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# Constitutional Law -- Is There a Civil Right to Housing Accommodations?

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### Constitutional Law

#### IS THERE A CIVIL RIGHT TO HOUSING ACCOMMODATIONS?

##### Introduction

The Supreme Court's inundation of the separate-but-equal doctrine in the historic *Desegregation Cases*<sup>1</sup> has had a marked effect on judicial and legislative thought in the entire realm of public accommodation.<sup>2</sup> The thrust of *Brown v. Board of Education*<sup>3</sup> and cases following is that the Constitution demands that all persons have a civil right to be accommodated on identical terms without discrimination on the basis of color in public or quasi-public facilities.<sup>4</sup> This Note will investigate their influence upon discrimination in the field of housing. An attempt will be made to determine whether there is today a civil right, which may be asserted by a prospective tenant or vendee, to buy, acquire, lease, occupy, use, and enjoy property and to obtain decent living and housing accommodations without discrimination because of race or religion. Such a determination will, of course, involve the inverse consideration of the landlord's freedom in selecting his tenants.<sup>5</sup>

Typically, the prospective tenant who will want to establish this civil right is a Negro attempting to rent an apartment or to buy a house in a comfortable neighborhood.<sup>6</sup> Can he arm himself with the Constitution

<sup>1</sup> *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (prohibiting racial segregation in District of Columbia public schools). The previously condoned doctrine of "separate-but-equal" facilities was expressly rejected. A year later the Court commanded that desegregation be accomplished "with all deliberate speed" giving supervisory power to local federal district courts. *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

<sup>2</sup> *Gayle v. Browder*, 352 U.S. 903 (1956) (intrastate public transportation); *Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955) (segregated public beaches and bath houses); *NAACP v. St. Louis-San Francisco Ry.*, 297 I.C.C. 335 (1955) (interstate transportation facilities). See Survey, 2 RACE REL. L. REP. 881-911 (1957).

Laws which have recently been passed forbidding discrimination are discussed at pp. 477-86, *infra*.

<sup>3</sup> See note 1 *supra*.

<sup>4</sup> So stated, the right regards a willing buyer and his right to *acquire* property; the correlative right regarding a willing seller and his right to *dispose of* property without "state" imposition of racial criteria was vindicated in *Buchanan v. Warley*, 245 U.S. 60 (1917).

<sup>5</sup> Henceforth the term "landlord" will be used frequently and should be understood to include builder, subdivider and those who are in the business of selling or renting lots and houses. A different meaning, if intended, will be made clear. Likewise, the term "tenant" will include prospective lessees and buyers of lots or homes. The relationships between the various people mentioned, as considered here, are essentially referable to the landlord-prospective tenant nexus.

<sup>6</sup> The Negro will be chosen to symbolize the minority groups who are the unfortunate victims of racial and religious discrimination. That the Negro feels this problem most keenly is documented, to give a significant example, by the Supreme Court itself in the *Brown* case. Moreover, Myrdal observes:

"Nothing is so obvious about the Negroes' level of living as the fact that most of them suffer from poor housing conditions. It is a matter of such common knowledge that it does not need much emphasis." MYRDAL, *THE AMERICAN DILEMMA* 376 (1944).

Today, however, spurred on both by economic progress and the increasing success of minority groups in various courts, the Negro has more reason to expect attainment of first-class citizenship.

and expect to overcome the discrimination so often encountered? Or, rather, is our fundamental charter a weapon in the landlord's arsenal? This presents the central issue, which is seen to be exclusively one of constitutional law.<sup>7</sup>

It happens that except for three or four key Supreme Court cases the most instructive and pertinent judicial precedents are several New York state decisions. Much reliance, therefore, has been placed upon the ideas therein contained—to illustrate the approach the judiciary has taken in this area. This Note will also contain an evaluation of state and city anti-discrimination housing laws which impose a duty upon certain landlords not to discriminate or segregate, considering possible constitutional objections to such a police power exercise in light of the societal protectives of our Constitution. The recent New York City Law, being the most fargoring of its kind, is singled out to illustrate the problems involved.

### *The Approach in the Courts*

#### *A. Is Landlord Activity "State Action"?*

Obviously, the key weapon of the prospective Negro tenant is the equal protection clause of the fourteenth amendment which is an "explicit safe-

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<sup>7</sup> The historical context of this problem is interesting to note. Prior to the fourteenth amendment common law treated a property owner who rented portions of his quarters to others as either a private home owner or as an innkeeper. One who owned a home could treat it "as his castle" and do with it as he wished. See, e.g., *Semayne's Case*, 5 Rep. 91, 77 Eng. Rep. 194 (K.B. 1604) (per Coke). However, an innkeeper, by opening his rooms to the public, assumed a duty to refrain from discrimination. *Ferguson v. Gies*, 82 Mich. 358, 46 N.W. 718 (1890) (statute involved); *Donnell v. State*, 48 Miss. 661, 680-81 (1873) (dictum). As a result of the post-Civil War amendments, this duty was extended to the Negro, a newly recognized citizen. *Ferguson v. Gies*, *supra*. It was at this point that the dispute over "equal" protection began. *West Chester and Philadelphia R.R. v. Miles*, 55 Pa. 209, 215 (1867) (separate-but-equal). *Contra*, *Ferguson v. Gies*, *supra*. The "landlord" under scrutiny in this Note is neither the common law private property owner nor the common law innkeeper but rather a juridical entity unknown to the common law.

Another common law idea which concerns the property owner-willing buyer relationship is the rule against restraints on alienation. See Schnebly, *Restraints upon the Alienation of Legal Interests*, 44 YALE L.J. 961, 1186, 1380 (1935). This aspect of property law, however, is only peripherally pertinent today when racial problems are involved, since the settlement of such problems has become almost exclusively a matter of constitutional law. Compare Ribble, *Legal Restraints on the Choice of a Dwelling*, 78 U. PA. L. REV. 842 (1930) and Schnebly, *supra* at 1190, "the problem, then, is not one of constitutional law, but of the social expediency of racial segregation at the expense of freedom of alienation," with *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Barrows v. Jackson*, 346 U.S. 249 (1953). The *Shelley* case held racially restrictive covenants to be valid, in that they may be voluntarily respected and no wrong is done by entering into such an agreement, but unenforceable, in that a court may not compel performance of the agreement. The restraint against alienation question was apparently neither raised by the litigants nor deemed important by the Court; it is not mentioned in the opinion. The question of any practical advantage of racially restrictive covenants seems closed. See Scanlan, *Racial Restrictions in Real Estate—Property Values Versus Human Values*, 24 NOTRE DAME LAW. 157 (1949). See also *Capitol Federal Savings and Loan Assoc. v. Smith*, 316 P.2d 252 (Colo. 1957). *But see* *Charlotte Park and Recreation Comm'n v. Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956).

guard of prohibited unfairness."<sup>8</sup> Cases dealing with racial discrimination have focused upon this clause or its parallel protective, the due process clause of the fifth amendment,<sup>9</sup> and have provoked significant remarks by some of our most distinguished jurists that would seem to indicate that any discrimination because of race or creed is unconstitutional per se:

Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.<sup>10</sup>

Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.<sup>11</sup>

Yet, on its face the fourteenth amendment proscribes only *state* action;<sup>12</sup> hence we find Mr. Justice Bradley stating in the *Civil Rights Cases*:<sup>13</sup> "It is *State Action* of a particular character that is prohibited. *Individual invasion* of individual rights is not the subject matter of the [fourteenth] amendment." (Emphasis added.) But time has proven these words misleading. In keeping with the spirit of the amendment, to insure that all citizens may enjoy identical rights under law (law as effected by the sovereign aspect of each state, albeit tripartite), the courts have been prone to find a variety of activities satisfying the requisite "state action." Individuals, private corporations, and private clubs have been found to act *by, for* or *as* the state, and, therefore, subject to the fourteenth amend-

<sup>8</sup> *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (distinguishing, yet noting the parallel protections of, the fourteenth and fifth amendments with regard to racial classifications). See note 9 *infra*.

<sup>9</sup> The fourteenth amendment concerns only state action and does not apply to federal activity. However, the fifth amendment's due process clause is held to prohibit similarly unjustifiable discrimination practiced by the federal government. *Bolling v. Sharpe*, note 8 *supra*; *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Bolling v. Sharpe*, *supra* at 500. Since the civil rights concern here is primarily a *state* action problem the equal protection clause will be the device in terms of which the problem will be resolved, though the resolution applies as well to the *federal* action situation.

<sup>10</sup> *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (per Chief Justice Stone).

<sup>11</sup> *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (per Chief Justice Warren) (a fifth amendment case). For a comprehensive and timely discussion of the question, see BLAUSTEIN & FERGUSON, *DESEGREGATION AND THE LAW* (1957), suggesting the thesis that racial classifications are unconstitutional per se, and, at 209, that: "The 'separate but equal' doctrine has finally become a constitutional nullity."

<sup>12</sup> The fourteenth amendment provides, in part:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction *the equal protection of the laws.*" (Emphasis added.) U.S. CONST. amend. XIV, § 1.

<sup>13</sup> 109 U.S. 3, 11 (1883). The Court struck down a national law forbidding racial discrimination by individuals in places of public accommodation on the ground that neither the thirteenth nor fourteenth amendments provided Congress with authority to pass such a law, and that this problem was more properly within the domain of the several states.

ment.<sup>14</sup> Current judicial tenor appears to favor extending the concept of "state action," centripetally concerning itself with the priority of personal rights. It seems that the limits of this doctrine remain to be drawn. It is clear, though, that the strength of the equal protection clause from the point of view of the Negro tenant will depend not on what *he* does or who *he* is but upon the nature of the person or persons discriminating against him. The fourteenth amendment inhibits certain action; it looks to the actor. The act in question must be found to satisfy the notion of "state action" before the amendment may apply. In terms of a mathematical proportion: as the landlord is public (acting *by*, *for* or *as* the state) the fourteenth amendment is applicable, and, conversely, as the landlord is private, the fourteenth amendment does not apply.

### B. Public Landlords

The federal courts were first presented with the problem of whether to enjoin racial discrimination by a public landlord in *Favors v. Randall*.<sup>15</sup> The landlord was the Philadelphia Housing Authority, one of many such corporations created by the various states to construct and manage low-rent housing projects in cooperation with the United States Housing Act of 1937.<sup>16</sup> The Act provided for granting various subsidies to local housing authorities to effect slum clearance and provide for redevelopment housing in those areas.<sup>17</sup> Pursuant to its statutory authority as the sole administering body, and in response to a reasonably determined practical need, the Philadelphia Housing Authority adopted the policy of quasi-segregation in the placing of its tenants to harmonize with the existing "neighborhood [racial] pattern." The district court decided that the Hous-

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<sup>14</sup> See, e.g., *Ex Parte Virginia*, 100 U.S. 339, 346 (1879) (an individual, a judge); *Marsh v. Alabama*, 326 U.S. 501 (1946) (a company-owned town); *Smith v. Allwright*, 321 U.S. 649, 663 (1944) (a voluntary association, the Texas Democratic Party). See also *State Action, A Study of Requirements Under the Fourteenth Amendment*, 1 RACE REL. L. REP. 613 (1956); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 So. CALIF. L. REV. 208 (1957).

A candid statement of the politico-judicial nature of "state action" is made in Comment, 45 MICH. L. REV. 733, 747 (1947):

"What is action by the state and where it ceases is an interesting speculation in political philosophy. In a final sense, state action permeates society, for the existence of anything and the action of any individual or group is permitted, commanded or forbidden by the state: it can fairly be said that everything in the social organism takes character from its relation to the central collective purpose manifested by the government. But a distinction is made in the common understanding between action by the state and the action of private persons and it is in terms of this distinction that the Fourteenth Amendment has been held to speak. Perhaps the only logical principle on which to found the distinction is to attribute that action to the state which embodies a purpose of the government or of one entrusted with its authority which is separable from the purposes of private individuals."

<sup>15</sup> 40 F. Supp. 743 (E.D. Pa. 1941).

<sup>16</sup> 50 STAT. 888, 42 U.S.C. §§ 1401-33 (1952). This act and its many amendments have extensively involved the federal government in the housing industry and in slum clearance. The most notable amendment was the Housing Act of 1949, 63 STAT. 413 42 U.S.C. §§ 1441-83 (1952). For legislative history and purpose see 1949 U.S. CODE CONG. SERVICE 1550. See also Note, *Discrimination Against Minorities in the Federal Housing Programs*, 31 IND. L.J. 501 (1956).

<sup>17</sup> 50 STAT. 888, 42 U.S.C. §§ 1409-10 (1952).

ing Authority was a state agency and that, as such, it was clearly bound to act only within the sphere of activity permitted under the fourteenth amendment, stating:<sup>18</sup>

Whoever, by virtue of public position under a State government . . . takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. Therefore, as a result of the adoption of the Fourteenth Amendment to the United States Constitution, a state is required to extend to its citizens of the two races, white and black, substantially equal treatment in the facilities it provides from the public funds.

The court then proceeded to commend the doctrine of *Plessy v. Ferguson*,<sup>19</sup> that separate-but-equal facilities satisfy constitutional demands, and denied the Negroes' motion for injunctive relief. On this point the holding was in line with the then current judicial style;<sup>20</sup> a more prescient view could not have been expected.<sup>21</sup>

A 1949 New Jersey decision, however, disapproved of the separate-but-equal standard. In *Seawell v. MacWhitney*<sup>22</sup> the court enjoined racial segregation in four housing projects in the City of East Orange. To reach this result the court viewed the discriminatory acts as having been performed by a municipal corporation, the City of East Orange, and by public officials acting pursuant to the state enabling act and performing a necessary public function; thereupon, the court employed the "state action" concept as expressed in *Virginia v. Rives*:<sup>23</sup>

It is doubtless true that a State may act through different agencies—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the [fourteenth] amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another.

and as expressed in *Shelley v. Kraemer*:<sup>24</sup>

In the *Civil Rights Cases*, 109 U.S. 3, 11, 17 (1883), this Court pointed out that the [Fourteenth] Amendment makes void "state action of every kind" which is inconsistent with the guaranties therein contained, and extends to manifestations of "State authority in the shape of laws, customs, or judicial or executive proceedings."

The court outspokenly declared that segregation (separate-but-equal) through state action violates the fourteenth amendment as well as the state's public policy.<sup>25</sup> Subsequent cases have almost uniformly reached

<sup>18</sup> *Favors v. Randall*, 40 F. Supp. 743 (E.D. Pa. 1941) at 747, quoting from *Ex Parte Virginia*, 100 U.S. 339, 347 (1879).

<sup>19</sup> 163 U.S. 537 (1896).

<sup>20</sup> See *Housing Authority v. Higginbotham*, 143 S.W.2d 95 (Tex. Civ. App. 1940). See also *Denard v. Housing Authority*, 203 Ark. 1050, 159 S.W.2d 764 (1942).

<sup>21</sup> *Plessy v. Ferguson* was still good law, not to be Supreme Court-destroyed until 1954, in *Brown v. Board of Education*. But see *Gandolfo v. Hartman*, 49 Fed. 181 (S.D. Cal. 1892) (restrictive covenant).

<sup>22</sup> 2 N.J. Super. 116, 63 A.2d 542 (1949), modified on appeal on the question of sufficiency of evidence, 2 N.J. 563, 67 A.2d 309 (1949).

<sup>23</sup> 100 U.S. 313, 318 (1879).

<sup>24</sup> 334 U.S. 1, 14 (1948).

<sup>25</sup> New Jersey had twice previously held that distinctions based on color were unconstitutional. *Bullock v. Wooding*, 123 N.J.L. 176, 8 A.2d 273 (1939) (public beaches); *Patterson v. Board of Educ.*, 11 N.J. Misc. 179, 164 Atl. 892, *aff'd* 112 N.J.L. 99, 169 Atl. 690 (1934) (public high school's swimming pool).

the same result.<sup>26</sup> The leading case is *Banks v. Housing Authority*,<sup>27</sup> decided solely on the basis of the equal protection clause of the Constitution.

The rationale behind this rule is simply that the "landlord," being a government-inspired, state-created Housing Authority, acts as the state in contemplation of law, not only satisfying traditional agency requirements but also the notion of public function or purpose. State action is manifest.<sup>28</sup>

### C. Is A Private Landlord Public?

Has the prospective tenant any recourse against a *private* landlord who discriminates against him because of color? Do the fourteenth amendment protectives apply to this relationship? Or, in the adopted phraesology, may circumstances exist which would persuade the court to view a private landlord as *public*?

The relationship of landlord and tenant before *Shelley v. Kraemer*<sup>29</sup> was treated as being governed solely by contract law. A private owner

<sup>26</sup> *Detroit Housing Comm'n v. Lewis*, 226 F.2d 180 (6th Cir. 1955); *Davis v. Housing Authority*, Civil No. 8637, E.D. Mo., 1955; *Vann v. Toledo Metropolitan Housing Authority*, 113 F. Supp. 210 (N.D. Ohio 1953); *Woodbridge v. Evansville Housing Authority*, Civil No. 618, S.D. Ind., 1953; *Taylor v. Leonard*, 30 N.J. Super. 116, 103 A.2d 632 (1954); *Banks v. Housing Authority*, 120 Cal. App. 2d 1, 260 P.2d 668 (1953); *Kankakee County Housing Authority v. Spurlock*, 3 Ill. 2d 277, 120 N.E.2d 561 (1954) (by implication). *Contra*, only on question of separate-but-equal, *Heyward v. Public Housing Adm'n*, 135 F. Supp. 217 (S.D. Ga. 1955) (rendered dictum by final disposition of the case in 154 F. Supp. 589 (S.D. Ga. 1957) dismissing the suit. The merits should never have been reached. 214 F.2d 222, 224 (D.C. Cir. 1954)); *West v. Housing Authority*, 211 Ga. 133, 84 S.E.2d 30 (1954) (dictum); *Miers v. Housing Authority*, 266 S.W.2d 487 (Tex. Civ. App. 1954) (dictum) (further proceedings were on matters here irrelevant).

It may be noted that the difference in approach gleaned from the aforementioned cases bears strong resemblance to geographical differences. Will this practice persist even in the federal courts?

<sup>27</sup> 120 Cal. App. 2d 1, 260 P.2d 668 (1953), *cert. denied*, 347 U.S. 974 (1954). The California court expressly rejected the rationale of *Favors v. Randall*, 40 F. Supp. 743 (E.D. Pa. 1941), remarking at 678 that:

"Although the opinion indicates the court recognized the basic requirement of equality of treatment it does not clearly indicate that the court's attention was pointedly directed to the fact that the rights of 'persons', not groups, were involved under the 14th Amendment. The rationale of the decision seems to be that upon the basis of the facts before it the court felt that the questioned method of selection would work out equitably between the two groups, white and colored; indeed, that the colored group would obtain more housing units than its proportionate needs called for. That, as we have seen, is not the kind of 'equal' treatment which the 14th Amendment requires."

*Banks* decided that the only permissible criterion for tenant selection by a public landlord must be based upon a equality of right, viewing the rights as identical for all citizens. The criteria of "neighborhood racial pattern" and "proportionate racial needs" if employed would merely perpetuate the existent inequality. *Id.* at 678. The practical effect of those criteria is equivalent to or approaches constitutionally obnoxious racial zoning. See *Buchanan v. Warley*, 245 U.S. 60 (1917); *City of Birmingham v. Monk*, 185 F.2d 859 (5th Cir. 1951), *cert. denied*, 341 U.S. 940 (1951). See also Note, 31 *IND. L.J.* 501 (1956).

<sup>28</sup> The public landlord situation as presented in the aforementioned cases does not substantially challenge traditional "state action" notions. The relationship between the state and the ultimate act of discrimination is not particularly subtle. Subsequent situations, however, will demand more careful attention.

<sup>29</sup> 334 U.S. 1 (1948). See note 7 *supra*.

could dispose of his property as he saw fit in the absence of countervailing constitutional or statutory requirements.<sup>30</sup> But, that latter qualification provides the rub. As pointed out in *Shelley*: "[I]t would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment."<sup>31</sup> This commitment led to the Court in that case to declare state enforcement of private racially-restrictive covenants unconstitutional. The implications of such language transcend traditional contract and property law ideas. But, the *extent* to which a private contract becomes *public* and invites constitutional scrutiny is not spelled out by the Court; it remains an open question.<sup>32</sup>

One year after *Shelley* the New York Court of Appeals decided *Dorsey v. Stuyvesant Town Corp.*<sup>33</sup> Faced with the implications of *Shelley* the court nevertheless held that the fourteenth amendment did not apply to the practice of racial discrimination by the landlord, Stuyvesant Town Corporation, concluding that there was no "state action." Even though Stuyvesant had enjoyed the benefits of eminent domain condemnation, a tax exemption that would amount to millions of dollars, and was acting under a supervisory contract with New York City, the court held that the landlord had the privilege of excluding Negroes from consideration as tenants in its housing project. Stuyvesant Town Corporation, a private corporation organized under the Redevelopment Companies Law of New York,<sup>34</sup> was found to be a private landlord despite a vigorous dissent which pointed both to the fact of state initiation of the project and to the intimate cooperation between Stuyvesant and New York City with the attendant control and regulation exercised. The effect of such activity, the dissent charged, was that the City had accomplished indirectly what it could not have done directly—racial zoning.<sup>35</sup>

The majority in *Dorsey* found that the public purpose (which they seem to equate with "state action") had been completed when the land was reclaimed and the apartments constructed. Action from that point on was deemed private despite continuing obligations under the contract with the City. The court's only defense for such a position consisted in

<sup>30</sup> See Annot., 3 A.L.R.2d 466 (1949).

<sup>31</sup> 334 U.S. at 22.

<sup>32</sup> See Shanks, "State Action" and the Girard Estate Case, 105 U. PA. L. REV. 213 (1956).

Apropos in this regard is a statement made by Chroust, *Law And The Administrative Process: An Epistemological Approach to Jurisprudence*, 58 HARV. L. REV. 573, 581 (1945):

"Any contract between two parties . . . is in its ultimate significance but an act of specification of the unity of the administration of human conduct. As a law-making act and, therefore, an administrative act, this contract is actually an act of public law."

This Note will *not* investigate the probabilities involved in trying to determine whether *Shelley* opened the lid of Pandora's box as far as the presence of "state action" in judicial proceedings is concerned. Legal commentators disagree as to the limits which will be injected into the doctrine of *Shelley*, but do seem to agree that there is need for some kind of limitation. See, e.g., Shanks, *supra*; Huber, *Revolution in Private Law?*, 6 S.C.L.Q. 8 (1953).

<sup>33</sup> 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950).

<sup>34</sup> N.Y. UNCONSOL. LAWS § 3401 (McKinney 1949).

<sup>35</sup> *Harmon v. Tyler*, 273 U.S. 668 (1927); *Buchanan v. Warley*, 245 U.S. 60 (1917); *City of Birmingham v. Monk*, 185 F.2d 859 (5th Cir. 1951), *cert. denied*, 341 U.S. 940 (1951).



its reading of the Redevelopment Companies Act.<sup>36</sup> That this is to disregard the obvious realities of the situation was the charge leveled by the dissenters.<sup>37</sup> Their spokesman, Judge Fuld, protested that the entire Stuyvesant undertaking was clearly "state action" because it was unmistakably a government-conceived, government-aided, and government-regulated project in urban redevelopment.

The *Dorsey* case becomes more understandable and plausible, at least as a decision of the New York Court of Appeals, when one reflects upon the prevailing jurisprudential commitments of New York courts. Particularly instructive are the cases of *Kemp v. Rubin*<sup>38</sup> and *Pratt v. La-Guardia*.<sup>39</sup> The latter case also dealt with the Stuyvesant Town project. An equitable action going to the supervisory contract between New York City and Stuyvesant was brought by Pratt, a taxpayer of the City, against the mayor and others to permanently enjoin the informally proposed policy of Stuyvesant Town to racially discriminate. The action was dismissed as being premature. The court said that not until the commission of some *act* which is then claimed to be repugnant to the fourteenth amendment would the court listen to the case.<sup>40</sup> The opinion strongly suggests that the New York judiciary will not concern itself with policy-making requests, no matter how great their intrinsic appeal. Similarly, a year before *Shelley* the court saw fit in *Kemp* to enforce a racially restrictive covenant, stating that it was:

. . . constrained to follow precedent and govern itself in accordance with what it considers to be the prevailing law . . .<sup>41</sup>

It seems clear . . . that *we do not have on our statute books any specific provision which outlaws racial restrictive covenants*. In the circumstances, *this court does not feel that it should judicially legislate* by reading into the statutes something which the Legislature itself has failed to adopt. (Emphasis added.)<sup>42</sup>

<sup>36</sup> *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950). The Redevelopment Companies Law, N.Y. UNCONSOL. § 3401 (McKinney 1942), was upheld as a proper police power exercise in *Murray v. La Guardia*, 291 N.Y. 320, 52 N.E.2d 884 (1942), *cert. denied*, 321 U.S. 771 (1943). Commenting on *Dorsey's* interpretation of that Law, it is said in *Race Discrimination in Housing*, 57 YALE L.J. 426, 440, n.66 (1948):

"The opinion construed the purpose of the statute in a narrow physical sense. In holding that the statutory purpose was accomplished at the moment the buildings were constructed, the court ignored the broad implications of 'neighborhood rehabilitation' required by the act. That the objective was to clear slums *and* provide for the housing needs of lower middle-class income groups is manifest in the continuing controls which the city maintains over the project."

<sup>37</sup> Fuld, J., Loughran, C. J., and Desmond, J., dissented. Lewis, Conway and Dye, J.J., concurred with Bromley, J., who wrote the opinion of the court. The desires of the dissenters were vindicated by the New York Legislature when it passed Article 2-A of the Civil Rights Law, "Equal Rights to Publicly-Aided Housing." See note 47, *infra*.

<sup>38</sup> 188 Misc. 310, 69 N.Y.S.2d 680 (1947), *rev'd*, 298 N.Y. 590, 81 N.E.2d 325 (1948). Merits were reversed on the authority of *Shelley v. Kraemer*. This reversal is not, however, inconsistent with the jurisprudential posture of the New York courts discussed in the text.

<sup>39</sup> 182 Misc. 462, 47 N.Y.S.2d 359 (1944), *aff'd without opinion*, 268 App. Div. 973, 52 N.Y.S.2d 569 (1944), *leave to appeal denied*, 294 N.Y. 842, 62 N.E.2d 394 (1945).

<sup>40</sup> *Id.*, 47 N.Y.S.2d at 365.

<sup>41</sup> 69 N.Y.S.2d at 683.

<sup>42</sup> *Id.* at 685. See note 38 *supra*.

The court did recognize their prerogative of liberal construction but were quick to reiterate a venerable expression of Cardozo: "[F]reedom to construe is not freedom to amend."<sup>43</sup>

Jurisprudentially, then, the New York courts see themselves, at least in this area, as strict interpreters of the law—as written or as dictated by judicial precedent. Moreover, they understand the civil right amendment of the State Constitutional Convention of 1938 to be merely permissive in character requiring further legislative implementation to create any *new* rights.<sup>44</sup> Litigants with novel "civil rights" claims are referred to the legislature. It is submitted *Dorsey* quite clearly reflects this judicial approach. *Globerman v. Grand Central Parkway Gardens*,<sup>45</sup> following *Dorsey*, reinforced this commitment, observing, *inter alia*:<sup>46</sup>

Until such time as the Legislature shall have adopted a law which shall declare that the opportunity to purchase and to lease real property without discrimination shall constitute a civil right, claims of the nature asserted in this action are not actionable.

Thus, it seems that as far as the New York courts were concerned the *Dorsey* situation posed merely a fact-determining problem. The jurisprudential tenor was clear; the complaining Negroes had to overcome a formidable inertia. This they failed to accomplish.

Whether the holding in *Dorsey* commends itself, and regardless of the fact that the New York Legislature soon foreclosed the possibility of such a holding in the future,<sup>47</sup> the New York courts' approach to the problem remains significant, and poses three propositions. First, faced with the problem of private versus public landlord, a particular court may be expected to bottom its judgment on its established jurisprudential commitments concerning the Constitution. These may be gleaned beforehand and will likely include the court's predispositions regarding the respective weights in balancing property rights against personal civil rights and the

<sup>43</sup> Quoted in *Kemp*, 69 N.Y.S.2d at 685; Cardozo, J., was speaking for the court in *Sexauer & Lemke v. Luke A. Burke & Sons Co.*, 228 N.Y. 341, 127 N.E. 329, 331 (1920).

<sup>44</sup> *Kemp v. Rubin*, 69 N.Y.S.2d at 684-85. Reference is to Section 11, Article 1, of the Constitution of the State of New York:

"No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."

<sup>45</sup> 115 N.Y.S.2d 757 (Sup. Ct. N.Y. Co. 1952). The case involved the landlord-tenant contract relationship, the assertion having been made that the landlord had a legal obligation to renew or extend the lease of a present tenant without discrimination. Although the case did not involve *racial* discrimination the court relied upon the *Dorsey* holding, in part, and said at 760: "The landlords have the absolute right, under law, to choose their tenants. They possess this right, not only with respect to original tenancies, but also with respect to any renewals or extensions thereof." See *Alsberg v. Lucerne Hotel Co.*, 46 Misc. 617, 92 N.Y.S. 851 (1905) (concerning the rights of an apartment hotel owner).

<sup>46</sup> *Globerman v. Grand Central Parkway Gardens*, 115 N.Y.S.2d 757, 761 (Sup. Ct. N.Y. Co. 1952).

<sup>47</sup> N.Y. Civil Rights Law § 18 (Supp. 1957) (including landlords such as *Stuyvesant* within the "publicly-assisted" classification). See note 70 *infra*.

court's inclinations regarding judicial legislation. Secondly, outstanding among the factors which will help determine the constitutional nature of the landlord will be the essential moving force and purpose behind his existence,<sup>48</sup> and the presence or lack of governmental regulation. Thirdly, we can expect continued unanimity in the recognition that a *private* landlord has the privilege of discriminating indiscriminately.

Recognizing in *Dorsey*, which presented a landlord who on the facts was more public than most, the apparent unwillingness of the New York courts to follow the spirit of *Shelley*, are there, nevertheless, theories upon which courts of other jurisdictions might seize if they desire to give the particular Negro relief? *Ming v. Horgan*,<sup>49</sup> now before a California court, may provide an answer to this question. A "middle-ground" is involved. *Ming* squarely poses the question of whether a landlord who is financed under existing FHA<sup>50</sup> underwriting procedures is a *public* landlord.<sup>51</sup>

The Negro plaintiffs' argument admits that private landlords may discriminate as they please but it urges that the factor of FHA assistance or FHA participation transforms the builder-landlords into quasi-administrative "arms" of government. If that is so, plaintiffs argue, the Constitution imposes a duty upon them not to discriminate. They conceive of the statutory scheme, its purpose and its ultimate financial assistance, as having the effect of a conduit rendering the acts of the builders (as discriminating sellers) "governmental action."<sup>52</sup>

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<sup>48</sup> This characterization is intended to provoke thought as to the way in which the courts are searching for an answer to "state action" when an individual or corporation is in fact the actor but when the act has either been suggested by, made possible by, or been assisted by the state.

<sup>49</sup> No. 97,130, Dept. 6, Super. Ct. Calif., Sacramento County, 1958. At the time of this writing a decision in the case has not been reached.

<sup>50</sup> "FHA" will be employed in this Note to indicate the Federal Housing Authority.

<sup>51</sup> This issue has never been adequately raised in court. However, in *Johnson v. Levitt & Sons, Inc.*, 131 F. Supp 114 (E.D. Pa. 1955) a similar fact situation was involved. The plaintiffs sued in federal court against the FHA and VA (Veterans Administration) as federal agencies and against the Levitt corporation. The suit against the government was dismissed for failure to state a claim upon which relief could be granted. The court said at 116:

"[The extensive involvement of the government in the construction of a housing community like Levittown does] not, however, in my opinion, result in making Levitt and Sons, Inc., of New York, the government of the United States or a branch or agency of it nor [does it] make the government of the United States the builder or developer of the Levittown project . . . . Neither the FHA nor the VA has been charged by Congress with the duty of preventing discrimination in the sales of housing properties. What the plaintiffs are saying in effect is that these agencies ought to be charged with that duty. But that is something which can be done only by Congress and which cannot be forced upon the agencies in question by the courts through the injunctive process."

The suit against Levitt also failed, but because the complaint did not allege that the discrimination was being accomplished under color of any state authority, a prerequisite to federal jurisdiction under the civil rights laws, REV. STAT. 1977-79 (1875), 42 U.S.C. §§ 1981-83 (1952) and 28 U.S.C. § 1343 (3) (1952).

Two cases have been found which hold by implication that an FHA landlord is private, *Globerman v. Grand Central Parkway Gardens*, 115 N.Y.S.2d 757 (Sup. Ct. N.Y. Co., 1952), and *Novick v. Levitt & Sons*, 108 N.Y.S.2d 615 (Sup. Ct. Nassau Co. 1951), *aff'd without opinion*, 279 App. Div. 658, 107 N.Y.S.2d 1016 (2d Dept. 1951), although the precise issue of public versus private was not in question.

<sup>52</sup> These arguments have been gleaned from the Brief for Plaintiff.

The National Housing Act of 1949 embodies the congressional declaration of our national housing policy:<sup>53</sup>

The Congress hereby declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation.

Pursuant to this policy Congress ordained to encourage private builders to create more houses by making financing procedures more attractive with FHA loan guaranties. This method is indirect and may be contrasted with the direct subsidies granted in the case of low-rent public housing projects. But the plaintiffs in *Ming* see this relationship as one which would justify the labelling of the builder who chooses to take advantage of this government help as a constructive trustee. This presents what they call the fundamental issue of the case:<sup>54</sup>

May the operative builders who produce the needed housing as envisioned by, and which is the objective of, the National Housing Act and who avail themselves of the facilities of the Federal Housing Authority in the production of that housing, discriminate against intended Congressional beneficiaries solely on the basis of race. . . ?

It may be said that in large measure *Congress has provided* the builder with a large tract of land containing many new houses. Is the public purpose complete at this point, before he then, as home owner, offers them for sale to prospective buyers?<sup>55</sup> Or, does the Act envision the sale as well? The spirit of the National Housing Act is surely that encompassing; although Congress did not spell out standards to govern sales, it must have viewed subsequent sales as an essential part of its overall plan.

<sup>53</sup> 63 STAT. 413, 42 U.S.C. § 1441 (1952).

<sup>54</sup> Brief for Plaintiff, p. 49, *Ming v. Horgan*.

<sup>55</sup> Cf. *Dorsey v. Stuyvesant Town Corp.* See text at 469. But see Brief for Plaintiff, pp. 27, 28, *Ming v. Horgan*, commenting that such a contention is untenable:

"This Alice-In-Wonderland claim of the right to impose racial discrimination in the selection of purchasers is predicated on the fact that each of the houses will be sold by the builder in his private capacity to an individual who will execute an individual mortgage with the house and land as security to a private lending institution. All that has gone before—the cooperation between government and builder in planning the development, the rigorous requirements imposed by government as a precondition of the prior commitment without which not a single house would have been produced, the lending institution's agreement to make the mortgage loan, conditioned as it was on the certain knowledge that it could minimize its risk through the mortgage insurance program, the close cooperation between builder and government conforming the houses to standards set by government, the conformity of the subdivision to the overall county or city planning required by government, the proviso that FHA must approve the ultimate buyer, the requirements as to down payments and interest rates to be assessed against the buyer-mortgagor—all these are brushed aside as matters of no consequence. All that will come after—the fact that government credit stands behind the mortgage insurance, the requirement against sale on less favorable credit terms, the pledge of government to process complaints of faulty construction for a year after sale or initial occupancy—all these are relegated into the unimportant. The blind man has seized the elephant's tail and is telling us that the animal resembles a rope."

Perhaps a comparison is apt between the FHA landlord and the public landlord discussed previously. Both are congressionally inspired; each landlord became such because of the National Housing Act. Each landlord receives assistance from the federal government. There is one significant difference, however. Low-rent public housing projects are administered by state-created agencies provided for by the federal Act, while the administration of the FHA home building program is accomplished essentially by the home builder-owner himself. The comparable "tenant selection" is being done on the one hand by a state agency and on the other by the "agency" of the builder-owner himself and his real estate broker. It is contended that this latter "agency" must be, in contemplation of law, a quasi-administrative "arm" of government since Congress has given the FHA landlord financial support and other benefits—necessarily including a power to select tenants for his project. To hold otherwise, allowing FHA landlords to discriminate, would be to indirectly sanction the government's channelling of power and financial support into private hands "to rob Constitutional guarantees of all vitality."<sup>56</sup> An analogy is suggested to the power lodged in labor unions because of federal legislation, the point being that this power is *more* than it would have been absent government legislation. The Supreme Court has considered the consequences of this investment of power in labor unions, having cautioned, in *American Communications Association v. Douds*:<sup>57</sup>

But power is never without responsibility. And when authority derives in part from Government's thumb on the scales, the exercise of that power by

<sup>56</sup> Brief for Plaintiff, p. 30, *Ming v. Horgan*. Cf. Note, *Constitutional Restrictions on a Lessee of Public Property*, 42 VA. L. REV. 647 (1956). The situation considered therein is where a municipality, for example, rents an auditorium to a private organization which in turn conducts a function ordinarily open to the public but which is racially restricted by that organization, not by the municipality. It may be said that the town *provided* the group with the means to frustrate the Constitution, or, on the other hand, that this is mere private discrimination. The author there recommends the test of good faith—whether the municipality acted or is acting in good faith with respect to its public and constitutional obligations. Compare *Derrington v. Plummer*, 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957), with *Madden v. Queens Jockey Club*, 269 N.Y. 249, 72 N.E.2d 697 (1947).

<sup>57</sup> 339 U.S. 382, 401 (1950). The Court continued by clarifying, at 402:

"We do not suggest that labor unions which utilize the facilities of the National Labor Relations Board become Government agencies or may be regulated as such. But it is plain that when Congress clothes the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, [quoted from *Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 202 (1944)] *the public interest in the good faith exercise of that power is very great.*" (Emphasis added.)

Query, what does the *public interest* dictate regarding non-discriminatory tenant selection?

Note also the comments made by Mr. Justice Jackson in *The Supreme Court in the American System of Government*, The Godkin Lectures at Harvard University, 1955, at 69:

"It is my basic view that whenever any organization or combination of individuals, whether in a corporation, a labor union or other body, obtains such economic or legal advantage that it can control or in effect govern the lives of other people, it is subject to the control of the Government, be it state or federal, for the Government can suffer no rivals in the field of coercion. Liberty requires that coercion be applied to the individual not by other individuals but by the Government after full inquiry into the justification."

Is the FHA landlord in such a position, and if so, will the fact that the Government helped to put him there persuade a court to find public action?

private persons becomes closely akin, in some respects, to its exercise by Government itself.

This postulate may well be adopted by the judiciary as the link between FHA housing and public housing, rendering the major differences between them constitutionally irrelevant. To do this would be to say that even though an FHA landlord when selecting his tenants is not a governmental agency, the relationship of the FHA landlord to his tenants may be equated with the relationship of the public housing authority to its tenants—through the investment of power idea. That is, that the power he exercises is to be exercised within the same limits as governmental action because his “authority derives in part from Government’s thumb on the scales.”<sup>58</sup> The results, then, reached in *Banks v. Housing Authority*<sup>59</sup> could be applied; and in the *Ming* case the “rights” of the plaintiffs would be vindicated.

The situation presented by an FHA landlord also suggests two other theories which commend themselves. The theories are prompted by the Supreme Court cases of *Smith v. Allwright*<sup>60</sup> and *Marsh v. Alabama*.<sup>61</sup> In *Smith* the Court found “state action” and was able to apply the fifteenth amendment to prohibit racial discrimination by a voluntary association of individuals which technically had no legal connection with the state. The right of Negroes to vote was being circumvented by the Democratic Party of Texas which had adopted the prerequisite of “white” citizenship to be able to vote in primary elections. Observing that Texas law had “entrusted” the Party “with the determination of the qualifications of participants in the primary,” the Court declared that this is state action, and remarked:<sup>62</sup>

The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.

The foundation of the democratic political structure was clearly in jeopardy, the elective process, cast as it must be as a responsibility of the state. State action will be found when such an essential *state function* is involved and racial discrimination is being practiced, despite the fact that

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<sup>58</sup> See Brief for Plaintiff, p. 48, *Ming v. Horgan*:

“We do not suppose that even the builder-defendants in this case or their selling agents, the real estate brokers, will contend that government’s thumb was not laid heavily on the scales in the operative builder-defendants’ production of housing for the mass market in Sacramento county. We do not suppose that even they will contend that the purposes of the National Housing Act did not comprehend plaintiff and the class he represents equally with his white counterparts.”

<sup>59</sup> 120 Cal. App. 1, 260 P.2d 668 (1953), *cert. denied*, 347 U.S. 974 (1954). See text at p. 468, *supra*.

<sup>60</sup> 321 U.S. 649 (1944). This case arose under the fifteenth amendment which forbids “state” action denying or abridging the right of a citizen to vote on account of race or color.

<sup>61</sup> 326 U.S. 501 (1946).

<sup>62</sup> *Smith v. Allwright*, 321 U.S. 649, 664 (1944), *rehearing denied*, 322 U.S. 769 (1944).

"formal state action, either by way of legislative recognition or official authorization, is wholly wanting."<sup>63</sup>

The practice of using the Constitution to insure that functions which are properly state functions are not prostituted by private activity ultimately infringing upon personal civil rights in reinforced by the holding in *Marsh v. Alabama*.<sup>64</sup> There, a private corporation owned the "company town" of Chickasaw, Alabama, where a Jehovah's Witness undertook to exercise her freedom of speech and religion by passing out religious literature. She was arrested for trespass pursuant to an Alabama statute and was convicted. The conviction was reversed by the Supreme Court which held that the statute was unconstitutional as applied to her—in effect holding that the operation of a company town amounts constitutionally to the operation of a municipality, an "arm" of the state, which *must* respect personal civil rights. The Court said, *inter alia*:

The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.<sup>65</sup>

...  
When we *balance* the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, *as we must* here, we remain mindful of the fact that the latter occupy a preferred position.<sup>66</sup> (Emphasis added.)

These propositions, then, present themselves to the California court deciding the *Ming* case and to any state court having to decide the constitutional nature of an FHA landlord. The court will first have to determine whether *Shelley* applies, forbidding court sanction of the discrimination. Whether *Shelley*, which was a state case concerned solely with state action, would forbid finding an FHA landlord private, and thereby permitting discrimination, has to be answered. *Marsh* may introduce the seductive device of *balancing rights* when civil and property interests collide, and it may point toward a resolution of the issue by its comments regarding property being used so as to suggest availability to the public. *Douds* and *Smith* may convince the court that since the Government has seen fit to stimulate the housing industry and put its "thumb on the scales," the resultant housing should be deemed to have been constructed pursuant to a public function creating a duty in the landlords to assure the intended beneficiaries equal benefits. Then, too, *Dorsey* will suggest that the actors are but private builders and real estate agents, and that Congress has seen fit not to condition FHA assistance or to impose any duty on those who are assisted. And, the sidestep of telling a plaintiff that the court is not the proper forum for legislating is a strong temptation.<sup>67</sup>

<sup>63</sup> *Terry v. Adams*, 345 U.S. 461, 471 (1953) (the "Jaybird Primary" case).

<sup>64</sup> 326 U.S. 501 (1946).

<sup>65</sup> *Id.* at 506.

<sup>66</sup> *Id.* at 509. Here, again, it is clear that oftentimes property rights do conflict with civil rights. The Supreme Court expressly advocates considering this clash as a clash, and suggests balancing the opposing interests, preference always being accorded civil rights. See *Shelley v. Kraemer*, 334 U.S. 1 (1948); concurring opinion of Mr. Justice Frankfurter in *Marsh v. Alabama*, 326 U.S. at 510-11. This directive of the Supreme Court was expressly rejected by the New York Court of Appeals in *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541, 550 (1949), *cert. denied*, 339 U.S. 981 (1950). Query?

<sup>67</sup> The holding of *Dorsey* serves at least as a reminder of the bold position that state courts might take in order to favor projects the size of Stuyvesant Town or

*Anti-Discrimination Housing Laws — Their Constitutionality*  
Introduction

To provide a remedy for prospective tenants who are discriminated against because of color or creed in their quest for housing accommodations and, perhaps more importantly, to take positive steps toward alleviating the infectious slum situation, the legislative organs of a number of cities and states have enacted anti-discrimination housing laws.<sup>68</sup> The

to point the way toward establishing a loophole in the expanding "state action" doctrine and the consequent subordination of states' rights. The state courts' fear of the implications of *Smith, Marsh* and *Shelley* is clear. They retaliate by observing that the state sovereign in its form as the legislature should make the appropriate remarks on all civil rights issues, and until they do claimants will generally be without remedy. The extent to which the Supreme Court will permit this assertion, the extent to which the state legislatures will cooperate with their courts by continued silence, and the extent to which men will care to and dare to impose social and moral order upon themselves through legislation remain to be seen.

Another line of judicial thought suggests itself as a possible counteracting force for the expanding "state action" momentum, and that is the notion that a *voluntary association* acts "privately" and may discriminate with impunity. See *Goshorn v. Bar Ass'n of District of Columbia*, 152 F. Supp. 300 (D.C. 1957) (bar association); *Ross v. Ebert*, 275 Wis. 505, 82 N.W.2d 315 (1957) (trade union); *cf. State v. Clyburn*, 101 S.E.2d 295 (N.C. 1958) (restaurant proprietor may segregate his patrons); *Madden v. Queens Jockey Club*, 269 N.Y. 249, 72 N.E.2d 697 (1947) (state licensee, a race track, can, without reason or excuse, exclude a person from attending its races). *But cf. Derrington v. Plummer*, 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957) (county court house lessee, a cafeteria, can not discriminate against patrons on account of race). See also Letter from Alfred Avins and Edward Mainardi, Instructor and student at Rutgers School of Law, to the *Notre Dame Lawyer*, Dec. 6, 1957, on file in Notre Dame Law Library. It seems that, although the rule that private associations may act "privately" necessarily has a place in our jurisprudence—in light of the rights to private property and to peaceably assemble—the ideas expressed in *Marsh v. Alabama*, *Smith v. Allwright* and *Shelley v. Kraemer* recognize that conflicts with the guarantees of the fourteenth amendment will arise, and that a *proper* balancing of rights will not allow personal civil rights to be subverted.

<sup>68</sup> The statutes, ordinances and housing authority resolutions are collected in a publication of the Housing and Home Finance Agency, *Nondiscrimination Clauses in Regard to Public Housing, Private Housing and Urban Redevelopment Undertakings*, Oct. 1957.

Canada has also had some experience in this field. A 1954 Fair Accommodations Practices Act was passed for the province of Ontario, 3 Eliz. 2, c. 28, § 2 (1954) (Canada):

"No person shall deny to any person or class of persons the accommodation, services or facilities available in any place to which the public is customarily admitted because of the race, creed, color, nationality, ancestry or place of origin of such person or class of persons."

See *Matter of Shields*, noted in 1 RACE REL. L. REP. 1145 (1956), disposing of a complaint brought under that law finding that a private apartment owner is not covered by the Act.

The Ontario law corresponds roughly to the American statutes which prohibit racial and religious discrimination in places of "public accommodation." Twenty states, the District of Columbia and three territories have such statutes. Their constitutionality has been upheld a number of times. See *e.g.*, *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100 (1953); *People v. King*, 110 N.Y. 418, 18 N.E. 245 (1888). See COMMISSION ON LAW AND SOCIAL ACTION, AMERICAN JEWISH CONGRESS, MEMORANDUM ON CONSTITUTIONALITY OF METCALF-BAKER FAIR HOUSING PRACTICES BILL 7, 8 (1957).



laws are similar in that they proscribe all racial and religious discrimination but there are significant differences in the types of landlords they affect. Public housing authorities and urban redevelopment companies are subject to these laws in at least twenty-six cities in thirteen states.<sup>69</sup> Publicly-assisted landlords<sup>70</sup> are covered by the statutes of Massachusetts,<sup>71</sup> New Jersey,<sup>72</sup> New York,<sup>73</sup> Oregon,<sup>74</sup> and Washington.<sup>75</sup> The most fargoing, however, is the recent New York City Law<sup>76</sup> which applies to *all* landlords save those who rent apartments in apartment houses of less than three units or sell homes in a development of less than ten contiguous homes. The coverage of this law is broad indeed, affecting an estimated 1,700,000 apartments in that city.<sup>77</sup>

<sup>69</sup> *Ibid.* See also 18 LAW. GUILD REV. 23, 25 (1958) where it is pointed out that the passage of this New York City law has spurred drives to enact similar legislation in other cities and states. However, not mentioned in the article is Chicago, where Alderman Despres and Holman are preparing a similar bill. See letters from Leon M. Despres and Claude W. B. Holman, Chicago Aldermen, to the *Notre Dame Lawyer*, Jan. 14, 1958, on file in Notre Dame Law Library.

<sup>70</sup> The definition of "publicly-assisted" varies somewhat in these laws. New York State has been a pioneer in this legislation and its EXECUTIVE LAW § 292 (11) now reads:

"The term 'publicly-assisted housing accommodations' shall include all housing accommodations within the state of New York in

- (a) public housing,
- (b) housing operated by housing companies under the supervision of the commissioner of housing,
- (c) housing . . .
  - (1) which is exempt in whole or in part from taxes levied by the state or any of its political subdivisions,
  - (2) which is constructed on land sold below cost by the state or any of its political subdivisions or any agency thereof, pursuant to the federal housing act of nineteen hundred forty-nine,
  - (3) which is constructed in whole or in part on property acquired or assembled by the state or any of its political subdivisions or any agency thereof through the power of condemnation or otherwise for the purpose of such construction, or
  - (4) for the acquisition, construction, repair or maintenance of which the state or any of its political subdivisions or any agency thereof supplies funds or other financial assistance,
- (d) housing which is located in a multiple [at least a three-family] dwelling, the acquisition, construction, rehabilitation, repair or maintenance of which is . . . financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and such guaranty or insurance; and
- (e) housing which is offered for sale by a person who owns or otherwise controls the sale of ten or more housing accommodations located on land that is contiguous (exclusive of public streets), if [the acquisition, construction, rehabilitation, repair or maintenance of such housing accommodations is financed as in paragraph (d), *supra*.]"

<sup>71</sup> MASS. ANN. LAWS c. 151 B, § 1 (Supp. 1957).

<sup>72</sup> N.J. STAT. ANN. §§ 18-25-4, 5 (Supp. 1957).

<sup>73</sup> N.Y. EXECUTIVE LAW §§ 290-98 (Supp. 1957); N.Y. CIVIL RIGHTS LAW § 18 (Supp. 1957).

<sup>74</sup> ORE. REV. STAT. §§ 659.032-34 (1957).

<sup>75</sup> WASH. REV. CODE § 49.60 (1957).

<sup>76</sup> Admin. Code of New York City, c. 41, § X41-1.0 (1957).

<sup>77</sup> See Letter from John J. O'Neill, Administrative Assistant to the President of

Recognizing the touchy personal problems that will likely arise as a result of these "anti-discrimination" or "open-occupancy" housing laws, the legislatures have designed the enforcement provisions to utilize the conciliatory technique, which has proven very successful in the administrative process.<sup>78</sup> Hence an administrative agency is created, where an aggrieved person may bring a complaint. The agency will conduct an investigation and attempt through conciliation to eliminate any existing practice of discrimination. If this method fails, a procedure is established for determining whether court action is warranted. For example, the New York City Law provides that the City Commission on Intergroup Relations will first deal with the problem. If necessary, the matter will then be referred to a board selected from a panel appointed by the mayor to decide whether the case need be brought to court. If so, the case will be referred to the city's corporation counsel to bring suit to enforce the law.<sup>79</sup>

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the City Council of New York, to the *Notre Dame Lawyer*, Apr. 30, 1958, on file in Notre Dame Law Library.

Although significant anti-discrimination housing laws exist and other such legislation is being agitated for, a distinct majority of the states have neither considered such laws nor do they indicate a need or desire to do so. See Letters to the *Notre Dame Lawyer* in reply to a letter sent to the governors of the forty-eight states on Nov. 12, 1957, inquiring about legislation in this area, on file in Notre Dame Law Library. Positions at opposite extremes were taken in some letters. For example, a letter from the Louisiana Legislative Council made reference to the provision in the Louisiana Criminal Code, LA. REV. STAT. § 14:317 (1921), which provides, in part:

"No person or the agent of any person owning or having in charge any apartment house, tenement house, or other building in any city, which is used for dwelling purposes, shall rent any part of any building to a negro person or negro family . . ."

See Letter from Emmett Asseff, Executive Director of the Louisiana Legislative Council, to the *Notre Dame Lawyer*, Nov. 25, 1957, on file in Notre Dame Law Library. The letter from North Carolina contained the remark:

"Such an approach as this, in effect using the force of state law to compel one to have certain neighbors, does seem to go pretty far along the line toward a 'police state.' In the final analysis, people will get along with one another if they sincerely feel within their hearts the desire to do so. It is not likely that any amount of legislation will compel this result."

Letter from Robert E. Giles, Administrative Assistant to the Governor of North Carolina, to the *Notre Dame Lawyer*, Nov. 20, 1957, on file in Notre Dame Law Library.

Minnesota and New York, on the other hand, seem determined to go as far as they can toward declaring broad civil rights in this area. Note the 1957 Minnesota Law, c. 953, § 2, which provides:

"The opportunity to buy, acquire, lease, sublease, occupy and use and enjoy property and to obtain decent living and housing accommodations without discrimination because of race, color, creed, religion, national origin or ancestry is hereby recognized and declared to be a civil right."

See also Letter from Averell Harriman, Governor of New York, to the *Notre Dame Lawyer* Nov. 18, 1957, on file in Notre Dame Law Library.

<sup>78</sup> The merits of this method, particularly the conciliation technique, are discussed in Carter, *Practical Considerations of Anti-Discrimination Legislation—Experience Under the New York Law Against Discrimination*, 40 CORNELL L.Q. 40 (1954).

<sup>79</sup> Admin. Code of New York City, c. 41, § X41-1.0 (c-f) (1957). The New York state law provides for conciliation and also for a public hearing, if necessary, to be conducted by the State Commission Against Discrimination. That Com-

*Continued on page 480*

Once in court, the landlord has an opportunity to raise constitutional objections. Regarding the laws as they pertain to public housing authorities the question of their constitutionality is not apt, since these landlords already have the constitutional duty not to discriminate.<sup>80</sup> It may be said that the law as applied to them is, constitutionally speaking, redundant, or that it states a truism. But, as the laws may impose *new* duties upon redevelopment companies and publicly-assisted landlords they are open to question as permissible exercises of state police power. Only the constitutionality of the New York City Law will be considered in this Note because it is felt that since it is the most extreme objections to it will include objections to a law which is not as fargoing. To make such a study is to examine the traditional objections to exercises of state police power purported to be in the public interest: that the law offends due process notions by exceeding permissible state power, that the classifications made by the law are arbitrary and unreasonable, or that the law conflicts with federal operations in that field.<sup>81</sup>

#### A. *Attacking the State's Power*

The fourteenth amendment commands that no state shall "deprive any person of life, liberty, or property, without due process of law."<sup>82</sup> Private landlords arguing against constitutionality look to the due process clause and assert that state regulation of their tenant selection deprives them of a crucial incident of property ownership by interfering with the right to rent, sell or otherwise dispose of it. They charge that there is no justification for sacrificing real property rights, traditionally sacred, in an at-

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mission also has power to issue cease and desist orders. Court action may then be taken either by the Commission to enforce the order or by the landlord to appeal the ruling. Or, in the alternative, an aggrieved may proceed directly with a civil action. His choice of one of these remedies is preclusive with respect to the other. *Castle Hill Beach Club v. Arbury*, 208 Misc. 622, 144 N.Y.S.2d 747 (1955) (further proceedings on matters here irrelevant).

<sup>80</sup> See note 26 *supra*.

<sup>81</sup> An ingenious argument, which pertains peculiarly to "open-occupancy" housing laws, was devised and presented to the New York Supreme Court, Westchester County, by Alfred Avins, counsel for respondents in *New York State Comm'n Against Discrimination v. Pelham Hall Apartments, Inc.*, 170 N.Y.S.2d 750 (Sup. Ct. Westchester Co. 1958). Called the "public utility argument" (see Brief for Respondents, pp. 25, 26, and Avins, *Trade Regulations*, 12 *RUTGERS L. REV.* 149 (1957)), it proceeds from an initial premise that the effect of the law is to convert a large number of houses from private property into quasi-public utilities by entitling the public to demand accommodation without discrimination as a matter of right. This premise is sound, he says, because before the law private houses were private and the owner could do with them what he pleased, act indiscriminately; but after the law the property was vulnerable to an absolute and *public* right to demand service, or accommodation, the *sine qua non* of a public utility. Since this conversion is without compensation from the state, it is argued, unconstitutional interference has transpired. Petitioner attacked the premise, *i.e.*, that the public had been given an absolute right, by pointing to the fact that under the law a landlord may "reject or exclude for any reason or no reason *as long as the exclusion is not founded on race, creed, color or national origin.*" Reply Brief for Petitioner, p. 10, *New York State Comm'n Against Discrimination v. Pelham Hall Apartments, Inc.*, *supra*. The "public utility argument" was apparently disregarded by the court and does seem to be quite far-fetched.

<sup>82</sup> U.S. CONST. amend. XIV, § 1.

tempt<sup>83</sup> to cure this alleged social evil, nor for interfering with their peculiar relationship with their tenants as if they were innkeepers who deal primarily with transients and who have little need for ensuring continued social tranquility. Regardless of the legalistic appeal of these protests the answer still depends on whether the state has the power to so govern.<sup>84</sup>

This so-called police power is inherent in each state and is appropriately exercised when it concerns the health, safety or welfare of those governed. The concept, of course, is a plastic one and may be seen manifested in myriad ways. Regarding the limits of this power the Supreme Court stated in *Nebbia v. New York*:<sup>85</sup>

The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

This test must be applied to the anti-discrimination housing laws. But, there are cases closer to the landlord-tenant relationship than *Nebbia*, for instance, the cases passing upon government's power to control rents. The laws were upheld in each instance.<sup>86</sup> However, each case turned upon the fact that an emergency was found to exist, vindicating the extraordinary police power exercise by the state. The New York Court of

<sup>83</sup> There are sharp differences of opinion as to the true effects of laws passed in this area, as to whether they can and will cure the evil involved. A recent newspaper article, Grutzner, *Housing Outlook Cloudy in Harlem*, N.Y. Times, Feb. 23, 1958, p. R 1, col. 8, points to the current experience that New York City is having and the failure of attempts at racial integration in Harlem. Mr. Grutzner restates the views of various organizations including the NAACP and the Urban League. Though these organizations look to the recent New York City Law with some degree of hope, the fact seems to remain that there are some areas in which these laws may do more harm than good. Query whether this situation is to be noted by the judiciary or only by the legislators?

<sup>84</sup> As Eager, J., upholding New York State's anti-discrimination housing law in *New York State Comm'n Against Discrimination v. Pelham Hall Apartments, Inc.*, 170 N.Y.S.2d 750, 757 (Sup. Ct. Westchester Co. 1958), has put it:

"Involved here, it is said is an apparent collision of rights, namely, a clash between the right on the one hand of the private owner of property to enjoy and use it in the manner most desirable and/or profitable to him, and the right on the other hand of all individuals here to be treated equally and free of all discrimination on account of race, color, or religion. In the final analysis, however, what is here involved is a conflict between the rights of the private property owner and the inherent power of the state to regulate the use and enjoyment of private property in the interest of public welfare; and . . . the power of the state, when reasonably exercised, is supreme."

<sup>85</sup> 291 U.S. 502, 525 (1934).

<sup>86</sup> E.g., *Bowles v. Willingham*, 321 U.S. 503 (1944); *Block v. Hirsh*, 256 U.S. 135 (1921); *Lincoln Bldg. Associates v. Barr*, 1 N.Y.2d 413, 135 N.E.2d 801 (1956); *People ex rel. Durham Realty Corp. v. LaFetra*, 230 N.Y. 429, 130 N.E. 601 (1921).

Appeals noted this fact recently when dealing with the 1955 re-enactment of the New York Business Rent Law,<sup>87</sup> but stated further that:<sup>88</sup>

The law is clear. The principles by which to test the constitutionality of a statute resting on the police power have been asserted over and over again: A legislative enactment carries with it a strong presumption of constitutionality, i.e., it is presumed to be supported by facts known to the Legislature . . . [And courts may not] substitute their judgment for that of the Legislature so long as there can be discovered "any state of facts either known or which could reasonably be assumed" to afford support for the legislative decision to act.<sup>89</sup>

It seems quite probable that if and when the Supreme Court is faced with testing a law as broad as that of New York City it will be inclined to favor the law, just as it favored New York's Emergency Housing Laws<sup>90</sup> in *Levy Leasing Co. v. Siegel*.<sup>91</sup> Note the parallel circumstances: the Emergency Housing Laws were enacted on the basis of legislative findings that a shortage of dwelling space and the consequent over-crowding were leading to unsanitary conditions, disease, immorality, and wide-spread discontent.<sup>92</sup> The selected remedy deprived landlords of their right to

<sup>87</sup> N.Y. UNCONSOL. LAWS § 8551 (McKinney Supp. 1957) was upheld. *Lincoln Bldg. Associates v. Barr*, *supra* note 86. The court was careful to note in this regard that:

"The disposition of this appeal . . . is dependent upon the existence of facts justifying the 1955 extension of the law under review. In no way is it determinative of the constitutionality of . . . controls in any later year. Rent controls, all will agree, ought not achieve a status of permanence in our economy. They have no justification except in periods of emergency. [Citing cases.] . . . Whether and for how long the Legislature may lawfully continue [such] control must, and shall, be a question open for future review." 135 N.E.2d at 805-06.

<sup>88</sup> *Id.* at 802.

<sup>89</sup> Quoting from *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938). See also *Nebbia v. New York*, 291 U.S. 502 (1934), where it is stated at 537:

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*."

<sup>90</sup> Laws of New York, cc. 942-53, 1920.

<sup>91</sup> 258 U.S. 242 (1922). See *Block v. Hirsh*, 256 U.S. 135, 156 (1921), where Mr. Justice Holmes remarks: "Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present."

<sup>92</sup> The recent New York City Law begins with this statement:

"In the city of New York, with its great cosmopolitan population consisting of large numbers of people of every race, color, religion, national origin and ancestry, many persons have been compelled to live in circumscribed sections under substandard, unhealthful, unsanitary and crowded living conditions because of discrimination and segregation in housing. These conditions have caused increased mortality, morbidity, delinquency, risk of fire, intergroup tension, loss of tax revenue and other evils. As a result, the peace, health, safety and general welfare of the entire city and all its inhabitants are threatened. Such segregation in housing also necessarily results in other forms of segregation and discrimination which are against the policy of the state of New York. It results in racial segregation in public schools and other public facilities, which is condemned by the constitutions of our state and nation. In order to guard against

evict. After stressing the great weight to be given legislative findings, the Court upheld the laws, noting:<sup>93</sup>

It is strenuously argued, as it was in *Block v. Hirsh*, 256 U.S. 135 [1921], and in the *Marcus Brown Case*, [256 U.S. 170 (1921)] that the relation of landlord and tenant is a private one and is not so affected by a public interest as to render it subject to regulation by the exercise of the police power.

It is not necessary to discuss this contention at length, for so early as 1906, when the Tenement House Act of New York, enacted in 1901, was assailed as an unconstitutional interference with the right of property in land, on substantially all of the grounds now urged against the Emergency Housing Laws, this court, in a *per curiam* opinion affirmed a decree of the Court of Appeals of New York (179 N.Y. 325), sustaining regulations requiring large expenditures by landlords as a valid exercise of the police power. *Moeschen v. Tenement House Department*, 203 U.S. 583 [1906]. To require uncompensated expenditures very certainly affects the right of property in land as definitely, and often as seriously, as regulation of the amount of rent that may be charged for it can do. Many decisions of this court were cited as sufficient to justify the summary disposition there made of the question, as one even then so settled by authority as not to be longer open to discussion.

The judicial precedents clearly favor upholding reasonable laws which inhibit landlords, and indeed, of almost any public welfare-police power legislation.<sup>94</sup> Nonetheless, also to be considered is the unquestionably present, albeit unwritten, factor of the socio-political and moral predispositions of the judges who must decide the case. A measure which attempts to legislate ethics and morals asks careful scrutiny. A question which is always pertinent, though it may border on a judgment as to the wisdom of such a law, is whether the state should impose a currently popular commitment upon a minority who may violently disagree. A law which strikes so close to home may cause some rethinking of the judicial "rubber stamp" attitude now commonplace. The effect of such a law may well be to relieve the slum situation but it is also to forcibly integrate private apartment buildings and heretofore happily restricted areas. As is indicated, a law as extreme as the New York City anti-discrimination housing law may persuade the courts to recast their judicial eye now set to look quite favorably upon all state social legislation.

#### B. State-Federal Conflict?

Another argument against constitutionality rests upon the proposition that state regulation of tenant selection conflicts, at least in part, with

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these evils, it is necessary to assure to all inhabitants of the city equal opportunity to obtain living quarters, regardless of race, color, religion, national origin or ancestry.

"It is hereby declared to be the policy of the city to assure equal opportunity to all residents to live in decent, sanitary and healthful living quarters, regardless of race, color, religion, national origin or ancestry, in order that the peace, health, safety and general welfare of all the inhabitants of the city may be protected and insured."

<sup>93</sup> 258 U.S. at 246-47.

<sup>94</sup> In *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) the Supreme Court finally put to rest the benighted juristic posture of the nineteenth and early twentieth centuries in this area (see Rodes, *Due Process and Social Legislation in the Supreme Court — A Post Mortem*, 33 NOTRE DAME LAW. 5 (1957)), emphatically stating: "Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." Cf. *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945).

federal legislation dealing with housing. This argument is raised since landlords covered by the law include those who participate in FHA financing procedures. The rule is that state laws which are found to clearly conflict with proper federal laws or substantially burden their operations must fall.<sup>95</sup>

First, is there a clear conflict? Congress, despite extensive involvement in the housing field, has remained silent on the question of discrimination in tenant selection. The criteria now imposed upon federal housing projects concern solely the financial status of prospective tenants, their status as veterans, or their preferred status as a result of displacement by the federal project.<sup>96</sup> On a number of occasions proposals to include non-discrimination provisions in federal housing laws have been considered by Congress but they have never been adopted.<sup>97</sup> Even though Congress could not pass a law which positively sanctions preferential treatment of any race or religion,<sup>98</sup> it certainly could have forbidden discrimination.<sup>99</sup> What inference must be drawn from this silence? Did Congress mean that discrimination should not be forbidden, or did it leave the states free to make their own policy decision? Considering the magnitude and seriousness of the problem the former inference hardly seems reasonable.

<sup>95</sup> *E.g.*, *Graves v. New York ex rel O'Keefe*, 306 U.S. 466 (1939); *United States v. Chester*, 144 F.2d 415 (3d Cir. 1944). This is a direct result of the federal supremacy doctrine and its corollary the federal immunity doctrine. See *Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 159 (1819).

<sup>96</sup> 63 STAT. 422 (1949), 42 U.S.C. § 1415 (8) (1952); 63 STAT. 423 (1949), 42 U.S.C. § 1410 (g), (m) (1952). Regulations have been promulgated by the Public Housing Authority and may be found in its Housing Manual, dated Feb. 21, 1951, at Section 102.1. They provide as follows:

"The following general statement of racial policy shall be applicable to all low-rent housing projects developed and operated under the United States Housing Act of 1937, as amended.

"1. Programs for the development of low-rent housing, in order to be eligible for PHA assistance, must reflect equitable provision for eligible families of all races determined on the approximate volume of their respective needs for such housing.

"2. While the selection of tenants and the assigning of dwelling units are primarily matters for local determination, urgency of need and the preference prescribed in the Housing Act of 1949 are the basic statutory standards for the selection of tenants."

Regarding these regulations, it was said in *Heyward v. Public Housing Administration*, 238 F.2d 689, 697 (5th Cir. 1956) that "they *do not require* that housing be made available on a nonsegregated or nondiscriminatory basis." (Emphasis added.)

<sup>97</sup> Bills have been introduced on a number of occasions which would effect a national policy of non-discrimination regarding the housing programs, including FHA loan guaranty procedures. For an extended treatment of these attempts see *Brief for Defendants*, pp. 55-57, *Ming v. Horgan*. See also Note, *Discrimination Against Minorities in the Federal Housing Programs*, 31 IND. L.J. 501, 502, n.13 (1956); 99 CONG. REC. 1428 (1953); *Hearings before Senate Committee on Banking and Currency*, 83d Cong., 2d Sess. 289, 893 (1954). The court in *Johnson v. Levitt & Sons*, 131 F.Supp. 114 (E.D. Pa. 1955), based its decision on the fact that Congress has remained silent.

<sup>98</sup> This would clearly be a violation of the fifth amendment's due process safeguard. Fortunately there has been no such law enacted.

<sup>99</sup> This would be a situation quite different from that which caused the Supreme Court to bristle in the Civil Rights Cases, 109 U.S. 3 (1883). Conditioning the benefits of the federal housing program could readily be justified on a purely contractual level. See *Johnson v. Levitt & Sons*, 131 F. Supp. 114, 116 (E.D. Pa. 1955).

Surely Congress could not have intended that states when faced with this malignant problem on the local level would be helpless to cope with it.

Secondly, is there a substantial burden on the operations of the federal program? There are two possibilities: (1) that this no-discrimination precondition would deter one from choosing to become a landlord, particularly an FHA landlord,<sup>100</sup> or (2) that the resultant integration would cause the value of the landlord's property to decrease considerably. As to the first, the thrust of the state law is not directly upon FHA financing procedures, and any effect it might have as a deterrent to participating in the FHA program appears *indirect* and insubstantial at best.<sup>101</sup> Concerning the second, although property values may be affected by forced integration, this effect is caused by an ideology which is founded upon and cultivated by a constitutionally objectionable commitment: Negroes are to be treated equally *except* when they attempt to move next door. To make this exception is to call them inferior citizens! Thus, this adverse economic effect cannot be constitutionally recognized. Moreover, experience has already shown that such effects have not been as severe or long-lasting as the vehemence of the objection would indicate.<sup>102</sup>

No real burden on the federal housing program exists. Congress' silence does not preclude the states from passing Fair Housing Laws<sup>103</sup> nor do these laws interfere with FHA operations.<sup>104</sup> They, too, may

<sup>100</sup> To isolate the consideration here to FHA landlords when considering the effect of the state law upon federal housing procedures is only reasonable. To consider also the public landlords, *i.e.*, local housing authorities, would be to belabor a constitutionally redundant feature of the law. That is, no *new* duties are imposed upon them by the state law since the fourteenth amendment requires non-discriminatory tenant selection anyway, as pointed out in the text at pages 467-68.

<sup>101</sup> *Cf.* Brookchester, Inc., Section 1 v. Ligham, 17 N.J. 460, 111 A.2d 737 (1955); Stuyvesant Town v. Ligham, 17 N.J. 473, 111 A.2d 744 (1955).

<sup>102</sup> See Comment, *Application of the Sherman Act to Housing Segregation*, 63 YALE L.J. 1124, 1130, n.39 (1954):

"Most observers . . . seem to agree that initial Negro entry into an all white area may depress prices for a while. When this does occur, it is usually because of a 'panic' effect on the part of some whites; the latter, feeling that the value of the property will go down, rush to sell it and thus themselves cause it to depreciate in value. In instances where this does happen, however, the price decline is usually only temporary." [Citing WEAVER, *THE NEGRO GHETTO* 279-301 (1948) and others.]

See also ABRAMS, *RACE BIAS IN HOUSING* 80 (1947); Mayer, *Property Values: The Effect of Integration and Anti-Discrimination Laws*, 18 LAW. GUILD REV. 20 (1958).

<sup>103</sup> *Cf.* Green v. Frazier, 253 U.S. 233 (1920) (upholding North Dakota's entering the housing business).

<sup>104</sup> In fact FHA has positively cooperated with these laws and seems to welcome them, despite earlier policies to the contrary. See Tenth Annual Report of the Housing and Home Finance Agency 43, 1956; ABRAMS, *FORBIDDEN NEIGHBORS* c. 16 (1955). See also HHFA, Press Release No. 1192, Feb. 9, 1957, where Albert M. Cole, Administrator of the Housing and Home Finance Agency, announced the new policy of FHA for New York:

"The new procedure requires that builders also be advised that they are expected to conduct their operations in New York in conformity with these laws and that failure to do so could impair their ability to qualify for future F.H.A. mortgage insurance pending satisfactory correction of the noncompliance."

Compare Cole's announcement with his testimony before Subcommittee No. 2 of the House Committee on the Judiciary on July 14, 1955, reprinted in *Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary*, 85th Cong., 1st Sess., ser. 1, 381-96 (1957).



become redundant in a constitutional sense, as is the case with the laws concerning public housing authorities, if *Ming v. Horgan*<sup>105</sup> is decided favorably to the prospective tenant and that position becomes generally accepted.<sup>106</sup>

### C. *Attacking the Classification*

The decisive classification made in the New York City Law concerns the type of dwelling owned or under the control of the landlord. To be within the coverage of the law the dwelling must be a "multiple dwelling." Any such classification is subject to testing according to the limitations of the fourteenth amendment. As Mr. Justice Holmes stated for the Court in *Patsone v. Pennsylvania*:<sup>107</sup>

We start with the general consideration that a State may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out . . . . It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named . . . . The question therefore narrows itself to whether this court can say that the [legislature] was not warranted in assuming as its premise for the law that [the class which the law singles out was] the peculiar source of the evil that it desired to prevent.

With regard to the "multiple dwelling" classification, the question is whether it is reasonable for the legislature to include within the class thus defined apartment buildings of greater than two units and houses within a contiguous group of ten or more owned by or subject to the power of sale of the same person. It can reasonably be conceived that those who are covered by the law are in the *business* of renting and selling housing accommodations and, thus, that they are the ones signally responsible for the evils resulting from housing discrimination.<sup>108</sup> If such a basis can reasonably be conceived of it is assumed to exist and the legislation, to that extent, is valid and constitutional.<sup>109</sup>

<sup>105</sup> No. 97,130, Dept. 6, Super. Ct. Calif., Sacramento County, 1958.

<sup>106</sup> This effect would be achieved more summarily if the Supreme Court would sanction that result. However, it is interesting to note that *Banks v. Housing Authority*, 120 Cal. App. 2d 1, 260 P.2d 668 (1953), was a significant case in this field, was decided by the California Supreme Court, but was denied certiorari, 347 U.S. 974 (1954).

<sup>107</sup> 232 U.S. 138, 144 (1914).

<sup>108</sup> If this needs any demonstration, see, e.g., *LONG & JOHNSON, PEOPLE V. PROPERTY* (1947); *WEAVER, THE NEGRO GHETTO* (1948); *ABRAMS, FORBIDDEN NEIGHBORS* (1955); *TO SECURE THESE RIGHTS, REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 67-68* (1947); *COMMISSION ON LAW AND SOCIAL ACTION, MEMORANDUM ON CONSTITUTIONALITY OF METCALF-BAKER FAIR HOUSING PRACTICES BILL 6* (1957).

<sup>109</sup> *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

This summary approval of the classification in the New York City Law is paralleled by that in the terse opinion of Judge Eager in *New York State Comm'n Against Discrimination v. Pelham Hall Apartments, Inc.*, 170 N.Y.S.2d 750 (Sup. Ct. Westchester Co. 1958), upholding the New York *state* law. The problem there is a slightly different one, however, as it concerns the relevancy of the classification based on the presence or absence of an FHA loan guaranty to the evil of discrimination. For an elucidation of the argument which contends that this classification violates the requirements of the equal protection clause rendering the law unconstitutional, see the Opinion of the Attorney General of Oregon published in 2 RACE REL. L. REP. 746 (1957). See also Brief for Respondents, pp. 32, 33, *New York State Comm'n Against Discrimination v. Pelham Hall Apartments, Inc.*, *supra*.

### Conclusion

On the heels of a World War and an unprecedented economic boom, and while this nation tried to adjust itself both externally and internally as one of *the* powers of the world, the internal problem of the second-class citizenship of the Negro loomed large—on social, political, and economic levels. In 1954 and 1955 the Supreme Court forthrightly dealt with it in one of its most critical aspects, public education, when the Court decided *Brown v. Board of Education*. Subsequent years have shown that something more is needed; the Negro problem still exists. Conspicuously, the Negro ghetto remains—hence this investigation of the nature of that particular phase of the problem. Assuming that chief among the causes of this situation is discrimination on the part of landlords, it must be determined whether this activity offends our Constitution and reflects a glaring hypocrisy in American conduct, or whether such behavior is merely the cultural result of permissible personal choice.

Judicially considered the problem focuses on the fifth and fourteenth amendments to the Constitution. The question is whether they impose any duty upon landlords when dealing with prospective tenants to act other than indiscriminately. The answer seems to be that there is such a duty—to regard all persons equally—only when the landlord acts *by, for* or *as* the state. The determination of when a landlord is so acting is the socio-legal problem to which this Note is addressed.

At this time, only public housing authorities, creatures of the state, inspired by the federal housing program, have been held to act as the state. A pregnant opportunity to extend the duties imposed by the fourteenth amendment to state-assisted landlords was presented to the New York courts in *Dorsey v. Stuyvesant Town Corp.* They chose to favor the status quo. Since then, the involvement of government in housing has increased tremendously as has the impetus to vindicate the Negro's rights in court. These two movements have met; and the purpose of this Note is to marshal pertinent judicial precedents to help furnish an answer to the question whether the courts will declare for the Negro a civil right to housing accommodations. Judging from the currently popular jurisprudential commitment to let the legislature rather than the judiciary create civil rights, and from the successful legislation being passed in this area by the states, the writer would conclude that while the courts may, there is little chance that they will choose to extend the present doctrines in this field. In fact, to extend state-action ideas any further in the field of housing would seriously strain the already severely tested fibers of the concept of private property. The one situation which could, however, go either way is the FHA-assisted landlord issue raised in *Ming v. Horgan*. The bothersome problem there is that to find state action, or more properly federal action, precedent has to be most carefully handled and explained, since the government assistance and cooperation is indirect when compared with the public housing authority situation.

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*But see* Brief for Petitioner, pp. 40-47, *ibid.* But, it seems that the leading case of *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) and even its more recent counterpart, *Morey v. Dowd*, 354 U.S. 457 (1957), provide sufficient authority to withstand this objection on equal protection grounds.

And too, the facile avoidance by the court in *Dorsey*, placing the issue with the legislature, was disposition enough for *that* court since they at least had a real expectation that the legislature would act, but this alternative does *not* present itself in the FHA case. Congress has made itself sufficiently clear on that score by defeating several bills aimed at conditioning FHA assistance.

It is hoped that the judiciary will synthesize the respective spirits of the *Shelley*, *Marsh*, and *Smith* cases to solve some of the Negro's housing problems while keeping a watchful eye on the landlord's sometimes dwindling but constitutional and natural right to private property. And the legislatures, where they feel that there is a need, indeed when they recognize that it is their duty, should lead in articulating those dimensions of the civil right to housing accommodations which their persuasions recommend.

*Thomas B. McNeill*