra* at note 246-247.
265. See note 247 and accompanying text *supra.*
266. See note 240 and accompanying text *supra.*
267. If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same. . .

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

A 1968 amendment increased the possible fine from $5,000 to $10,000 and provided for possible life imprisonment.

268. If two or more persons in any State . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support . . . in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a member of Congress . . . ; or to injure any citizen in person or property on account of such support . . . ; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

injure, threaten, or intimidate a citizen in the free exercise or enjoyment of any right secured by the Constitution or laws of the United States. It is important to note that neither statute, by its language, requires conduct under color of law or state action. Thus, literally read, both statutes would reach purely private conduct.

In *United States v. Guest*,[269] six defendants were indicted under section 241 for criminal conspiracy to deprive black citizens of several rights secured to them by the Constitution and laws of the United States, *e.g.*, equal access to public accommodations without racial discrimination. Their defense was that the indictments did not charge an offense under the laws of the United States because there was no allegation of "under color of law," reasoning that the charges were based on violation of the equal protection clause[270] which speaks to the states and protects individuals against state action, not wrongs done by individuals. Without deciding the issue of the scope of section 241, the Court reversed the dismissal of the indictments on grounds that a certain one of the allegations was sufficient to allege state action.

In a concurring opinion by Justice Clark,[271] three Justices[272] expressed the view that section 5 of the fourteenth amendment[273] clearly empowers Congress to enact laws punishing all conspiracies that interfere with fourteenth amendment rights, whether or not state action was involved. However, they did not commit themselves on the issue of whether section 241 was itself such a congressional act. In a separate opinion, three Justices[274] expressed the view that not only did Congress have the power to reach such conspiracies by purely private individuals, but that Congress had already exercised that power in section 241.[275]

269. 383 U.S. 745 (1966).
270. U.S. Const. amend. XIV, § 1:
No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.
271. 383 U.S. at 762.
272. Justices Clark, Black and Fortas.
273. U.S. Const. amend. XIV, § 5:
The Congress shall have power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment].
274. Justices Brennan, Douglas and Chief Justice Warren.
275. 383 U.S. at 777.

> [A] conspiracy to interfere with the right to equal utilization of state facilities . . . is a conspiracy to interfere with a 'right . . . secured . . . by the Constitution' within the meaning of Section 241—without regard to whether state officers participated . . . . Section 241 reaches such a private conspiracy, not because the Fourteenth Amendment of its own force prohibits such . . . , but because Section 241, as an exercise of congressional power under Section 5 of that Amendment, prohibits *all* conspiracies to interfere with the exercise of a 'right . . . secured . . . by the Constitution' and because the right to equal utilization of state facilities is a 'right . . . secured . . . by the Constitution' within the meaning of Section 241.

The Court also discussed section 241 in *United States v. Price*.[276] Without deciding its scope of coverage, the Court did say that the language of section 241 "is plain and unlimited . . . [and] embraces *all* of the rights and privileges secured to citizens by *all* of the Constitution and *all* of the laws of the United States."[277]

The section may very well be about to attain the full scope indicated by its literal wording. If it does, then it will reach all conspiracies to deprive citizens of rights secured by the Constitution or laws of the United States, and the presence of action, either "state" or "under color of law," will become irrelevant. The case which hopefully portends such a holding is *United States v. Johnson*,[278] an action under section 241 in which the lower court dismissed because it felt that the 1964 Civil Rights Act provided the exclusive remedy. Justice Douglas, writing for the Court, reversed and remanded the section 241 indictment for trial.

The hopeful point is that the opinion refers to "outside hoodlums" who assaulted black citizens for exercising their right to equality in public accommodations under the 1964 Civil Rights Act.[279] The implication is that only a purely private conspiracy was involved and that section 241 reaches it. If that interpretation prevails, then the views of Justices Brennan and Douglas and Chief Justice Warren in *Guest*[280] will have become the majority view of the Court.

276. 383 U.S. 787 (1966) (unanimous decision).
277. 383 U.S. at 800 (emphasis in original).
278. 390 U.S. 563 (1968).
279. *See* 42 U.S.C. § 2000 (1964).
280. Justice Marshall took no part in *Johnson*. Justices Stewart, Black and Harlan dissented on the ground that the 1964 Civil Rights Act provided an exclusive remedy

Turning to the civil side, section 1985(3) has not enjoyed such a development. The provision was not considered by the Supreme Court until *Collins v. Hardyman*.[281] Plaintiffs' theory for damages in that case was that defendants had conspired to break up their political meeting and thereby violated their rights to peaceably assemble. The Court held that the complaint did not state a cause of action under section 1985(3). The majority construed the section to require a conspiracy which had as its purpose the depriving of any person of the equal protection of the laws. Thus, the majority reasoned, the conspiracy by private individuals could not affect the plaintiffs' equal protection because private discrimination is not "inequality before the law."[282]

The dissent,[283] joined by Justices Burton, Black, and Douglas, read the statute as the Court may have read section 241 in *United States v. Johnson*.[284] The dissent asserted that the clear language of section 1985(3)[285] refutes any suggestion that under color of state law is necessary for the cause of action. Rather, Congress has exercised its power in that section to create a federal cause of action in aid of persons injured by private individuals by deprivation of constitutional rights.

Since *Collins*, the lower federal courts have dismissed a large number of cases brought under section 1985(3), usually on the grounds that plaintiff failed to show intentional discrimination or that a federal right existed.[286] On the other hand, the language of section 1985(3) is generally the same as that of section 241, which is now arguably construed to reach all conspiracies, including those purely private, which have the purpose and effect of depriving persons of their rights secured by the Constitution. Other than the precedent of *Collins*,

under the circumstances. The dissent did not mention problems of state action or under color of law.

281. 341 U.S. 651 (1951).

282. 341 U.S. at 661. The majority did leave open the possibility of a private conspiracy of "such magnitude" that could work a deprivation of equal protection of the laws. As a possible example, the Court cited the post Civil War Ku Klux Klan. *Id.* at 662.

283. *Id.* at 663.

284. See note 278 and accompanying text *supra.*

285. See note 268 *supra.*

286. *See* T. EMERSON, D. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1093 and cases cited therein (student ed. 1967).

there appears no reason for not construing sections 241 and 1985(3) consistently as sections 242 and 1983 are construed consistently.

Assuming this analysis is correct and that the dissent in *Collins* will be accepted by a majority of the Court as law, consideration is now given to possible causes of action by black farmers in the context of FES, FHA and ASCS programs. Although conspiracy must be proved, the civil remedy would allow the plaintiff to go against any defendant, whether federal, state or private. Thus, whether a given program is directly federal or not becomes irrelevant. On the other hand, it would be difficult to sue an entire unit of a particular program since, presumably, it would usually not be possible to prove that officials of the FHA state office, for example, entered the agreement, which constituted the conspiracy, to deny equal treatment to black farmers.

Section 1985(3), under the above analysis, would be most useful at the very local level and against smaller conspiracies formed for more particular purposes. A good example would be a hotly contested ASCS election in which black farmers have organized to elect a black man. If, in this regard, black farm families in the area are intimidated by purely private action, as for example night riders, section 242[287] will not apply against them. Section 1985(3), on the other hand, and if construed consistently with section 241, might allow a civil remedy for such conduct.

A final weakness of section 1985(3) is that it provides only for damages. Unlike section 1983, injunctive relief is not mentioned. However, *Brewer v. Hoxie School District*[288] holds that rights protected by section 1985(3) may also be protected by injunction in certain cases. That case also involves racial discrimination and rights to equal protection. Furthermore, in the example of the ASCS election, the only adequate remedy would be one in equity which prevented the defendants from interfering with plaintiffs' rights to organize and vote.

5. Jurisdictional Problems

In bringing actions in federal court to secure relief for the deprivation of rights explored in this comment, plaintiffs must deal with the

287. *See* notes 234-236 and accompanying text *supra*.
288. 238 F.2d 91 (8th Cir. 1956).

usual procedural hurdles involved in seeking judicial review of administrative actions.[289] One of those hurdles, the problem of jurisdiction, is particularly significant and will be briefly discussed.[290]

Before turning to the problem of jurisdiction, it should be noted that the actions envisioned will appropriately be brought as class actions seeking injunctive relief. Because of the nature of the illegal activity and the large size of the groups involved, class actions have been quite commonly used in recent years to enjoin discriminatory practices, including segregation in education and in the use of public facilities.[291] An order ending discrimination against one black farmer

289. *E.g.*, justiciability, ripeness, standing, jurisdiction, reviewability, exhaustion of remedies.

290. Of the other possible problems, only exhaustion or reviewability might cause difficulties in the suits discussed in this comment. As to exhaustion, the administrative remedies for discrimination by FES are detailed in the text at notes 143-146 *supra*. A direct program such as ASCS is covered by 7 C.F.R. §§ 15.50-15.52 (1970). Section 15.51 prohibits discrimination in direct programs in terms similar to Title VI of the 1964 Civil Rights Act. Section 15.52 provides for filing of complaints by "any person who believes himself or any specific class of individuals" to be subjected to prohibited discrimination. If the program has a regular procedure established for complaints or appeals, the complaint is to be filed within that system with the agency sending a copy and action reports to the Secretary. If there is no established procedure within the discriminating program, the complaint goes directly to the Secretary. The investigative function is discharged by the Office of the Inspector General. Nowhere is there a specification that corrective action must be taken or what it might be. There is just the prohibition of discrimination and provision that amounts to giving notice to the Secretary that discrimination has occurred. Such remedies can easily be exhausted, and they probably could be ignored as inadequate.

Judicial review of the kind of problems discussed in this comment would appear to be clearly available to program recipients. The arguments in favor of reviewability together with the possible hazards are adequately set out for the interested reader in *Note, The Federal Agricultural Stabilization Program and the Negro*, 67 COLUM. L. REV. 1121, 1129-1130 (1967) and *Note, Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84, 121-124 (1967). If not otherwise provided, judicial review of agency action may be obtained under § 10 of the Administrative Procedure Act except to the extent that statutes preclude judicial review or agency action is committed to agency discretion by law. 5 U.S.C. § 1009(c) (1964). One should keep in mind that "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." Harmon v. Brucker, 355 U.S. 579, 581-582 (1958). In short, there is today what has been called a presumption of reviewability. Cahn & Cahn, *The New Sovereign Immunity*, 81 HARV. L. REV. 929, 952 (1968). In spite of criticism, occasionally one will find a court implying non-reviewability from the fact that Congress provided for judicial review of actions of other provisions under the same act but not of actions under the contested provision. This harks back to a pre-Administrative Procedure Act case: Switchmen's Union v. National Mediation Board, 320 U.S. 297 (1943). For a recent example, see Paducah Junior College v. Secretary of Health, Education and Welfare, 255 F. Supp. 147 (W.D. Ky. 1966).

291. Class actions are permitted by FED. R. CIV. P. 23. For a small sample of the many cases, see Watson v. City of Memphis, 373 U.S. 526 (1963), Orleans Parish School Board v. Bush, 242 F.2d 156, 165 (5th Cir. 1957), Kansas City v. Williams, 205 F.2d 47, 51-52 (8th Cir. 1953). For a discussion of the intricacies of class actions in this

would do nothing about stopping the wholesale practice against his numerous fellow sufferers. Hence, an effective end to racial discrimination in FES, FHA and ASCS programs depends upon relief provided by a class action which runs to the entire class of black farmers affected.

The federal courts, being courts of limited jurisdiction,[292] are controlled by specific jurisdictional grants from Congress. For the most part, the discriminatory practices complained of will not lead to claims involving amounts greater than $10,000 required for jurisdiction under the general federal question statute.[293] Plaintiffs may not cumulate their individual damages to arrive at the required jurisdictional amount.[294]

For actions under 42 U.S.C. §§ 1983[295] and 1985 (1964),[296] jurisdiction may be found in 28 U.S.C. § 1343 (1964)[297] without regard to any jurisdictional amount.[298] An action against FHA based on section 1982[299] would fall under the civil rights jurisdictional statute[300] and thereby escape the jurisdictional amount requirement. Presumably, an action based on Title VI of the Civil Rights Act of 1964[301] would

context, see *Note, Parties Plaintiff in Civil Rights Litigation*, 68 COLUM. L. REV. 893 (1968).

292. *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 14 (1963).

293. 28 U.S.C. § 1331 (1964).

294. Hague v. C.I.O., 307 U.S. 496 (1939).

295. *See* note 235 and text accompanying notes 246-254 *supra*.

296. *See* note 268 and text accompanying notes 281-288 *supra*.

297. 28 U.S.C. § 1343 (1964):

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
>
> (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
>
> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

298. Hague v. C.I.O., 307 U.S. 496 (1939); Douglas v. City of Jeannette, 319 U.S. 157 (1943).

299. See text *supra* at notes 161-188.

300. The applicable subsection is 1343(4). See note 297 *supra*. *See also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 412 n.1 (1968).

301. See text *supra* at notes 137-146.

also find jurisdiction under section 1343(4) since Title VI is "an Act of Congress providing for the protection of civil rights."[302]

Actions against the federal government based on purely constitutional arguments cannot be grounded on section 1343 because they do not involve deprivations "under color of any state law,"[303] nor do they come under any "Act of Congress providing for the protection of civil rights."[304] However, for Department of Agriculture programs which are usually passed pursuant to the commerce power of Congress, jurisdiction can be based on 28 U.S.C. § 1337[305] without regard to the amount in controversy.[306]

302. See note 297 *supra*.
303. *See* 28 U.S.C. § 1343(3) (1964) *supra* note 297.
304. *See* 28 U.S.C. § 1343(4) (1964) *supra* note 297.
305. 28 U.S.C. 1337 (1964):
The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.
306. Mulford v. Smith, 307 U.S. 38 (1939).
The question of standing should also be noted in passing. In the general welfare area, standing to challenge agency action by the welfare beneficiary is sometimes quite elusive. An example of the more or less model welfare case where no standing is found is Barlow v. Collins, 398 F.2d 398 (5th Cir. 1968). There, tenant farmers receiving benefits under the Food and Agriculture Act of 1965, 7 U.S.C. § 1444 (Supp. V, 1969), in the form of land diversion payments, challenged a regulation which permitted assignment of the payments to them for rent, thereby depriving the tenants of bargaining power with merchants and suppliers which they had previously enjoyed. The Fifth Circuit held that there was no standing where nothing more than mere economic harm made possible by the government action was shown, unless there was an express or implied statutory grant of standing or a grant of jurisdiction to the courts to review the Secretary's action. The court also rejected plaintiff's argument that a "property" in the benefits was being deprived in violation of fifth amendment due process. That argument hinged on a stated policy of the Secretary acting to protect the interests of tenants which was written into the act.
For a good discussion of area, see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, (1968). *See also*, Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L REV. 84, 124-29 (1967), for a treatment of recent cases to detect an emerging criterion for standing in welfare cases: "legislative intent to protect." For a comparative treatment see also Dugan, *Standing, The "New Property," and the Costs of Welfare: Dilemmas in American and West German Provider-Administration*, 45 WASH. L. REV. 497 (1970).
Unlike the general welfare area, plaintiffs in the suits contemplated here will have no standing problems. The key lies in the fact that we are dealing with a constitutional right to be free of invidious racial discrimination by the government.
Surely, if Congress passed a law providing specified benefits for white citizens only, a black citizen could seek and obtain judicial review of the law's constitutionality. His status as citizen, his right to equal participation in society (which in a sense is what his right not to be discriminated against on racial grounds means) is being denied by the government. So also, failure of government agencies, or government-financed private organizations (insofar as their activity may be deemed government action), to administer their programs nondiscriminatorily should be contestable by the black segment of their intended beneficiaries.
One has but to reflect on the fact that no question was raised of the plaintiff's

CONCLUSION

The problems are enormous, and made even more difficult to attack because the federal government has helped to create and perpetuate them. In our legal system, there still are unusual and sometimes impossible obstacles which exist to block those who seek to encourage the "sovereign" to administer its own welfare programs in a fair and non-discriminatory manner. It is anomolous that the central government, which is so concerned with the explosion of the inner-city, would allow its welfare programs to fail so completely as regards the southern black farmer and his family, thus forcing them to flee the rural South for the northern ghettos.

Perhaps widespread political organization among the farmers themselves, or basic statutory changes in the existing programs, or even new programs will be necessary before the quality of life for the southern black farmer is made better. However, the premise of this comment, whether valid or not, is that the existing farm welfare programs are basically workable and will better the life of the southern black farmer, if and when the factor of racial discrimination is removed.

To reach the desired goal through judicial action, this comment has surveyed the possible statutory legal actions existing under 18 U.S.C. §§ 241 and 242, and under 42 U.S.C. §§ 1985(3) and 1983. In addition, the following possibly pivotal legal theories and legal actions have been considered:

(1) Federal Extension Service—class actions against land-grant college administrators who direct the FES program in a given state, as well as all lesser FES personnel, under a school desegregation approach as characterized in *Green*, or Title VI of the 1964 Civil

standing to challenge the denial of equal protection in Burton v. Wilmington Parking Authority, 365 U.S. 713 (1961), where the Negro plaintiff challenged the refusal of a restaurant in the parking facility to serve him. Nor was there a question in Evans v. Newton, 382 U.S. 296 (1966), when Negro citizens of the town claimed they had an equal right to use the park. In both these cases, plaintiffs were members of a subset (blacks) of the larger class (citizens), and no legitimate government purpose was furthered by distinguishing them for different treatment. A similar case is presented here. When the black approaches the agricultural offices for their services he carries with him a right not to be discriminated against for racial reasons; the agents, being a part of the government, have a correlative duty not to discriminate. Breach of that duty gives rise to a judicially cognizable harm. Van Alstyne, *supra*, categorizes this argument as the equal protection exception to the right-privilege distinction.

Rights Act, to enjoin further discrimination and to obtain workable plans which would assure that extension service would henceforth be provided on an equal basis;

(2) Farmers Home Administration—class actions against the Secretary of Agriculture, the national director of FHA, FHA area administrators, state and county and lesser FHA personnel, under the thirteenth amendment and 42 U.S.C. §§ 1981 and 1982 and *Jones v. Mayer*, seeking to enjoin the defendants from continuing to provide assistance unequally as between white and black farmers, and seeking the affirmative relief of directing the defendants to fashion whatever plans or regulations are necessary to assure fair administration of FHA benefits, and possibly money damages;

(3) Agricultural Stabilization and Conservation Service—class actions against the Secretary of Agriculture, ASCS administrators, state directors, state committees, county committees and lesser ASCS personnel, seeking an order that defendants void any committee election in which full and equal opportunity to exercise the right to vote has been denied to black farmers, either directly because of committee activity, or because of harassing activities by outside hoodlums, on the theory that failure to void the election denies fifth amendment "equal protection" by depriving one of the right to vote for racial reasons, and the right to have his vote possess equal value.

*M. John Bundy**
*Allen D. Evans***

* Member, Washington State Bar Ass'n. B.A., University of Washington, 1965; J.D. 1969.
** Member, District of Columbia Bar Ass'n. B.S. Webb Institute of Naval Architecture, 1961; J.D., University of Washington, 1969.