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# THE CONSTITUTIONALITY OF LAWS AGAINST DISCRIMINATION IN PUBLICLY ASSISTED HOUSING

*ARNOLD FORSTER* AND SOL RABKIN***

ONE interesting by-product of the efforts of both federal and state governments to deal with the housing shortage that developed during World War II was the creation of the urban redevelopment program primarily under Title I of the United States Housing Act of 1949.[1] This program sought to encourage the investment of private capital in urban redevelopment projects. Under this law the federal government was authorized to give grants to make loans to local governments for the elimination of slums. The funds made available under this program were usable for the assembling of tracts for this purpose. The condemnation power of the state could be invoked in connection with such projects. Federal funds obtained by grant or loan were to be used to help acquire the land and to ready it for redevelopment. As much as two-thirds of such non-construction cost could be covered by the federal assistance. The actual redevelopment could be by private investors on the theory that such redevelopment benefits the entire community.

The statute recognized that urban redevelopment would necessarily involve displacement of many slum dwelling families and sought to protect such persons by requiring the redeveloper to relocate those displaced by such slum clearance in decent, safe and sanitary housing. There was no requirement, however, that the new facilities must be free from discrimination and segregation. Not surprisingly, this omission gave rise to difficulties. Often the areas into which newcomer

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1 Federal statutes governing urban renewal are 42 U.S.C. §§ 1441-1462.

racial minorities were forced by poverty and existing practices of racial exclusion are precisely the old time-worn overcrowded areas which have become slums. Hence, such redevelopment projects have often been the occasion for intergroup friction because the charge was made that they were intended as Negro clearance rather than slum clearance.[2]

An effort to impose on such projects a requirement of non-discrimination by reliance on the Fourteenth Amendment has proved unsuccessful. When this issue came before the New York State Court of Appeals,[3] that court in a four to three decision ruled that the private corporation erecting and operating the redevelopment housing was under no duty to operate the project without discrimination. It rejected the argument of the plaintiffs that the grant to the private redeveloper of a substantial tax exemption, use of the public power of eminent domain to assemble the land for the project, and the transfer of city-owned land in streets abandoned within the project to the developer attached to the private redeveloper sufficient governmental aspects to make it subject to the "equal treatment" requirement of the Fourteenth Amendment. Said the court, "The aid which the State has afforded to respondents and the control to which they are subject are not sufficient to transmute their conduct into State action under the constitutional provisions here in question."[4]

The dissent took the position that "conduct of private individuals offends against the constitutional provision if it appears in an activity of public importance and if the State has accorded the transaction either the panoply of its authority or the weight of its power, interest and support."[5]

The federal government also sought to encourage home building by a mortgage loan insurance program operated by the Federal Hous-

[2] See Kankakee Housing Authority v. Spurlock 3 Ill. 2d 277, 120 N.E.2d 561 (1954); Barnes v. City of Gadsden, 3 Race Relations Reporter 712 (N.D. Ala. 1958); Tate v. City of Eufala, 165 F. Supp. 1216 (N.D. Ala. 1958).

[3] Dorsey v. Stuyvesant Town Corporation, 299 N.Y. 512, 87 N.E.2d 541 (1949) cert. denied 339 U.S. 981 (1950). Stuyvesant Town is a housing project erected and operated by the Metropolitan Life Insurance Company. It houses approximately 25,000 persons and cost well over $100,000,000. The City of New York by ordinance granted to the project a partial tax exemption aggregating over $55,000,000, condemned land to obtain the large plot used for the project and turned over to the builder many acres of city streets. Officials of the builder openly acknowledged their intention to exclude Negroes. The action to test the propriety of such racial discrimination in the project was brought by three Negroes whose applications for apartments had been rejected.

[4] Id. at 536, 87 N.E.2d at 551.

[5] Id. at 542, 87 N.E.2d at 555.

ing Administration.[6] Under this program, mortgage lenders are insured by the federal government against loss on mortgages placed on housing approved for that purpose by FHA. If the mortgagor defaults, the mortgage lender is reimbursed for any loss by FHA. Veterans Administration operates a similar mortgage loan insurance to assist veterans to buy homes and to insure their getting mortgage loans at low rates.[7] The mortgage borrower pays a premium for the FHA loan insurance which is held as a reserve against losses but any losses over and above these premiums are repaid out of the federal treasury.

The purpose of this program, in part at least, is to assure builders a means of obtaining credit to cover their costs of operation and to safeguard them against the risks flowing from the need to find purchasers who have access to mortgage credit. FHA or VA approval results in great benefits to a builder. Hence, when FHA approval was granted to the builder of Levittown, Pennsylvania, in the face of an established policy of Negro exclusion, a Negro quickly sued to compel imposition on him of a policy of non-discrimination based on his receipt of the benefits of FHA approval.

Since there was no statute barring such discrimination, the plaintiff based his action on a claim of breach of the Fourteenth Amendment. He contended that the builder's acceptance of FHA approval and his use of credit based on that approval imposed on him a concomitant duty to assure to all would-be purchasers of homes in the grant project equal treatment. The Federal District Court ruled against the plaintiff[8] holding "that is something which can be done only by Congress." The court also refused to accept the argument that Levittown, Pa., was a governmental entity like the company town in *Marsh v. Alabama*,[9] and was therefore subject to the requirements of the Fourteenth Amendment.

## STATE LAWS AGAINST DISCRIMINATION IN PUBLICLY ASSISTED HOUSING

While, as has been shown above, the courts were unwilling to find publicly assisted housing subject to the constitutional ban on dis-

[6] 12 U.S.C. §§ 1709-1715.
[7] 38 U.S.C. §§ 1801-1824.
[8] Johnson v. Levitt, 131 F. Supp. 114, 116.
[9] 326 U.S. 501 (1946). This arose as a suit brought by an itinerant preacher who had been denied access to the streets of a company town when he sought access to its residents to preach for his faith. The court held that a company town was a governmental entity subject to the strictures of the Fourteenth Amendment.

crimination by states and the federal government, a number of state legislatures were taking affirmative action against such discrimination. This process stemmed from earlier enactment in some states of laws against discrimination in public housing.[10] When some of these states later enacted laws creating programs to aid urban redevelopment and the erection of housing for low and middle income groups, they included provisions specifically barring racial and religious discrimination. Thus, in Connecticut,[11] Illinois,[12] Indiana,[13] Massachusetts,[14] Michigan,[15] New Jersey,[16] New York,[17] Pennsylvania,[18] Washington,[19]

[10] i.e., Conn. Gen. Stat. Rev. of 1958 § 53-35 (1949); 4 Ann. Laws of Mass. 348 c. 121, § 26ff; New Jersey Stat. Ann. § 55. 14A-39.1; N.Y. Public Housing Law Sec. 223 L. 1945 c. 292, sec. 12.

[11] Conn. Gen. Stat. Rev. of 1958, Sec. 53-35, 1951 Supp., Conn. Gen. Stat. Title 64, c. 417, Sec. 1407b (1949).

[12] 32 Smith-Hurd Ill. Ann. Stat. 487, Sec. 550.3-4. The Neighborhood Redevelopment Corporation Law, 1941 July 9, Laws 1941, vol. 1 p. 431, sec. 3-4. Redevelopment plan must "provide that there shall be no discrimination on account of race, color, creed or national origin."

[13] 9 Burns Ind. Stat. Ann. 1260 Sec. 48-8503(b)(1950). Definitions: "Redevelopment" Provided that no provision of this act shall authorize the exclusion of any citizen from a zoned area because of his or her race, creed or national origin. (Act 1945, c. 276, sec. 3, p. 1219).

[14] 4 Ann. Laws of Mass. 348, c. 121, sec. 26ff, Low Rent Housing Projects, "For all purposes of this chapter, no person shall, because of race, creed, color or religion, be subjected to any discrimination or segregation." 4B Ann. Laws of Mass. 1958 Supp. 26-31 c. 151 B, sec. 1 (10)(11) banning discrimination in publicly assisted housing (1957).

[15] Mich. Stat. Ann. (1957 Supp.) 178, sec. 28.343 which includes "government housing" in the term "places of public accommodation, amusement and recreation" in statute banning discrimination in such places.

[16] New Jersey Stat. Ann. sec. 55.14A-39.1 (1950) Local Housing Authorities Law. "For all of the purposes of the act to which this act is a supplement, no person shall because of race, religious principles, color, national origin or ancestry be subject to any discrimination." L. 1950, c. 105, p. 198 sec. 1.

[17] New York Public Housing Law, sec. 223, L. 1945, c. 292, sec. 12. "For all purposes of this chapter, no person shall because of race, creed, color or national origin, be subjected to any discrimination."

[18] Purdon's Pa. Ann. Stat. Title 35, sec. 1590.12. Veterans housing. ". . . it shall be unlawful to make any discrimination whatsoever on account of race, creed or color." (1947 P.L. 1414, sec. 12); Purdon's Pa. Ann. Stat. sec. 1664 (1958 Supp.) Housing and Redevelopment Assistance Law, "There shall be no discrimination against any person because of race, color, religion, or national origin in the rental or occupancy of any housing constructed under the provisions of this Act." (1949 P.L. 1635, sec. 4, as amended 1956 P.L. 1449, sec. 1); Purdon's Pa. Ann. Stat. sec. 1711(a)(1) and (8) Urban Redevelopment Law, Requirement that contract with redeveloper contain a covenant that no person shall be deprived of the right to live in the redevelopment project by reason of race, creed, color or national origin, and that it prohibit discrimination in the use, sale or lease of any part of the project against any person because of race, color, religion or national origin (1945, P.L. 991, sec. 11).

[19] Wash. L. 1957, c. 42, sec. 17. No discrimination in urban renewal.

and Wisconsin,[20] the redevelopment and veterans housing laws as well as the public housing laws contain such provision.

At first the legislatures adopting such laws were content simply to ban discrimination and to provide no means to compel compliance. In the absence of any specific provision, the onus of establishing his rights under the anti-discrimination provision law lay entirely on the victim. Such a person could only complain to the state agency administering or overseeing the program. If this complaint proved fruitless, the complainant was left only with the possibility of bringing suit in the courts to compel compliance. If he finally prevailed in the courts, he might then obtain a court order compelling compliance with the law, provided that in the interim, while the suit was pending, all the housing facilities in the project had not been filled. The ineffectiveness of this remedy is demonstrated by the fact that there is no known record of any such suit.

Various states, therefore, established various methods for enforcement. To strengthen enforcement of its law against discrimination in public housing, Connecticut[21] made such discrimination a crime. New York permitted the victim of such discrimination to sue for damages and authorized suit for an injunction by any taxpayer with an assessment larger than $1,000.[22]

The first state law to authorize the administrative agency enforcing the law against discrimination in employment to handle complaints of discrimination in housing was enacted in Connecticut.[23] Rhode Island,[24] New Jersey,[25] New York,[26] Massachusetts,[27] Oregon,[28] Washington[29] and Colorado[30] took similar action in the years following.

20 West's Wisc. Stat. Ann. sec. 66.39 (1B) Veterans housing; sec. 66.40 (2H) Housing Authorities Law (low income housing); sec. 66.405 (2M) Urban Redevelopment Law; Sec. 66.43 (2M) Blighted Area Law.

21 Conn. Gen. Stat. Rev. of 1958, sec. 53-35, 1951 Supp. Conn. Gen. Stat. Title 64, c. 417, sec. 1407b (1949).

22 N.Y. Civil Rights Law, sec. 18d, L. 1950, c. 287.

23 Conn. Gen. Stat. Rev. of 1958, sec. 53-36, 1951 Supp. Conn. Gen. Stat. Title 6, c. 417, sec. 1408b (1949).

24 3 Gen. Laws of R.I., 89, sec. 11-24-4, Gen. Law C. 606, sec. 29 as enacted by P.L. 1952, C. 2958, sec. 3.

25 N.J. Stat. Ann., sec. 18:25-9.1, L. 1954, c. 198, p 745, sec. 1.

26 N.Y. Exec. Law, sec. 296, 3, L. 1955, c. 340, sec. 3.

27 Mass. Ann. Laws (1958 Supp.) c. 151B, sec. 1 (10) (1957, 426, sec. 6.).

28 Ore. L. 1957, c. 725, sec. 3,4.

29 Wash. Rev. Code, sec. 49.60.030 and 49.60 as amended by Wash. L. 1957, c. 37.

30 Colo. Sess. Laws 1959, c. 148, sec. 2.

While the machinery for enforcement of laws against housing discrimination was being expanded, a similar expansion was going on in the forms of housing made subject to the ban on discrimination. The first laws barred discrimination in publicly assisted urban redevelopment housing. Then the ban was extended to all publicly assisted housing. In some cases this was done by amending the law barring discrimination in places of public accommodation by adding to its coverage "publicly assisted housing." In other cases, as in Connecticut,[31] this was done by adding to the statute barring discrimination in public housing a ban on publicly assisted housing. New York State adopted a whole new statute against discrimination in such housing aid, defining publicly assisted housing as (1) housing its construction, (2) housing built on land sold to the builder by the state or any of its agencies or subdivisions, below cost, (3) housing erected on land acquired or assembled by the state through its power of condemnation, and (4) housing which was acquired, built, repaired or maintained with the aid of the state or any of its agencies or subdivisions.[32]

The widespread FHA and VA mortgage insurance program was the next area covered by state laws of this type. New York, the first state to enact such a ban, made the ban applicable only to FHA or VA insured multiple dwellings and one and two family houses included in developments containing at least 10 adjacent homes and which were built after the enactment of the law.[33] Massachusetts[34] took similar action, as did Oregon.[35] New Jersey[36] and Washington[37] made their statutes applicable to all FHA or VA insured housing without limitation as to dwelling size or the size of the project in which the house was situated. Washington's statute applied even to such housing built before the enactment of the law.

## CONSTITUTIONALITY OF LAWS AGAINST DISCRIMINATION IN HOUSING

The first test of the validity of a state law directed against discrimination in publicly assisted housing arose in New York. A complaint was filed with the State Commission Against Discrimination

31 See Note 10 supra.
32 N.Y. Civil Rights Law, sec. 18-a, b, c, d, e. L. 1950 C. 287.
33 N.Y. Civil Rights Law, Art. 2A, sec. 18-b, 3(e) and (f), Laws 1955, c. 341.
34 Mass. Acts of the Gen. Court of 1959, c. 239.
35 Ore. Laws of 1957, c. 724, ORS 659.032-659.034.
36 N.J. Stat. Ann., sec. 18:25-5K, L. 1957, c. 66, p 128, sec. 2.
37 Laws of Wash. 1957, c. 37, sec. 4, p. 111.

by a Negro charging that he had been rejected as a tenant by the operator of an apartment house in New Rochelle. The house in question had been built with the aid of an FHA insured mortgage. The commissioner assigned to investigate the case found probable cause to credit the allegations of the complaint. He thereupon attempted in accordance with the procedure established by the statute to settle the matter by conciliation and persuasion. When this effort proved futile, the matter was scheduled for public hearing. In the public hearing, the respondent apartment house operator did not even bother to put the charge of discrimination into issue. Instead his defense consisted of (1) a claim that his building was not subject to the provisions of the New York state law because he obtained his FHA mortgage insurance commitment on June 30, 1955, a day before the statute took effect, and (2) a claim that the statute was unconstitutional. The Commission hearing board ruled that the respondent's apartment house was subject to the law because the FHA's mortgage insurance was actually issued after the statute took effect on July 1, 1955. The administrative agency dealt with the objection of unconstitutionality by pointing out that it must assume the validity of the law under which it was operating. It, therefore, issued an order directing the respondent to cease discriminating against the complainant.

When the respondents failed to comply with the Commission's order, that agency took the next step set out under the statute. It sought an order from the New York State Supreme Court directing the respondent to comply with the New York State Law Against Discrimination and to cease discriminating against the Negro complainant.[38] The respondents in the court action raised the same defenses they had offered in the Commission hearing.

Mr. Justice Samuel W. Eager ruled for the Commission. He rejected the contention of the respondents that the law was not applicable to them because they had gotten their FHA loan insurance before the New York act went into effect. He found the fact to be that the June 30, 1955 FHA commitment upon which respondents based their claim was "merely a commitment to insure the loan when and if made and provided all conditions mentioned in the commitment were complied with," and that the building loan agreement for making

38 New York State Commission v. Pelham Hall Apts., 10 Misc. 2d 334, 170 N.Y.S. 2d 750 (1958).

of the loan and the mortgage loan securing the note were not executed until November 18, 1955 and the money not advanced by the lender until after that date. He concluded, therefore, that the respondents' apartment house "comes fully within the coverage" of the statute.

Mr. Justice Eager opened his consideration of the constitutionality of the law with a discussion of *Dorsey v. Stuyvesant Town Corporation*[39] which he found inapplicable because it was decided when there was no state law on the subject and was based on that fact. He noted, however, that at the same time that the Court of Appeals held in *Dorsey* that the Constitutional provision did not itself apply to prohibit racial discrimination in housing, it "gave indication that it felt that the matter of protection against racial discrimination was a proper function for state law and that the state had the power to enact legislation providing against such discrimination in new areas such as in the case of publicly assisted housing."

Respondents' argument that the statute was unconstitutional was based in part on the claim that the statute violated what was claimed to be a constitutionally protected right of an owner of private property to choose to whom he will sell or rent. Acknowledging that the private ownership of private property, free of unreasonable restraint upon control thereof, is truly a part of our way of life, protected by Amendments V and XIV of the U. S. Constitution, and Article 1, Secs. 6, 7, 10 and 11 of the N. Y. State Constitution, Judge Eager noted that we also hold firmly to the philosophy that all men are created equal and that discrimination on account of race, color or religion is antagonistic to the fundamental tenets of our form of government. He concluded:[40]

"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, as hereafter noted, the power of the state, when reasonably exercised, is supreme."

Noting that the Legislature in enacting the statute under consideration had stated that it should "be deemed an exercise of the police power of the state for the protection of the welfare, health and peace of the people of this state and the fulfillment and enforcement

[39] See note 3 supra.

[40] 10 Misc. 2d 334, at 341, 170 N.Y.S.2d at 757. The lower courts' decisions were unanimously affirmed by the N.J. Supreme court on February 9, 1960. The court found the N.J. statute constitutional.

of the provisions of the constitution of this state concerning civil rights," the court stated, "Now, it is firmly settled that private property rights are subject to the exercise of police power legislation" and "The policy, wisdom and expediency of police power legislation affecting private property rights, such as the legislative acts under attack here, are for the Legislature and the Governor."[41]

Furthermore, the court ruled, ". . . legislative acts directed against the practice of racial or religious discrimination are presumed constitutional . . . and are to be stricken down by courts only if it appears that they are clearly arbitrary, discriminatory and without any reasonable basis. Where reasonableness of legislation such as this is fairly debatable the court may not question the legislative discretion in adopting it and these particular acts are not to be declared unconstitutional merely because they may tend to cut down the property rights of certain private property owners and may result in some financial loss to them without provision for compensation therefor."[42] Judge Eager therefore concluded "that the Legislature did act within the bounds of the police power in enacting provisions against racial and religious discrimination in publicly-assisted housing accommodations."[43]

Respondents also sought to invoke the "equal protection" provision of the XIV Amendment against the statute charging that the limitation of the statute to multiple dwellings receiving public assistance after July 1, 1955, and the failure of the statute to cover all housing was unconstitutional discrimination.

The court rejected this contention, saying that it is well settled that the prohibition against denial of equal protection of the laws does not preclude a state from resorting to classification for purposes of legislation. The applicable test, the court noted, ". . . is whether or not the classification rests upon some reasonable basis bearing in mind the subject-matter and the object of the legislation," and in deciding whether there is such a reasonable basis "the court may take into consideration the fact that civil rights and anti-discrimination legislation in this state, and on the federal basis for that matter, has been and is a step by step proposition."[44] The court therefore concluded that the legislative classification in this statute was reasonable

41 Id. at 341, 342, 170 N.Y.S.2d at 759.
42 Id. at 341, 170 N.Y.S.2d at 758.
43 Id. at 342, 170 N.Y.S.2d at 759.
44 Id. at 343, 170 N.Y.S.2d 759.

and proper and granted the order sought by the Commission. Although there had been some indication by the respondents that the matter would be carried to higher courts, there was no appeal.

The second case involving the constitutionality of a state law barring racial and religious discrimination in housing erected with FHA mortgage insurance assistance arose in New Jersey. This case arose out of complaints filed with the New Jersey Division Against Discrimination by Negro complainants charging the builders of Levittown, New Jersey, and of a smaller community of new homes, Green Fields Farm, Inc., with violation of New Jersey's law barring discrimination in all housing financed in whole or in part by a loan, the repayment of which is guaranteed or insured by the Federal Government or any agency thereof. When the D.A.D. undertook to process the complaints it received, the respondent builders applied to the New Jersey courts to declare that the D.A.D. was without authority to deal with the matter.[45] In addition to a number of technical attacks on the statute, the builder plaintiffs contended that if the law were construed to apply to them and the housing in question, it violated the Fourteenth Amendment to the Federal Constitution.

It should be noted that the builder of Levittown had been reported in the public press as publicly avowing its intention of maintaining its customary policy of excluding Negroes from purchasing homes in the project.[46] Both the New Jersey trial court and its intermediate appellate court[47] rejected these attacks on the law and held it constitutional. In doing so, the Appellate Division of the Superior Court of New Jersey said the following philosophy pronounced in a 1954 case is basic and applicable to the case at bar:

> "The eventual survival of any form of government necessarily depends on the equal apportionment of the rights and privileges of citizenship as well as its obligations and duties among all its citizens irrespective of race, color or creed. Such a principle has long been the keystone of our national and state form of government."

The case is now under consideration by the New Jersey State Supreme Court.[48] Meanwhile the public hearings by the D.A.D. on the original complaint were cancelled by mutual consent of all the parties. This cancellation was part of an agreement that if the New

[45] Levitt & Sons v. D.A.D., 56 N.J. Super. 542 (1959).
[46] N.Y. Times, June 6, 1958 at p. 25, col. 8.
[47] Ibid.
[48] New York Post, Dec. 21, 1959.

Jersey Supreme Court upholds the law and finds the D.A.D. to have jurisdiction in this matter, the D.A.D. may issue a cease-and-desist order without hearing which would, if not obeyed by the respondent, be enforceable by the courts without further hearing. The waiver of administrative hearing by the respondents would, however, not be a waiver of respondents' right to pursue whatever judicial remedies are available to them in respect to the issues of interpretation, construction and validity of the law.[49]

The most recent case involving such a state law came up in the State of Washington.[50] In this case, *O'Meara v. Washington State Board Against Discrimination,* a court for the first time ruled a state law against discrimination in publicly assisted (FHA insured) housing unconstitutional.

The matter began when a Negro, Robert L. Jones, filed a complaint with the Washington State Board Against Discrimination, the agency charged with enforcement of the state law against discrimination in publicly assisted housing, charging a commander in the United States Coast Guard, John J. O'Meara, and his wife, the owners of a single-family residence in Seattle, with violation of the law by refusal to sell their house to him on account of his, the complainant's race. The investigation by the board resulted in a finding of reasonable cause for believing that an unfair practice had been committed. When efforts to settle the matter by conciliation failed, a public hearing was held at which a hearing board took testimony from the parties and other witnesses and heard argument by counsel. It found that the respondents, the O'Mearas, had offered their house for sale, that the complainant had offered and been ready and willing to buy at the price asked and his offer had been rejected solely because of his race.

It also found that the Washington State Board had jurisdiction in the matter because the O'Mearas had purchased their home in 1955 with an FHA insured mortgage, and ordered the respondents to cease and desist from refusing to sell their home to complainant and within three days of the receipt of the Board's order to accept the complainant's offer or to submit to complainant a counter-offer. The

[49] From The State Capital, Published by Bethune Jones, Red Bank, N.J. "Racial Relations Developments at the State and Local Levels" December 1959.

[50] O'Meara v. Wash. State Board, No. 535996, Super. Ct., Wash. King County, July 31, 1959.

Board also ordered respondents not to sell or contract to sell their home to anyone else until the expiration of the time limit for acceptance of the complainant's offer or respondents' counter-offer.

This determination resulted in the respondents applying to the Superior Court of the State of Washington for King County for an order against the enforcement of the Board's order. The Board and the complainant, Jones, who were named as respondents by the petitioners, O'Meara, then sought cross orders to compel compliance with the Board's order, and the Seattle Real Estate Board sought and received permission to involve itself in the case as additional defendants, though its role in the matter was to take over the prosecution of the O'Meara petition attacking the law and the Board's action. The O'Mearas, who had offered their home for sale, had left the state because Commander O'Meara had been transferred elsewhere, had left to take up his new station, and the Seattle Real Estate Board on its own application became an additional party defendant and submitted a brief jointly with the O'Mearas in support of the O'Meara's contention.

On July 31, 1959, Judge James W. Hodson ruled in favor of the petitioners, the O'Mearas, and held the order of the State Board Against Discrimination null and void.

The court first reviewed the facts. Even though the Board's order had been based on a hearing which lasted eleven hours, the court itself took testimony, hearing expert witnesses. It noted that the house involved was 24 years old and had been bought by the O'Mearas with FHA mortgage insurance in 1955, well before the enactment in 1957 of the Washington state law under which the Board had acted. After reviewing the statute itself, Judge Hodson said:

"This court is fully cognizant of the evils which flow from discrimination because of race, creed, or color in a free democratic society. The practice of discrimination is utterly inconsistent with the political philosophy upon which our institutions are based and with the moral principles which we inherit from our Judeo-Christian tradition. Its effects, in terms of social economic and psychological damage to the community, are well known. Segregated housing, in particular, is linked intimately with sub-standard, unhealthy, unsafe living conditions with resultant fire and health hazards. It undoubtedly contributes to instability in family life, moral laxity, and delinquency. It can and must be eliminated, not only in order that the

members of our minority groups may reach their full potential but also in order that the majority may be brought to act in a manner consistent with the principles which they profess."

The court also cited a list of sociological discussions of segregation it had read in connection with its consideration of the case and said, "The court is in agreement not only with the testimony adduced in this case, but with most of the foregoing listed material. However, sociology is not law."

As the court viewed the case, what was involved was "a head-on collision between two rights, both of which historically have been regarded as basic, natural, inherent, and inalienable." These rights the court described as (1) "the right of every individual to be treated equally regardless of such irrelevant factors as race, creed and color," and (2) "the right of the owner of private property to complete freedom of choice in selecting those with whom he will deal." The latter right, the court said, "has been formalized as the principle of freedom of contract." The court augured its conclusion when it ended its discussion of this claimed conflict of rights by saying, "The danger is that, in our zeal to protect and enforce the right to equality, we may seriously invade and curtail the right of freedom of contract."

The court next discussed the recent decisions in the New York[51] and New Jersey[52] cases discussed above and a California lower court decision, *Ming v. Horgan*,[53] which involved no statute but in which a Negro plaintiff, suing a group of builder subdividers and real estate sales agents in the Sacramento, California, area who were operating with FHA insured financing, was held to have a valid cause of action against the defendants when the court found they had refused to sell to the plaintiff on account of his race. The California court held that even in the absence of a state statute barring discrimination in such a case, the acceptance of FHA mortgage insurance made a builder unable to discriminate on the basis of race or creed in deciding to whom he would sell. It therefore awarded the Negro plaintiff nominal damages but also granted him declaratory relief. The court said that if it failed so to hold, "gone would be the principle of integration which seems to have become the law of the land as a necessary component of that equality of right required by the Constitution."

[51] See note 38 supra.
[52] See note 45 supra.
[53] 3 Race Rel. L. R. 639 (Cal. Super. Ct. 1958).

The court in the *O'Meara* case was apparently not impressed by any of these three decisions. Instead it said, "The state here, in order to prevail, must demonstrate that the complainant *Jones* lies within the ambit of the equal-protection clause of the 14th Amendment to the United States Constitution which is 'an explicit safeguard of prohibited unfairness'." Having posited this novel theory as to the test of the constitutionality of state laws *against* discrimination, the court noted that the 14th Amendment is directed only against *state action* and found that the discriminating landowner here, O'Meara, was certainly not acting for the state and that, therefore, the 14th Amendment could not be invoked. The court concluded, therefore, that the state act under which O'Meara had been charged was unconstitutional.

It is submitted that the entire consideration of the 14th Amendment here is fallacious. That amendment is not and has never been held, except in the instant case, a positive test under which state laws banning racial or religious discrimination must be justified. On the contrary, it is a negative test under which state laws which deny equal protection of the laws by requiring discrimination based on race or creed must be struck down. If there is no state law banning discrimination, then a plaintiff seeking to invoke the aid of a court in preventing such discrimination may seek to establish that the discrimination perpetrated is a form of state action in violation of the equal protection of the law's guarantee of the 14th Amendment. If he succeeds, then the court applies the amendment and estops the discrimination. But if he fails, he is left without a remedy. Civil Rights Cases 109 U.S. 3 (1883) and *Dorsey v. Stuyvesant Town.*[54]

But where there is a state law specifically banning the discrimination attacked, the 14th Amendment has no application unless the discriminator can show that the ban on his right to discriminate is a denial to him of equal protection of the laws. Here no such claim was made by O'Meara. State laws against discrimination need meet no 14th Amendment test but rather must meet the test that they are within the police power of the state. It must appear that the discrimination they bar constitutes a serious social evil which, if allowed to go unhindered, would endanger the community. It is submitted, in this regard, that the court's language quoted above as to the social, economic and psychological damage to the community flowing from

54 See note 3 supra.

segregated housing would suffice to demonstrate that housing discrimination clearly is the type of evil against which the legislature may constitutionally invoke the police power.

The court did discuss the police power in a paragraph opening with an acknowledgment that a state law is "entitled to a presumption of constitutionality" and a further acknowledgment that the court cannot substitute its own judgment for that of the legislature as to the wisdom, expediency or propriety of legislation. The court notes that the only limitation on the police power is that its exercise must not be "unreasonable, arbitrary, or capricious," and "the means selected to accomplish the desired result shall have a real and substantial relation to the object sought to be attained."

It is also noted by the court that statutes are not to be declared unconstitutional merely because they may tend to cut down the property rights of certain property owners. But none of these strictures on the police power are applied by the court to the case at hand. Instead the discussion of police power is ended with a statement that the right of private property is "a fundamental, natural and inalienable right guaranteed by the Federal and state constitutions" and that a purpose for which our government was founded was to protect individuals in the enjoyment of private property, "and one of the incidents of ownership has always been the right freely to choose those with whom the owner will deal."

The court next discusses the *Pelham, Horgan* and *Levitt* cases, saying they may have been correctly decided since each dealt with the erection of "a mass housing development" by "one who obtains an FHA committment prior to construction." In such case, the court said, by doing so the builder "becomes so intimately identified with government as to become affected with a public interest" and thus the builders become "persons of public accommodation." But this would not be the case with "the individual owner of a single private home." Hence, the court ruled the three cases discussed "not here persuasive." The court added that in these three cases only new housing was affected and "it can well be argued that, as a matter of social policy, thoroughly integrated housing should first be brought about in such new developments because there it can be accomplished at the outset without disturbing established patterns."

Finally, the court raises the question of the reasonableness of the classification in the act, its being applicable only to publicly as-

sisted housing. It quotes from a decision by Mr. Justice Holmes in *Patsone v. Pennsylvania,* 232 U.S. 138 (1914) which establishes as one test that the class selected must be chosen from those from whom the evil legislated against is mainly to be feared, and applying this test, finds that there is no greater likelihood of discrimination in publicly assisted housing than in private housing. The court therefore concludes, without considering whether other tests of reasonableness might apply, that the classification is arbitrary and capricious and, therefore, violates the equal protection clause of the 14th Amendment.

To be compared with this conclusion is the language used by the court in discussing the *Pelham, Levitt* and *Horgan* cases that a statute limited to new, not yet occupied, publicly assisted housing might well be a proper classification. Is such housing more likely to be sold or rented discriminately than old housing? Thus the court, by inference at least, acknowledges that there may be other tests of reasonableness of classification than the relationship of the class selected for coverage in the statute to the source of the evil.

## The Issue of Constitutionality

It is noteworthy that all three of the statutes which have thus far been the subject of a ruling as to their constitutionality contain an explicit legislative awareness of the evils flowing from housing discrimination and a declaration that the statute is enacted under the police power of the state for the protection of the public welfare, health and peace of the people of the state.[55]

It is well settled law as the court pointed out in its decision in the *O'Meara* case[56] that in the exercise of the police power, the legislature may enact any law to protect the health, safety, morals and welfare of the people and that the only limitation on this power is that the law must not be arbitrary, capricious or unreasonable and the means selected to attain the desired result shall have a real and substantial relation to the object sought to be attained.[57] There is no need at this late date to spell out or prove the existence of a relationship between racial and religious discrimination in housing and the existence of a whole train of serious social evils, slums, crimes, juvenile delinquency, health dangers, etc., which flow from such

55 N.J. Rev. Stat., 18:25-3; N.Y. Law Against Disc. sec. 290; Wash. Laws of 1957, C. 37, sec. 1.

56 See note 50 supra.

57 Nebbia v. New York, 291 U.S. 502 (1934) at pp. 523, 525.

discrimination.[58] There is ample evidence not only to justify but even to require legislative counteraction against the source of this evil. And it is obvious that there is a logical and reasonable connection between a ban on such discrimination in a substantial part of the field of available housing, all housing erected or purchased with FHA or VA aid, and the prevention or minimization of the evil against which the legislation is directed.[59]

Another rule established by the courts in dealing with attacks on the constitutionality of statutes resting on the police power is that such statutes are entitled to a strong presumption of constitutionality. Though this presumption is rebuttable and courts may scrutinize the basis of the legislative enactment based on the existence of a particular state of facts, they may not substitute their judgment for that of the legislature so long as there can be found any state of facts to afford support for the legislative decision to act.[60] This presumption serves to reinforce the conclusion that the statutes under examination here are constitutional.

On occasion, statutes against discrimination in housing have been attacked as being in violation of the "due process" clause of the Fourteenth Amendment. In essence, this argument, alluded to by the court in *O'Meara,* is that the right of private property which is described as a "fundamental, natural and inalienable right guaranteed by the Federal and state constitutions" which includes the "right freely to choose those with whom the owner will deal"—is breached by a statute denying the owner the right to discriminate on the basis of race or creed and that this is a taking of property without due process. In considering this argument, one must first note that there can be no doubt that the right of private property is and has always been held to be subject in the use of such property to regulation so that such use shall not be injurious to the rights of the community,[61] and that such regulation may even validly involve the destruction of one's

[58] See, for example: Myrdal, An American Dilemma, 625 (1944), Long and Johnson, People v. Property (1947), Abrams, Forbidden Neighbors (1955), Report of President's Committee on Civil Rights, To Secure These Right 67 (1947), Commission on Race and Housing, Where Shall We Live (1958).

[59] The issue raised by the fact that the remedial legislation does not attack every source of the evil but limits itself at this time to dealing with a part of the problem will be discussed below in connection with the question of classification.

[60] United States v. Carolene Products Co., 304 U.S. 144 (1938) at p. 152.

[61] Commonwealth v. Alger, 61 Mass. 53, 84 (1857).

property[62] or fundamental loss[63] without compensation therefor.[64]

The specific question of the impact of the Due Process Clause of the Fourteenth Amendment on laws barring discrimination has been discussed by the United States Supreme Court in *Railway Mail Association v. Corsi.*[65] In that case an association of postal clerks questioned the validity of section 43 of the New York Civil Rights Law which prohibits discrimination by labor organizations. The association claimed that the law violated the due process clause because it destroyed the association's right to select its membership and abridged its freedom of contract. The Court rejected this argument, saying "A judicial determination that such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color."[66]

Mr. Justice Frankfurter's concurring opinion deals solely with this argument and deals with it more fully. He said:

"Apart from the other objections, which are too unsubstantial to require consideration, it is urged that the Due Process Clause of the Fourteenth Amendment precludes the State of New York from prohibiting racial and religious discrimination against those seeking employment. Elaborately to argue against this contention is to dignify a claim devoid of constitutional substance. Of course a State may leave abstention from such discriminations to the conscience of individuals. On the other hand, a State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment. Certainly the insistence by individuals on their private prejudices as to race, color or creed, in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of nondiscrimination beyond that which the Constitution itself exacts."[67]

The statutes under consideration herein all deal with discrimi-

[62] Miller v. Schone, 276 U.S. 272 (1928).

[63] Block v. Hirsch, 256 U.S. 135 (1921).

[64] It is noteworthy that in none of the three cases involving the constitutionality of laws against discrimination in publicly assisted housing does it appear that the contention has been made that the enforcement of the law against the property owner would result in financial loss to him.

[65] 326 U.S. 88 (1944).

[66] Id. at 93-94.

[67] Id. at 98.

nation in publicly assisted housing and apply no clog to racial or religious discrimination in purely private housing. This omission has, as would be expected, served as the basis for another attack on the constitutionality of such statutes. Although framed in terms of an attack on the reasonableness of the classification used by the legislature, the essence of this argument is that the legislature must either deal with all of the problem or nought. To state the argument is to make clear its defects. And it is not surprising that most courts faced with such a problem have refused to impose such a legislative straitjacket on law makers dealing with serious community problems. It is now a well established constitutional principle that remedial legislation intended to regulate, limit, or minimize an evil may deal with the problem on a step by step basis. Thus the United States Supreme Court has held that a state legislature in attacking what it finds to be a danger to the public welfare need not deal with every aspect of the problem, saying that the state is "not bound to strike at all evils at the same time or in the same way."[68] And more recently the same court upheld an Oklahoma statute which undertook to deal with misleading advertising by professional men by enacting legislation against such advertising by one specific profession. In this case the Court said that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."[69]

In seeking to apply the "all or nought" approach, those attacking anti-discrimination legislation argue that the singling out of a phase of the problem is a denial to those singled out of the equal protection of the law guaranteed by the Fourteenth Amendment. The attitude of the United States Supreme Court toward the use of the Fourteenth Amendment as a bar to legislation directed against discrimination has been discussed above.[70] But the Court has also said:

"Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification was made, and that the different treatments be not so disparate, relative to the difference, as to be wholly arbitrary."[71]

A legislative classification such as is here under consideration

68 Semler v. Oregon State Board of Examiners, 294 U.S. 608, 610 (1934).
69 Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 489 (1955).
70 See note 65 supra.
71 Walters v. St. Louis, 347 U.S. 231, 237 (1953)

will be upheld as against the equal protection clause if it is not "purely arbitrary" and has some reasonable basis even if in practice it results in some inequality. It will be sustained if any state of facts reasonably can be conceived that would sustain it, and one assailing the classification carries the burden of showing that it is essentially arbitrary and without any reasonable basis.[72] It would appear that the legislature's decision to impose a duty of non-discrimination on those selling housing which they obtained with the aid of the public credit has several very reasonable grounds. It is hardly arbitrary for the legislature in selecting the housing to which it will first apply a ban on discrimination, to impose that requirement of higher community conduct on those receiving public aid. Is not the strengthening of the guarantee of equal treatment implicit in our basic democratic institutions a proper requirement to impose on housing obtained by the use of the public credit? Another reasonable basis for the legislature's selection of publicly assisted housing as the first class to be subjected to a ban on discrimination is that such a ban can be more easily enforced than a ban on other types of housing since the very involvement of a public agency in such transfers makes enforcement of the ban easier in such transactions. Furthermore, the sanction of possible delay or suspension of the public mortgage insurance is available as a potential additional enforcing device.

It is clear that there are not one, but several, completely reasonable bases for the legislative classification involved in statutes barring discrimination in publicly assisted housing and that, therefore, any effort to strike down such statutes as improper legislàtive classifications is improper.

## CONCLUSION

The constitutionality of state laws against discrimination in publicly assisted housing still awaits decision by the highest state courts and the federal courts. It is submitted that the weight of precedent would indicate that the final decisions will and should be that such laws are proper and constitutional in view of the attitude of the courts on related questions. While the discussion herein has been confined to the question of the constitutionality of laws against discrimination in publicly assisted housing, it is suggested that the reasoning which led to the conclusion that such laws are constitutional

72 Morey v. Doud, 354 U.S. 457 (1957), Lindsley v. Natural Carbonic Gas, 220 U.S. 61.

is equally applicable to the question of the constitutionality of laws directed against racial and religious discrimination in housing the creation of which was achieved with no form of public assistance whatsoever. There are now four states which have enacted such legislation.[73] When these new statutes are tested in the courts, the precedents including those discussed herein and the additional cases which will have been decided in the interim will have an important effect in determining whether the fundamental right of equality of opportunity in housing without discrimination because of race or creed will be a part of our American way of life or whether the racial ghetto will have been frozen into our country's living patterns.

[73] Colorado, Sess. Laws Colo. 1959, c. 148; Oregon, Ore. Laws 1959, c. 584; Massachusetts, Mass. Acts, 1959, c. 239; Connecticut, Conn. Gen. Stat. Rev. of 1958, sec. 53-35 as amended eff. Oct. 1, 1959. In addition the cities of New York and Pittsburgh, Pa. have adopted ordinances barring discrimination in private housing. N.Y.C. Adm. Code, sec. X41-1.0. (1958 Supp.) and Pittsburgh Ordinance, Dec. 8, 1958 supplementing Ord. No. 237.