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NOTRE DAME CONFERENCE ON CONGRESSIONAL CIVIL RIGHTS LEGISLATION — A REPORT

This is the report of a conference on problems of Congressional civil rights legislation held at the Notre Dame Law School February 8 - 10, 1963. By fortunate coincidence, as the report was completed Congress had already before it a civil rights bill backed by unusually strong Presidential support.

This circumstance has had, of course, its difficult side for the preparers of this report, the least of which has been revising an earlier draft in order to take account of the Administration's measure. In fact, most of the provisions of the President's proposal (except Title II) were debated, at least in general terms, by the conference, and a consensus reached about them.

A more basic difficulty will be apparent when we note that the working premise of the Notre Dame Conference, as laid down by Dean Joseph O'Meara in our first session, was that we should frame recommendations without regard to anyone's views of their political chances. This is, therefore, a report of the consensus we reached as to what Congress *should* pass, not as to what it possibly or probably might pass.

We continue to believe that this was a sound approach. We do, of course, recognize that the legislative decision this year will be made on the Administration's bill. Perhaps, nevertheless, what is reported here will be helpful to Congress as it deliberates, and will help the country understand better the problems and the results which may be expected from various legislative approaches to them.

The conference was limited to three subjects: schools, employment, and voting. We have, therefore, no recommendations or reflections to report on the public accommodations part of the President's program (Title II).

This report states the consensus of the conference. The extent of agreement reached through extensive discussion was impressive, and except at a few points the consensus was well-nigh complete. This was all the more notable, because many differing views had been brought to the meetings.

The conferees participated as individuals, not as representatives of their organizations. They included, in addition to Dean O'Meara, Carl A. Auerbach, University of Minnesota Law School; Wiley A. Branton, Voter Education Project; Thomas F. Broden, Jr., Notre Dame Law School; Leslie W. Dunbar, Southern Regional Council; John G. Feild, President's Committee on Equal Employment Opportunity (as observer); Harold C. Fleming, The Potomac Institute; G. W. Foster, Jr., Law School, University of Wisconsin; Eli Ginzberg, Conservation of Human Resources, Columbia University; Vivian W. Henderson, Economics, Fisk University; Paul H. Norgren, Industrial Relations Section, Princeton University; John de J. Pemberton, American Civil Liberties Union; Daniel H. Pollitt, University of North Carolina Law School; John Silard, Attorney, Washington, D. C.; Michael I. Sovern, Columbia University School of Law; William Taylor, U. S. Commission on Civil Rights (as observer); John H. Wheeler, Attorney, Durham, North Carolina. We had also the benefit of consultation with President Hesburgh, and the gracious, friendly hospitality of the Notre Dame campus.

INTRODUCTION

The crisis of America's race relations has become almost unbearably intense, and its causes are interlaced with countless characteristics of our history and our social structure. These are propositions for which any elaboration, at this time, would be redundant.

The present crisis is not the first in our history. Crises in race relations, as in the other relationships of men with men, are not necessarily caused by worsened conditions; the opposite may in fact be so. But as long as the relationships enclose and nurture discontent on one or both sides, periodic crises will occur. The present crisis is far less brutal and violent than that of 1917 - 1921. It has probably been accompanied by no deeper or more widespread moral self-scrutiny, religious debate, or intellectual and literary study than went with the racial crisis of Civil War days.

Those crises passed, and after each the condition of Negro Americans was still bad. What is primarily different about the present crisis is that it is not likely to pass until a new equilibrium acceptable to Negroes is reached. Earlier crises ended when white people tired of them; this one will not.

The pressure of this fact, or perhaps the realization of it, has much to do with creating the contemporary emotional urgings of both Negroes and whites, the all too facile bandying about of such concepts as "hatred" and "revolution," and the obsessive overvaluation of the strength of the Black Muslims. On the other hand, prudence, if nothing else, dictates the working assumption that no person has reason to have an attachment to a constitutional system if its processes fail to make real its guarantees.

If Congress had no other reason to act to end the crisis, this would be sufficient: unless the crisis is overcome, the Constitution as we know it will bend. Concepts such as federalism, and universal obedience to the courts, and Presidential deference to the legislative will of Congress, have already been affected. There are reasons at least as good, and some of us will think even better, for Congressional action: these have to do with justice and friendship and religion. But Congress has a special responsibility to defend and protect the Constitution.

Political science distinguishes between the "deliberative" and the "representative" functions of a legislature. Congress is our representative body, and there is no other which can so express and certify the national will. As long as Congress is silent, civil rights has something of a bootleg aspect. Congress has not been altogether silent. The Acts of 1957 and 1960 and the poll tax amendment are of value, but at the most they give protection, and a laggard one at that, for but one right. What the country urgently needs, and what American constitutionalism is weakened by the absence of, is an unambiguous registering of the national will in behalf of racial justice, as only Congress in its representative role can do.

The subsequent pages of this paper are hopefully intended to help Congress in its deliberative role; i.e., in defining and framing its policies. In this field of civil rights, and at this time, Congress by deliberating and enacting will also be representing, supplying the will and the resolution that can put the crisis behind us.

The times require, in other words, not only that Congress act wisely, but that it act — and act with dispatch, and without ambiguity or timidity. But if in its drive to represent the national will, Congress does not act wisely, the outcome could be bitter. Congress passed voting laws in 1957 and 1960 which were not suited to achieve their goals, and have not done so. Their failure has contributed to the present crisis, because those laws brought disillusion on top of high hopes.

In order to act effectively, Congress should be guided by certain principles that include the following:

(1) Congress should legislate not for the appeasement of crisis, but for the solution of it.

(2) Administrative actions, when appropriate and constitutional, are more effective and less piecemeal than judicial remedies.

(3) Where possible and suitable, it is good federal practice to draw support from state and local governments in the administration of federal programs.

(4) In some problem areas, the national interest is best served by local solutions. In such problem areas, Congressional action is not appropriate when there is a realistic prospect of a prompt solution at the local level.

EQUAL RIGHTS TO PUBLIC EDUCATION

The first point above is especially pertinent in 1963. Congressional action at this time ought to begin with schools. We say this with all the emphasis we can.

There are at least five reasons for this priority.

First, nine years have now passed since *Brown v. Topeka* declared a constitutional right of all American children, a right still wantonly flouted or ignored. In support of it, and in the face of overt defiance, the Presidency was until the fall of 1957 indecisive and since has been inadequately empowered. Congress has done nothing.

The decision was responded to by eleven southern states with defiance, lawlessness, and at times near rebellion. In a sense, it is a sign of the basic strength of American society that defiance so intense and widespread was able to be contained without rupture of national bonds. The federal courts and the Presidency, aided by enlightened opinion in the South, have by now decisively weakened the political resistance. Nevertheless, through evasion or inaction, more than two-thirds of the biracial school districts of the eleven southern states have as yet made no start toward school desegregation; 99% of the Negro children of these states are still in segregated schools; and in three states — Alabama, Mississippi, and South Carolina — not even a token start has yet been made.

The Supreme Court's decision of 1954 was received by Negro citizens as a promise and as an earnest of a new life for them in our common country. A very large cause of the current crisis is the disappointment which followed. Our high court had spoken — and was not obeyed. The good will of our people had been invoked — and did not respond.

There is, therefore, a symbolic importance to the schools issue which none other has. In no other area can Congress so clearly and unambiguously represent and register a national decision in affirmation of equality. Furthermore, if Congress were to act in another area, *and did not in this one*, recalcitrant school districts would have reason to believe that Congress does not disapprove of their policies.

Second, education has an intrinsic value, both for the individual and for the nation, of unsurpassed importance.

Third, education is basic to the durable achievement of other civil rights. It affects employment opportunities and voting eligibility and the intelligent use of the ballot. It affects housing patterns (and is affected by them). It determines and will determine the quality and the temper of Negro communal leadership.

Fourth, there should be no hesitation in saying that our needs go beyond civil rights, and that a better integrated society is a social, political, and moral imperative. The American people need to live more happily with each other. Our public schools weave the web of society as no other institution does.

Fifth, school integration brings forth the hard, but basically important, issues. (The extension of employment opportunities does also.) To desegregate transportation, or restaurants and hotels, or professional associations requires little more than a decision to stop doing one thing and do another. These decisions are socially and morally necessary, but the Negro and white people of this country would both delude themselves if they expected these decisions to go far toward solving our racial inequities. To solve them, or even to begin to do so, the country must see clearly and face the gigantic problems of our disadvantaged people. Whenever school desegregation in a community gets beyond token dimensions, that community will unavoidably confront the cultural wrongs it itself has created, and will, we think, be brought to an awareness that something must be done about them.

To summarize then, school legislation deserves priority because of its symbolic value, because of the intrinsic cultural importance of education, because education is basic to the achievement of other civil rights, and because the integration of schools has profound and beneficial social consequences.

The bill first introduced by Senator Clark and Representative Celler in 1961* sought to achieve these objectives. It has provided the leading ideas which have guided discussions since 1961, and which the conferees at the Notre Dame Law School believed basically sound. In important respects, however, we did differ from Clark-Celler.

The principal features of the Clark-Celler approach are (1) the requirement of a desegregation plan by those school districts which use race as an assignment criterion; (2) the filing of the plan with the Secretary of Health, Education and Welfare, who is empowered to grant financial and technical assistance to aid in carrying out the plans, if he determines that the plans are legally satisfactory; similar assistance would be available to certain other districts; (3) a requirement of "at least first-step compliance" immediately; and

* S. 1817, 87th Cong., 1st Sess. (1961).

(4) power for the Attorney-General to bring suits in federal district courts to compel compliance.

We believe that Congress should prepare an enactment which would embrace the following purposes:

- (1) A start must be effected, with provision for federal enforcement, in the more than 2000 biracial school districts that have made no beginning.
- (2) The completion of the desegregation process should be facilitated, in accordance with sound educational precepts.
- (3) Neither federal legislation nor administration should impede the initiation of suits by private plaintiffs in federal courts, or prejudice the outcome of their suits.
- (4) Nor should the federal role inhibit the reaching of local desegregation solutions by local consensus.

Of the above purposes, Nos. 3 and 4 have definite implications for northern school desegregation. Congress cannot at this time, however, wisely legislate to meet directly the northern questions (i.e., segregation not resulting from explicit governmental policy), and should not, therefore, try. Constitutional rights and principles have not yet been sufficiently clarified by adjudication, and professional controversy still somewhat obscures the educational merits of various solutions. Moreover, there is no reason at this date to suppose that local solutions cannot be satisfactorily and readily attained. (See principle no. 4, page 432 *supra*.)

Congress should candidly legislate for the southern problem, and the premier objective should be to effect start. To this end, Congress should impose an affirmative duty on every public school board to operate the schools under its jurisdiction on a nonracial basis. To assure this, formally recorded desegregation plans should be required of every biracial district, not already under court order, where initial assignment of school children is by race, or where, regardless of assignment policies, no Negro and white children are in fact in school together. The plan should be a document of public record. Its recording should be completed shortly after enactment, and certainly in not more than 60 days; more time is not required: there is nothing arcane about desegregation planning, and there exists an abundance of experience to consult.

The effect of this would be a Congressional finding and declaration that "all deliberate speed" means "now."* No defendant in a school desegregation case could henceforth plead time.

No purpose would be obviously served by requiring that the plans be filed with any office in Washington. There are good reasons why they should not be. Unless the federal office were to review and evaluate them, there would be no need for it to be custodian. Administrative review would be unfortunate. What pleased the Secretary of HEW would tend to please a federal judge, and the rights of a Negro plaintiff to seek redress in a federal court would become progressively, and merely, formal. His remedy would be through his Washington lobbyist, not through his local lawyer.

* Cf. The Supreme Court's gloss in *Watson v. Memphis*, 10 L.ed 2d 529 (1963).

The Attorney-General must be empowered to intervene in pending school litigation, and, more importantly, to bring suit in the name of the United States to effect prompt desegregation starts, through civil action or other proceeding for preventive relief, including an application for an injunction against school boards depriving or threatening to deprive individuals of their equal protection rights. The affirmative duty should be defined in the statute in such a way as to preserve in full the freedom of action of private plaintiffs,* and to give at least tacit Congressional recognition to the impossibility of the Attorney-General filing suits in as many as 2,000 districts (in the unhappy and unlikely chance that would be indicated), and the consequent desirability of his bringing suit in the most strongly resistant areas.**

The Attorney-General should proceed on his own investigation, as he does in voting violations under the Civil Rights Act of 1957.† He should not have to await on complaints; the privilege of private counsel for private complainants should be fully preserved and should suffice. Congress has a specific constitutional mandate to enforce the terms of the 14th Amendment;†† by a statute such, as is recommended here it would do so by affirming the duty of school boards to operate nonracial systems; the Attorney-General can and should, consequently, be made responsible to combat violations which he discovers. We need to remember that *Brown v. Topeka* is not a limitation on the power of Congress; the Supreme Court proscribed denial of an *individual* right. This does not inhibit Congress from going beyond to a general protection of the right.

The simple, yet conclusive, reasons for placing this responsibility on the Attorney-General are to expedite the desegregation process, bring to bear national authority, and relieve Negro plaintiffs, organizations, and lawyers of some of their heavy psychological and financial burdens.

To do an effective job, the already overstrained staff of the Civil Rights Division of the Department of Justice will have to be strengthened. The present Administration has considerably enlarged that staff and its function since January 1961, but has done so in part by using personnel from other Divisions. The Administration should ask Congress for the money needed to staff adequately the Civil Rights Division, and Congress should provide it.

The right of private plaintiffs to bring suit should not, we repeat, be impaired or diluted by new statutory authority for the Attorney-General. The law of school desegregation is evolving through the courts, and in terms of individual rights, not public policies. Whether the nation would have been better off had it a decade ago approached the issue differently, through statutes rather than decrees, is an interesting but now practically irrelevant question. It did not, and now is too late for constructive change. The atmosphere for freely litigating

* Cf. § 310 of S. 1731; also Sec. 1602 of S. 772, 88th Cong., 1st Sess. introduced by Senator Clark.

** Cf. The formula "materially further the orderly progress of desegregation in public education." S. 1731, sec. 307 a2.

† P. L. 85-315, sec. 131 (c); cf. also Sec. 108 of S. 1209 (88th Cong., 1st session), introduced by Senator Kuchel and others, which would confer on the Attorney-General the power and the duty in school cases recommended here. The approach of S. 1209 to this problem is, therefore, much to be preferred over that of the Administration's bill.

†† U.S. CONST., amend. XIV, § 5.

and adjudicating individual claims to rights should be carefully preserved. There are still many unanswered 14th Amendment questions, particularly in connection with northern desegregation but also in the South. Hard and fast rules are, of course, impossible, but we would suggest that the Attorney-General plan his cases to spread and consolidate judicial interpretations already secured, and that the definition of new legal concepts to be sought be left to private plaintiffs and their attorneys.

The authority and the duty to bring suits in behalf of the United States are indispensable and already far too long withheld. Yet the Congressional requirement of "plans" is, if anything, even more worthwhile. It would put a positive duty on local people, and the country badly needs to begin thinking of school desegregation in those terms. While we believe that the Supreme Court in *Cooper v. Aaron** in 1958 did affirm this duty, nobody speaks the national will as does Congress. There are persuasive grounds also for believing that such a mandate from Congress would be obeyed in a great many school districts, and that much litigation could thereby be avoided.

To give further impetus to the integration process, the federal government should offer, on application to the Secretary of HEW, financial assistance to school districts making their first starts, or to districts, whether of the South or the North, revising their systems in the direction of more integration.

Assistance should be limited to specific projects proposed by the local school administrators, and should be strictly limited to projects facilitating the desegregation process. Examples might include programs of teacher preparation, special tuition for Negro students to help overcome the academic handicaps of their inferior schooling, and special training for Negro teachers to help overcome the academic shortcomings of their training. The assistance, which could be either by grant, loan, or both, should be based by the Secretary on a finding that the project as described and planned by the local administrators would make a substantial contribution to the success of desegregation.

*The Secretary should be instructed by the statute to adopt as his criterion of "desegregation" a unified school system. Only those projects should qualify which look toward, and are integral parts of a plan toward, the full integration of faculties, administrators, facilities, and the assignment of all students without regard to race; and which envision this accomplishment within a reasonably short period.***

Other forms of federal assistance, not reasonably connected to such technical projects as are mentioned above, should not be offered by Congress. So-called "compensatory" aid has sometimes been proposed, even to the inclusion of construction costs. We think there is a moral flaw in such proposals, and that

* 358 U.S. 1, 1619 (1958).

** Although otherwise the technical assistance provisions (Sections 301-306) of the Administration's bill seem to us soundly planned, they do rest on a definition of "desegregation" (Sec. 301b) which may well be soon obsolete. There are cases pending, some for a long while, which go beyond the bill's definition as "assignment . . . without regard to . . . race." Several northern cases seek, in effect, a finding that the 14th Amendment right is a right to attend a biracial school. But there are also cases in the South which go further than the assignment question and which argue that the 14th Amendment confers a right to attend a school system which is organized and administered throughout, without regard to race.

they also rest on an unproven, and we suspect unprovable, premise; viz., that integrated schools exceed the cost of "separate, but equal" schools.* Furthermore school desegregation law should not be a means of importing federal aid to education through the legislative back door for some school districts only. Construction can be adroitly used to freeze or even to reverse the process of desegregation and this is a second reason for not allowing federal cost assistance.

Several bills before the 88th Congress, including the Administration bill, would extend and broaden the functions of the Commission on Civil Rights, and would direct it to become a clearinghouse for information and a supplier of technical advice and assistance to those responsible for school desegregation (and other civil rights matters). As stated in S. 1117 and H. R. 5456, the CCR would

serve as a national clearing house for information, and provide advice and technical assistance to Government agencies, communities, industries, organizations or individuals in . . . the fields of voting, education, housing, employment, the use of public facilities, transportation, and the administration of justice.

We think there is much merit in the proposal, though as pertains to education the respective roles of the Commission and the Department of Health, Education and Welfare should be carefully distinguished.

Finally, Congress should, of course, repeal that section of the Morrill Act** which countenances segregated land grant colleges. The provision is anachronistic, and we believe of no legal standing or force now; consequently, we think the Administration has been lax by its continued observance of it. Congress should, nevertheless, remove this stain.

Moreover, probably the largest federal investment in education is represented by the vast federal research programs. In these various programs, Congress has imposed no dictates on the President or his subordinates as to choice of recipient. It is and has been the executive who often chooses to spend funds at segregated institutions, and it is the executive who has the responsibility to stop doing so.

EQUAL EMPLOYMENT RIGHTS

Private property rights have historically included an employer's rights to select his employees. Even with complete legal freedom, however, employers have been strongly influenced in their hiring policies by the pressures of popular opinion and custom, and by the prejudices (or supposed prejudices) of customers and other employees. Such restrictions on the employer's freedom to hire as he

* There might be a case for compensation had the South in fact provided equal schools. The logic would be that southern states had acted on the understanding that *Plessy v. Ferguson* was the law of the land, and therefore merited assistance when the constitutional issue was settled to the contrary in 1954. Whatever the force of this argument, it is lost both by the failure to provide equality between 1896 and 1954, and by noncompliance after 1954.

** And should do likewise with similar provisions of law in other fields, such as the Hill-Burton Act. These goals would be realized by Section 601 of the Administration bill.

pleases do not need to be organized in order to be effective. In contrast, members of minority groups can exert influence on the employer only by organizing (e.g., a boycott) or with the assistance of law.

Federal law has for some years restricted the employer's freedom to discriminate against union members, to hire children, to employ women on prejudicial terms, and to pay substandard wages or to work overlong hours.

With this history, there is no obvious reason why the question of the rights of private property should again be debated. It would seem that unless one were prepared to argue for the repeal of these other restrictions on the employer's freedom, he could not legitimately contend for a right to discriminate on racial or creedal grounds.

On the other hand, racial and creedal discrimination does in a unique way involve the prejudices not only of the employer himself but of his customers and other employees. Very probably, both the extent and the durability of this prejudice are exaggerated. But regardless, when the employer's prejudice is reinforced by that of customers and fellow workers, the economic situation of the minority group member is especially hopeless, and especially deserving of legal protection. A democratic government has no higher task than the protection of the weak.

The government of our democracy has indeed impelling reasons to combat employment discrimination. These may be summed up under the three heads of developing talents and skills, enlarging national purchasing power, and the continuing obligation of America to build an open, fluid society.

There is little need to dwell here on economics. The drastic and rapidly recurring transition in technology and in distribution methods, the imperative of an expanding market in order to sustain economic growth, the pressures of population, and the steady obliteration of regional economies all point to an inexorable need that people be equipped with marketable skills and talents and that they be enabled to earn well in order to buy well. Our national self-interest coincides with Negro aspirations for employment opportunities.

A sound democracy must be a society open to talents. In simpler days, of industrial adolescence, abundant land, and scarce people, government had only to leave alone in order for talents to flourish and find their levels. Modern government has to hold back and clear away the weeds and the clutter of a matured and complicated society that choke some of our people from the chance to develop themselves. Job discrimination is a particularly obnoxious growth, and one which is practically insuperable through individual effort. And as Mr. Robert Weaver has said, "Discrimination in housing and public places and in education is degrading and insulting. But discrimination in employment robs a man of the daily bread for himself and his family."^{*}

No one should suppose that an antidiscrimination law will in itself end the employment hardships of Negroes. It will not. We have an enormous problem of disadvantaged people, embracing perhaps a tenth or even more of our citizens who are undereducated, wrongly trained, and culturally distorted. These people, who are of all races, are poorly prepared to accept employment opportu-

* As quoted in the *New York Times*, June 5, 1963.

nities, and their rescue from inaptitude is a mammoth national task which nearly all governmental bodies have as yet combined in shirking. President Kennedy, in his message of June 19, 1963, coupled manpower training with civil rights. Congress should give unstinted consideration to this part of the message, and to the bills now before it to carry out the training program.

Yet if nondiscrimination is not a specific cure, discrimination has been a specific cause. It has to be removed, in schools, in employment, in housing, and at the polls, or else there can be no general progress in the well-being of our disadvantaged people, or their ability to add to the common good.

We can conveniently look at the employment question under several categories:

1. federal employment;
2. employment in interstate and foreign commerce;
3. employment by federal contractors;
4. employment by state and local governments;
5. employment by state and local governments, and by private institutions, for work financed by federal funds.

(1) There is no need for Congress to legislate regarding discrimination in federal employment. The President has sufficient authority to set standards in the Civil Service, and he has the clear responsibility to prevent discrimination. President Kennedy has gone further, and the present Administration has conscientiously and vigorously made a special effort to recruit and place Negroes in nontraditional jobs, and to hire in larger numbers. Much progress has, accordingly, been made toward fairer representation, and toward enhancing the aspirations of Negroes by the visible evidence of real opportunities. The President has only persuasive authority over certain independent agencies, but that is usually enough; if he should find that it is not, he could report his difficulties to Congress. In federal employment, the responsibility is the President's, and Congress should not dilute it by presumptive acting.

(2) Acting under the commerce clause, Congress should ban discrimination by all businesses engaged in or affecting interstate or foreign commerce. The law should contain a prohibition against discrimination on account of race, color, creed, or national origin, and a complaint procedure available either to the complaining individual or an organization acting in his behalf and at his request. The prohibition should extend not only to discrimination in hiring, but also to discrimination in recruitment; promotion, demotion, or transfer; layoff and dismissal; compensation; selection for training, including apprenticeship; membership in employee organizations; seniority rights; and access to all plant or office facilities.

The responsibility for administering the law should be vested in the Department of Labor. We think this preferable to a commission-type administration (an FEPC) because it would permit vigorous enforcement through established regulatory procedures. Enforcement of fair employment is a natural adjunct to the Labor Department's enforcement of wages and hours standards or other federally imposed standards on employers.

This means that the Department should not only act on complaints, but should by appropriate regulations establish suitable enforcement, inspection, and educational programs. Enforcement should include the power to order specific alterations of practice, and to issue cease and desist orders.

A complaint procedure is half meaningless unless it is, as it usually is not, expeditious. Congress should consult the experience of the various state anti-discrimination commissions now operating, as well as that of the President's Committee on Equal Employment Opportunities. One suggestion that Congress might consider is a provision that all complaints be heard initially by authorized regional or district officials, or by specially assigned officials in case of overcrowded dockets; that a decision must be given within 30 days of filing of complaint; and that in the event of employer appeal against a decision, the individual should during the appeal period have the benefits of the examiner's finding.

We think there should be no elaborate appeals procedure, available either to the employer or the individual. Appeals should go directly from the examiner to an impartial appeals board, and its decision should be final, subject only to review by a federal Court of Appeals confined to questions of law and due process. A similar appeals procedure would suffice for contesting the orders of an inspector enforcing the Department's regulations.

An interesting question is the relationship of a federal fair employment program to the state programs now operative, with enforcement powers, in 20 states.* We think federal programs should not preempt satisfactory state programs, even for firms in interstate or foreign commerce, unless there is a clear-cut administrative advantage. This should not be beyond the skill of legislative draftsmen to provide, nor should cooperative administration be beyond the ingenuity of federal and state officials. An approach to a like question is taken by the National Labor Relations Act, as amended, which expressly negates an inference of federal pre-emption in those situations where the federal agency has not assumed jurisdiction, and thereby permits parties to obtain relief under state law, Washington has enough to do without doing a job that the states can do as well or better. It may well be that both employer and minority group member would prefer a state administration close at hand, to a remote and impersonal federal.

(3) Employment by federal contractors is a special case. Appropriately, federal contractors should, in virtue of their relationship to the government, make a special contribution to the national need to utilize and develop fully our manpower. The President's Committee on Equal Employment Opportunity has diligently established a compliance system under Executive Order 10925 and, operating on the base of a statute applicable to all interstate commerce, the Committee could drop its policing functions and concentrate on the much discussed but rather nebulous "affirmative" requirements of the Executive Order. It could, in other words, demand from contractors, and aid them in effecting positive programs to bring minority group members into full participation in the

* Alaska, California, Colorado, Connecticut, Delaware, Illinois, Kansas, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington and Wisconsin. Antidiscrimination laws, with little or no enforcement power, exist also in Idaho, Indiana, and Kentucky.

national work force, on the premise that firms doing business with the government enter thereby into a partnership of national goals. Of the various techniques the Committee and, under its guidance, federal offices have already devised, we are especially impressed by the Defense Department's staff of Intergroup Relations Specialists, working in the field with contractors. No separate legislation seems required, the President having clear enough authority through his procurement power. Certainly, however, the President should ask for and Congress should grant funds necessary for the Committee, instead of using funds, as at present, appropriated for other purposes; if a statutory foundation for the Committee would facilitate this, that legislation should pass.

Furthermore, by control of appropriations both for the Committee and — more importantly — for the statutory programs over all employment in interstate and foreign commerce, Congress would be in a position to terminate. This is as it should be. We should not suppose an everlasting need for antidiscrimination measures. It may be an enduring part of human psychology to pay as little as one can for as much as one can get, and therefore a wage and hour law will always be useful. But to believe that racial prejudice is similarly basic to human nature is morally self-defeating. Our conviction must be that once the discrimination barriers are broken, and minority members are equipped to hold their own, there will be in a free society neither the desire nor the possibility of re-erecting the old walls.

(4) Does employment discrimination by state or municipal bodies fall under the ban of the equal protection clause? The question has not been adjudicated but the trend of recent decisions is clearly in that direction.

(5) A quite different question is presented by state or local programs financed in whole or in substantial part by federal dollars. The temptation to discuss this issue at length is considerable, for some of the racially discriminatory uses of federal money are shocking, through a great variety of outlets including but unfortunately not limited to the National Guard, the U. S. Employment Service, Hill-Burton hospital construction, the several federal highway programs, the multitudinous federal farm offices, air terminals, and many others. But many words might serve only to obscure the simplicity of the matter. It ought to be axiomatic that wherever money from the common treasury goes within this country, the Constitution goes along. It is unthinkable that the use of federal money to favor some of us and disfavor others of us could be rationally defended. This is so clear that to many it is not at all clear that any legislation to this end seems needed: the President, it would seem, has no right to spend money which will yield racial discrimination. The hard job of enforcement would be made more feasible, however, by Congressional action. A prohibition on discrimination by state and local governments or their contractors or agents, on all projects financed in whole or in substantial part by the federal treasury, should be included in the proposed fair employment act,* and administered by the Department of Labor, with the added sanction of a funds cutoff to insure compliance.

* Sec. 601 of the Administration's bill could accomplish this end. The President's Executive Order 11114 of June 22, 1963, also will help.

VOTING RIGHTS

The Civil Rights Acts of 1957 and 1960 were addressed principally to voting rights. That these first civil rights acts in four generations were concerned with voting, evidences its centrality among our civic values as well as our civic shortcomings. The problem of voting rights has been long and familiarly before us, and has been thoroughly documented by the U. S. Commission on Civil Rights;* further description here would be superfluous.

From the history of the last few years, some conclusions and inferences can be drawn, which we state seriatim:

(1) With the exception of a few pockets of discrimination against American Indians and Mexicans the denial of voting rights is a problem peculiar to certain areas in southern states and to their Negro residents. The problem is not even regional in scope: in extensive areas of the South, and the most populous one at that, Negroes today register and vote freely. Legislation of general application, such as the Administration's literacy bill of 1962,** would supersede state laws all over the country in order to reach abuses that are state-wide in at most only two or three states, and which are virulent in parts of not more than three others.†

(2) Voting discrimination and low Negro participation are not always equivalent. In the states of Arkansas, North Carolina, Tennessee, Texas, and Virginia, where there are today only isolated and passing discriminatory practices, Negro participation is low but is remediable by education and organized effort; the same is true of large areas of Florida, Georgia, and South Carolina, and scattered areas of the other three Deep South states. The evil of discrimination is confined, in other words, to certain communities of the Deep South where the constitutional prohibition against voting discrimination is openly flouted and efforts to obtain or to exercise voting rights are met by acts of intimidation, harassment, and physical violence, sanctioned and sometimes even participated in by local authorities and law enforcement officers.†† These are, and should rationally be regarded as, outlaw communities. Our federal system will be less seriously challenged by federal power brought to bear directly on these communities, than by federal laws which supersede state laws everywhere.

(3) This is not meant to preclude federal regulation of elections, or the establishment of federal standards when, in the judgment of Congress, they are necessary or desirable. There is, we think, outstanding merit in the bill intro-

* See *Report of the U. S. Commission on Civil Rights, 1959. Voting, 1961, U.S.C.C.R. Report. Hearings Before the U.S.C.C.R., Voting, 1959 (the Alabama hearings). Equal Protection of the Laws in North Carolina, U.S.C.C.R., 1962.* See also: *Civil Rights-1959, Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U. S. Senate, 86th Cong., 1st sess., Parts I-IV.*

** The Senate rider to H. R. 1361, 87th Cong., 2d Sess. (1962).

† At least two bills are before the 88th Cong., 1st Sess. which would implement the 14th amendment by reducing the House representation of states depriving eligible persons of the franchise: S. 1644 introduced by Sen. McNamara; and H. R. 6801, introduced by Rep. Stratton. To the same end is *Lampkin v. Hodges*, filed May 28, 1963 before the U. S. District Court of the District of Columbia.

†† See Report of the Mississippi Advisory Committee, *Report on Mississippi*, January 1963, U.S.C.C.R. Report; Voter Education Project, press release of March 28, 1963 on 64 Mississippi atrocities.

duced by Senator Hart at each Congress since 1959.* Senator Hart's bill authorizes the federal administration of registration and primary and general elections for U.S. Senators and Representatives in any district where a Congressional Election Commission "determines that unless such election is conducted by the Commission, persons having the qualifications requisite for electors of the most numerous branch of the legislature of the State in which the Congressional District is located are likely to be denied their right . . . to cast their votes and to have them fairly counted." On the sound premise that Congress has full authority under Article I, Sec. 4 of the Constitution to regulate elections of its own members, the proposed Commission would act solely at its discretion and without any recourse to the courts. It would, however, *follow state law* in registering eligible voters.

(4) The Hart bill goes to the key issue, as the Administration's 1962 literacy bill did not. The tool of discrimination is not the literacy laws of southern states, but their immoral and illegal administration, coupled with the physical intimidation and economic coercion of Negroes. Nor would the proposed sixth-grade literacy presumption of the Administration's 1963 voting bill** reach the extra-legal threat of violence or economic reprisal, and there is every prudent reason to suppose that communities which now illegally administer literacy requirements would resort to these extra-legal methods if their practices were set aside by a federal rule. Enactment of the sixth-grade presumption would provide a salutary device, but we caution against overly optimistic expectation of its value.

(5) In 1959 the Commission on Civil Rights proposed that federal registrars be appointed by the President in counties found by the President to practice discrimination.† Congress chose, instead, in the Civil Rights Act of 1960 to invoke the judicial process. Experience does not suggest that this was wise. Voter registration is, after all, a ministerial act. The courts' proper and necessary function is to protect individuals from illegal treatment by the functionnaires commissioned to register their names. To ask the courts to do more than this, to ask them — as the Act of 1960 does — to look into the complex whole of a county's or state's practices and ascertain what "pattern" exists, to ask them to supervise the registration of deprived persons or even to register them directly, all this is a heavy and unnatural load on the judicial process. The Acts of 1957 and 1960 were intended to facilitate Negro registration, but they were poorly designed for that purpose. It is sufficient to note that of the 40 voting cases filed under the Acts of 1957 and 1960, only 19 have reached decisions, and of the 30 cases filed since January 20, 1961, only 9 have been decided.

We seriously question, therefore, whether Congressional effort should be expended on the further refining of a basically defective approach. The Administration's present effort to do so (Sec. 101c) seeks by extraordinarily, almost

* S. 1281, 88th Cong., 1st Sess. (1963).

** S. 1731, § 101(b). See also the Administration's earlier bill, S. 1283, 88th Cong., 1st Sess. (1963).

† *Report of the U.S.C.C.R.*, 1959, p. 141.

monstrously, complicated means to make judicial administration perform a ministerial service. The effort should be to get the voting question out of the courts, not more deeply into it.

(6) The Acts of 1957 and 1960, imperfect as they are, do provide legal means for federal suppression of the grosser violations of the 14th and 15th Amendments. The Department of Justice has enforced them conscientiously and, with additional lawyers, could do yet more. (Amendment of the laws would be far less helpful than would appropriations making possible more attorneys in the Civil Rights Division.) As previously said, voting discrimination occurs now, with but few exceptions, only against Negroes and only in some localities of the South. By their defiance of the constitutional order, these places are virtually outlaw communities. New and more refined legislative remedies are not required to reach this blatant disregard of rights. To contain and disarm lawlessness, a clear federal presence is required at the first outbreaks. We think the Attorney-General has the power, in the face of determined lawlessness supported by an acquiescent or conspiratorial community, to send federal marshals and agents of the Federal Bureau of Investigation for on-the-spot protection of the exercise of federal rights. Such marshals and federal agents should be deployed in accordance with principles normally governing in law enforcement, in numbers and with authority adequate to deal with all anticipated exigencies, including authority and instructions to enforce compliance with federal law and to make arrests for violations.

Moreover, the Attorney-General may seek through the courts appropriate orders to prevent any parties from interfering with the registration or voting process.* We are, therefore, glad to note that the Department of Justice in *U. S. v. Greenwood*, now pending before the federal district court of northern Mississippi, has taken the position that freedom of assembly in connection with voter registration is a right within the power of the Attorney-General to make secure.**

CONCLUSION

There is an urgent need for bringing Congress into explicit support of racial equality. Unless and until this is done, the national decision in favor of equality is clouded and imperfect. The voting legislation of 1957 and 1960 has not achieved this end. It reaches only the issues of discriminatory application of state laws, or vicious interference with the exercise of the federal voting right. The Acts of 1957 and 1960 fall short of a Congressional affirmation of equality as an attribute of national and state citizenship.

* The argument made above in paragraph 6 was stated earlier by the Notre Dame Law School Conference in a preliminary statement submitted to the President on February 12, 1963, and subsequently inserted by Senator Douglas in the *Congressional Record* for February 19, at page 2388. The statement urged a more extensive use of executive powers to cope with voting discrimination, and the employment of additional methods to expedite cases and to bring them to satisfactory results. The statement was documented at the request of his conferees by G. W. Foster, Jr., Professor of Law at the University of Wisconsin, in a memorandum submitted to the Civil Rights Division on March 15, 1963.

** Senator Javits introduced a bill (S. 1693) on June 11, 1963, which would give statutory authorization for injunctions to prevent deprivation of rights by officials or private persons in Albany or Birmingham-type situations that are not clearly related to voting rights. Comments by distinguished law professors regarding the Constitutionality and need of the bill are printed in the *Congressional Record* for June 11 at pages 9970-9972.

For reasons which are now a part of history, but also for reasons of intrinsic value the first Congressional action should, above all, include a strong, well-designed school desegregation law. We propose that this have the following elements:

(a) "Desegregated schools" should be defined as those which accord each child the right to attend a nonracial school system.

(b) The primary aim of legislation, at this time, should be to effect starts in those biracial school districts of the South which have made no beginning.

(c) To this end, each school board having jurisdiction over such a district would be required to prepare and make public a desegregation plan.

(d) Further, the Attorney-General must be authorized to bring desegregation suits in the name of the United States, and to intervene in cases brought by private plaintiffs.

(e) And further, technical assistance from the Department of Health, Education and Welfare to facilitate desegregation should be available to school districts, South and North, for projects specifically related to the desegregation process.

(f) The right of private plaintiffs, through counsel of their choosing to bring desegregation suits, should be carefully preserved.

The Notre Dame conference considered also the fields of employment and voting.

Congress has waited long to act in enforcement of the 14th Amendment. When it at last does so, it should direct its action toward fundamental causes of racial inequity. The President's proposals for manpower training go to this problem. But without effective legislation to ban job discrimination, they will not be enough. A fair employment law is required.

The law should be administered by the Department of Labor (not by a new commission), and should cover all phases of the employment process of firms engaged in or affecting interstate and foreign commerce. The law should reach also employment, of all descriptions, carried on by state or local governments and by private institutions for work financed in whole or in part by federal funds.

We recommend further that, by several means, the law should rely on administrative regulations rather than quasi-judicial methods for enforcement. We think that this can be realized by incorporating the administration into the Department of Labor, and bringing the whole structure of the Department into responsibility for the work.

We propose that the President's Committee on Equal Employment Opportunity be continued, and that it press strongly to bring governmental contractors into partnership with the national government through affirmative actions that specially contribute to the development of job skills among Negroes and other minorities, and their full utilization.

In the third field — voting discrimination — the Notre Dame conference strongly believes that additional legislation is not a sufficient remedy.

The problem is neither nation-wide nor region-wide. The condition which requires federal attention is the lawlessness that exists in a relatively small number of outlaw communities of the Deep South.

This condition does not pose an issue of federalism. Federalism is a system of divided power among governments, and governments are instruments whose whole purpose is to establish an order of law. In these outlaw communities where citizenship rights are flagrantly destroyed, there is no law to respect.

We have here, in short, a problem of enforcement, and the President's power is adequate, strengthened by the Acts of 1957 and 1960, to create conditions which permit every citizen, freely and without fear, to register to vote, to cast his vote, and to have it honestly counted.

This is the centennial year of Emancipation. It is also the year when Negro patience with systematized social deprivation has finally broken. It is the year for Congress to act.