

## COMMENT

### THE O'MEARA CASE AND CONSTITUTIONAL REQUIREMENTS OF STATE ANTI-DISCRIMINATION HOUSING LAWS

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IN 1957, Washington joined more than a dozen states which have resolved to eliminate racial discrimination from publicly-assisted housing.<sup>1</sup> Having determined that demonstrations of prejudice menaced the legitimate aspiration of Negro citizens to secure shelter according to their needs and ability to pay, the legislature declared it to be unlawful for "the owner of publicly-assisted housing to refuse to sell, rent, or lease to any person . . . because of the race, creed, color, or national origin of such person . . ." <sup>2</sup> Enforcement of the law was entrusted to an administrative agency,<sup>3</sup> and "publicly-assisted housing" was defined to include housing "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 . . ." <sup>4</sup>

In the first case to reach a superior court under the 1957 statute, Washington's maiden effort to protect its citizens from housing discrimination was declared unconstitutional.<sup>5</sup> Because the result was seemingly at odds with two similar cases in New York and New Jersey,<sup>6</sup> and because housing statutes in a number of states were im-

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<sup>1</sup> For reference to these laws and a discussion of their significance, see McEntire, *Residence and Race* 266-67 (1960); Greenberg, *Race Relations and American Law* 304-12, 390 (1959); IV Report of the United States Commission on Civil Rights—Housing 120-132 (1961); Report of the United States Commission on Civil Rights 399 (1959); Forster and Rabkin, *The Constitutionality of Laws Against Discrimination in Publicly Assisted Housing*, 6 N.Y.L.F. 38 (1960).

<sup>2</sup> Wash. Rev. Code, § 49.60 as amended by Wash. L. 1957, c. 37.

<sup>3</sup> For an assessment of the success of administrative agencies in the enforcement of state anti-discrimination laws, see Note, 74 Harv. L. Rev. 526 (1961).

<sup>4</sup> Wash. Rev. Code, *supra* note 2.

<sup>5</sup> *O'Meara v. Washington State Board Against Discrimination*, No. 535996 (Wash. Super. Ct., King Cty., July 31, 1959), 4 Race Rel. L. Rep. 682 (1959).

<sup>6</sup> *New York State Comm'n Against Discrimination v. Pelham Hall Apts., Inc.*, 10 Misc. 2d 334, 170 N.Y.S.2d 750 (Sup. Ct. 1958); *Levitt & Sons v. Division Against Discrimination*, 56 N.J. Super. 542, 153 A.2d 700 (App. Div. 1959), *aff'd*, 31 N.J. 514, 158 A.2d 177, appeal dismissed, 363 U.S. 418 (1960).

periled by the rationale of the Washington superior court,<sup>7</sup> the judgment attracted widespread comment. Interestingly, the law journal responses were unanimously critical of Judge Hodson's analysis.<sup>8</sup> The authors of a recent book—largely devoted to a study of state laws against discrimination—felt it unnecessary even to dignify the opinion with detailed criticism; instead, they dismissed the case in the following laconic footnote:

We have deliberately omitted any discussion of *O'Meara v. Washington State Bd. Against Discrimination* . . . because Judge Hodson's decision in that case . . . is predicated upon an unsound theory and should be reversed on appeal.<sup>9</sup>

The sanguinity of the authors was only partly justified. The lower court had invalidated the statute on three grounds: (a) it was unconstitutional because it applied to some housing not within the compass of "state action" under the 14th Amendment; (b) it denied equal protection because it arbitrarily subjected owners of publicly-assisted housing to a legal duty not imposed on unassisted owners; (c) it violated the privileges and immunities clause of the state constitution. On review, the state supreme court made no mention of the first of Judge Hodson's three propositions, three members of the supreme court approved his reasoning with respect to the equal protection issue while doing little more than quoting verbatim from his opinion, five combined to produce a majority for affirmance solely on the strength of the local law issue, and four judges dissented.<sup>10</sup>

The critics were correct, then, to the extent that Judge Hodson's

<sup>7</sup> See note 1, supra. The majority of these statutes are limited to publicly-assisted housing.

<sup>8</sup> See, e.g., Forster and Rabkin, *The Constitutionality of Laws Against Discrimination in Publicly Assisted Housing*, 6 N.Y.L.F. 38, 48-57 (1960); McGhee and Ginger, *The House I Live In—A Study of Housing for Minorities*, 46 Cornell L.Q. 194, 235-36 (1961); Note, 74 Harv. L. Rev. 526, 583 (1961); Note, 28 Geo. Wash. L. Rev. 758, 772-74 (1960); Robison, *Housing—The Northern Civil Rights Frontier*, 13 W. Res. L. Rev. 101, 121-23 (see esp. n. 102) (1961).

<sup>9</sup> Konvitz and Leskes, *A Century of Civil Rights* 248 (1961). The chapter containing this footnote is ascribed to Mr. Leskes.

<sup>10</sup> 58 Wash. 2d 793, 365 P.2d 1 (1961). Certiorari was sought under 28 U.S.C. § 1257(3) (1958), but denied by the Supreme Court. 369 U.S. 839 (1962). It may not have been merely coincidental that the state supreme court majority ultimately turned the result on a state constitutional issue, thus effectively insulating the decision from Supreme Court review. See *Fox Film Corporation v. Muller*, 296 U.S. 207 (1935), and editorial comment on the denial of certiorari in the *O'Meara* case in N.Y. Times, April 3, 1962, p. 28, col. 1. Certainly it is entirely clear that denial of certiorari was in no respect an approval of the result reached by the Washington courts: "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions." Vinson, *Work of the Federal Courts*, 69 S. Ct. V (1949). (An address to the American Bar Association, Sept. 7, 1949.) For a capable study of problems created by this practice, i.e., the practice of state courts attaching an independent local law basis to sustain the result regardless of the federal questions involved, see Note, 74 Harv. L. Rev. 1375 (1961).

view of the 14th Amendment failed to command a majority on any issue. Reduced to *dicta*, and currently offset by four state supreme court decisions which are substantially opposed,<sup>11</sup> the mischievous rendering of the 14th Amendment and the impact of the case in other jurisdictions which must still review their own similar statutes, should be slight. Nevertheless, the case is disheartening for three reasons. First, it represents a regression in Washington for the elimination of second class citizenship in housing, not only in striking down the statute, but in doing so in such a fashion as to confuse legislators who might hereafter seek to remedy the supposed defects. Second, by exhibiting the judiciary's unreadiness to support local efforts to solve community problems at the state level, the case enhances the prospect for federal intervention by way of executive order<sup>12</sup> or judicial extension of the 14th Amendment<sup>13</sup>—alternatives which those convinced of the wisdom of local responsibility do not relish.<sup>14</sup> Third, it is discouraging to students of constitutional law as an unhappy reflection on the constitutional scholarship of the Washington courts.

Two of these criticisms may be spurned as based on value judgments which the reader is not inclined to share. The third is intended as a more serious indictment of professional judgment. It rests on the following bases.

Judge Hodson held that the statute would unconstitutionally exceed Washington's legislative prerogatives if it were not confined to situations where "state action" within the meaning of the 14th Amendment was involved:

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<sup>11</sup> For the New York and New Jersey cases, see note 6, *supra*. Since O'Meara, the California Supreme Court has upheld a similar statute against an equal protection argument, agreeing with Pelham Hall and Levitt, and expressly rejecting the rationale of O'Meara. *Burks v. Poppy Construction Co.*, 30 U.S.L. Week 2467 (April 3, 1962). In a well-reasoned opinion subsequent to its own Levitt case, the New Jersey Supreme Court explicitly repudiated the O'Meara case. *Jones v. Haridor Realty Co.*, — N.J. —, 181 A.2d 481 (1962).

<sup>12</sup> Such an order has been urged on the President by the United States Commission on Civil Rights in 1959 and in 1961. See both Reports at note 1, *supra*, pp. 537-40 and 150-53 respectively. The order has been prepared and is currently awaiting the President's signature.

<sup>13</sup> The constitutional rationale for such an extension already exists. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Garner v. Louisiana*, 82 S. Ct. 248 (1962) (concurring opinion of Justice Douglas); *Brewer v. Hoxie School Dist.*, 238 F.2d 91 (8th cir. 1956); *Ming v. Horgan*, 3 Race Rel. L. Rep. 693 (Super. Ct. Calif. 1958). Additionally, some writers have concluded that "state action" was never intended to be a limitation on federal authority to eliminate private discrimination. *Harris, The Quest for Equality* (1960); *Frank & Munro, The Original Understanding of "Equal Protection of the Laws,"* 50 Colum. L. Rev. 131, 168 (1950).

<sup>14</sup> For a review of local responsibility in 14th Amendment interpretation, and reference to citations, see Van Alstyne and Karst, *State Action*, 14 Stan. L. Rev. 3, 14-22, 34-36, 41-44, 46-57 (1961).

In order to be constitutional, the act in question must satisfy the notion of "state action."

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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. . . . However, the 14th Amendment proscribes only *state* action.<sup>15</sup>

The cases cited for these astonishing propositions were cases which did not involve *state* laws at all. Rather, they involved only the self-enforcing effect of the 14th and 5th Amendments unaided by any legislation,<sup>16</sup> and *federal* statutes wherein congressional power was circumscribed by section 5 of the 14th Amendment.<sup>17</sup> That the police power of the state to discourage discrimination is not coterminous with the power of Congress under the 14th Amendment, is perfectly clear. Thus, while Congress may not prohibit private discrimination in employment, education, housing, public accommodations, etc.,<sup>18</sup> the states have traditionally done so as a wholly proper exercise of their police power.<sup>19</sup> Equally, while Congress is without authority to enter into comprehensive zoning of private property—restricting private land use to certain purposes and authorizing others—yet the exercise of zoning power is thoroughly orthodox for the states.<sup>20</sup> These differences in the ambit of legislative power are obviously not based on a distinction that the states are not affecting "property rights" (as the court seemed to intimate), for clearly they are. The difference is simply the well settled one that congressional authority finds its source solely in constitutional delegations, while state authority is bottomed on the sovereignty of the state to enact police regula-

<sup>15</sup> *O'Meara v. Washington State Bd. Against Discrimination*, No. 535996 (Wash. Super. Ct., King Cty., July 31, 1959), 4 Race Rel. L. Rep. 682, 686 (1959), *aff'd*, 58 Wash.2d 793, 365 P.2d 1 (1961), cert. denied, 369 U.S. 839 (1962).

<sup>16</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Bolling v. Sharpe*, 347 U.S. 497 (1954). The *Bolling* case, concerning school segregation in the District of Columbia, technically arose under the 5th Amendment rather than the 14th, although the Supreme Court has viewed the respective coverages of both Amendments as substantially equivalent in matters of race relations and equal protection.

<sup>17</sup> *Civil Rights Cases*, 109 U.S. 3 (1883).

<sup>18</sup> *Ibid.* See also *Collins v. Hardyman*, 341 U.S. 651 (1951); *Corrigan v. Buckley*, 271 U.S. 323 (1926); *United States v. Wheeler*, 254 U.S. 281 (1920); *Hodges v. United States*, 203 U.S. 1 (1906); *United States v. Harris*, 106 U.S. 629 (1882); *United States v. Cruikshank*, 92 U.S. 542 (1875).

<sup>19</sup> *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945); *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948) and see the cases reviewed in works cited in notes 8 and 9, *supra*; esp. the article by Robison at nn. 86-92; Note, U. Pa. L. Rev. 515, 525-533 (1959); Ross and Freedman, *The Constitutionality of a Bill Prohibiting Discrimination in Housing*, 18 Law. Guild Rev. 30 (1958); Note, 45 Va. L. Rev. 428 (1959).

<sup>20</sup> See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Berman v. Parker*, 348 U.S. 26 (1954) (concerning police power of Congress in the District of Columbia).

tions of whatever kind it desires, so long as they are reasonably related to the public welfare of the community.<sup>21</sup>

Since the elimination of racial discrimination is a legitimate concern of government, the only federal question for the court to decide was whether the means of elimination selected by the Washington legislature were reasonably related to that end. Judge Hodson did not deny that enforcement of the anti-discrimination law would have the desired effect of eliminating some discrimination. Rather, he took the view that the law was necessarily arbitrary since it applied only to those who received some public assistance in securing their homes. In the seemingly persuasive language of the court, the vice of the law was this:

There is no reason to suppose that persons with FHA mortgages on their homes are more likely to discriminate against minority groups than those who have conventional mortgages or no mortgages, or those who are purchasing upon contract. This act would prohibit Commander O'Meara from doing what his neighbors are at perfect liberty to do.<sup>22</sup>

Concluding that there could be no rational basis for this kind of unequal treatment of home owners, Judge Hodson and three members of the supreme court concluded that the law was invalid under the equal protection clause of the 14th Amendment.

Two questions are involved here. First, are there no rational bases to support the state's differentiation between publicly-assisted and unassisted home owners? Second, assuming we find that some rational bases for such a distinction can be advanced, how substantial must they be in order to survive the requirements of the equal protection clause? As to the reasonableness of prohibiting discrimination in publicly-assisted housing while leaving private housing unaffected, surely the following distinctions are of some relevance:

(a). Legislation is generally called upon to respond to human needs which are substantial and pressing. Moreover, it is desirable that a law be tailored to the essential problem which occasioned it, for the law necessarily vindicates the interests of some persons at the expense of others, whether we are considering an anti-discrimination statute, a zoning ordinance, a trade regulation, or something else; in this sense, the law is never "neutral," because it necessarily places the power of government behind some interests or values in preference to others.<sup>23</sup>

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<sup>21</sup> Compare cases cited in note 18 with respect to limitations on congressional power with those cited in notes 19 and 20. See also, *Nebbia v. New York*, 291 U.S. 502 (1934); *Munn v. Illinois*, 94 U.S. 1133 (1876).

<sup>22</sup> 4 Race Rel. L. Rep. at 688; 365 P.2d at 5.

<sup>23</sup> Compare Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959), with Van Alstyne and Karst, *State Action*, 14 Stan. L. Rev. 3 (1961); Miller and Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. Chi. L.

The preservation of competing interests, compatible with protection of those persons whose special need called up the law, provides a reasonable basis for confining the law to the protection of that special need. If the substance of a given problem can be met by a limited law, it would be a novel demand to insist that less substantial problems of the same general type must also be treated identically as a condition of constitutionality.

An ordinance requiring that dogs be kept on leashes while outside the yards of their owners is illustrative. The purpose of such a law is to protect the public from the nuisance and harm which some unleashed dogs may cause. Yet, seldom are such laws drafted so as to apply equally to domesticated raccoons or ocelots, even though there is no evidence to suggest that these animals are individually less of a nuisance if not restrained, and even though there is no evidence that raccoon and ocelot owners are more diligent in confining their pets to their own yards. Abstractly, it is discriminatory to impose a duty on dog owners without imposing a similar duty on raccoon and ocelot owners who may be equally irresponsible as individuals. Would we therefore expect a judge, reviewing the applicability of the ordinance to a dog owner, to invalidate it with a paraphrase of the O'Meara court:

There is no reason to suppose that owners of dogs are more likely to let them run loose than owners of ocelots or owners of raccoons. This act would prohibit the defendant dog owner from doing what his raccoon and ocelot owning neighbors are at perfect liberty to do.

But of course the 14th Amendment does not require a foolish and "abstract symmetry"<sup>24</sup> of this kind; it is enough that the ordinance corrects the problem of animal nuisances in a substantial fashion, where the problem is most acute for the public which needs some protection, and not that it embrace other nuisances which are collectively, although not individually, less offensive. The reasonable legislative distinction between dog owners and raccoon and ocelot owners is therefore not that the former are more likely to turn their animals loose, but that with respect to the problem which occasioned the law, the latter are quantitatively less of a nuisance.

This aesopian illustration finds its analogy in the legislative distinction made by Washington between unassisted and publicly-assisted home owners. The interest of the protected class, Negroes and other minorities adversely affected by discrimination, is substantially greater with respect to publicly-assisted housing generally

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Rev. 661 (1960); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 So. Cal. L. Rev. 208 (1957).

<sup>24</sup> See text at note 37, *infra*.

than with respect to wholly private housing. Public assistance is provided to stimulate low-cost housing available to families of modest means. Thus, PHA facilities are commonly limited to low-income groups,<sup>25</sup> FNMA insurance is unavailable on loans exceeding \$15,000,<sup>26</sup> and FHA and VA insurance are designed to insure private lenders against economic risks commonly associated with low-income groups subject to unstable employment conditions.<sup>27</sup> Negroes are predominant in both low income and unstable employment categories, and therefore should tend to be among the principal beneficiaries of publicly-assisted housing vis-à-vis privately financed housing, when it becomes available on a non-discriminatory basis. Median family income for Negroes in 1959 was \$2,917, or only 52% of white family income.<sup>28</sup> Similarly, in periods of recession Negroes are more substantially affected than are whites; in the trough of the recent downturn of 1960-61, nonwhite unemployment rose to 13.9% compared with 6.9% for whites.<sup>29</sup> Symptomatic of economic disparities, enormously aggravated by discriminations, is the fact that nearly three times as many Negroes as whites live in substandard houses.<sup>30</sup> And while Negroes have not proportionately benefited from FHA insured housing under the current federal policy of allowing the developer or buyer to discriminate,<sup>31</sup> 44% of all publicly *established* housing units which are operated on an open occupancy basis are occupied by Negroes,<sup>32</sup> even though nonwhites comprise but 11.1% of the total population.<sup>33</sup> Since FHA-insured and other publicly-assisted housing is designed to alleviate the housing needs of the kind most critically experienced by Negroes, it is perfectly reasonable that the Washington legislature should first direct its attention to publicly-assisted housing of this sort. Since the need for housing on an open occupancy basis is less acute with respect to wholly private houses in terms of price, quantity,

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<sup>25</sup> See McEntire, *Residence and Race* 316-17 (1960).

<sup>26</sup> *Id.* at 309.

<sup>27</sup> Thus, the innovation of long term loans, high loan-to-value ratios, and the inclusion of a wife's income in judging qualification—all previously foreign to private institutions. IV Report of the United States Commission on Civil Rights—Housing 14, 66 (1961).

<sup>28</sup> U.S. Department of Commerce, Bureau of the Census, *Current Population Reports—Consumer Income*, Series P-60, No. 35 page 23, Table 2 (January 5, 1961).

<sup>29</sup> U.S. Bureau of Labor Statistics, Dep't of Labor, *Monthly Report on the Labor Force* 7 (April, 1961).

<sup>30</sup> Report of the United States Commission on Civil Rights 343 (1959).

<sup>31</sup> For discussions of this policy, see McEntire, pp. 290-314, 347-355; IV Report on United States Commission on Civil Rights—Housing 9-26 (1961). The six volumes of the Commission on Race and Housing, published by the University of California Press in 1960, provide what is perhaps the most comprehensive and current study made of the general problem.

<sup>32</sup> McEntire, *op. cit.* supra note 25, at p. 315.

<sup>33</sup> Bureau of the Census, Dep't of Commerce, *Statistical Abstract* 8, 26 (1961).

and ability to purchase, surely it is not unreasonable for the legislature to have left them unaffected in its very first attempt to deal with the problem!

(b). The interest of the white property holder in his freedom of choice to sell or not to sell is directly related to the measure of public assistance he has received and also provides a basis for distinguishing him from his unassisted counterpart. A man whose home is solely the result of *his own* labor, earnings, and savings might reasonably be vouchsafed a greater voice in how "his" house shall be used than, say, one who has invested comparatively little of his own time, energy, and savings but was provided with a home by somebody else, in this case, the state, through urban renewal, or the federal government, through FHA or PHA. For the state of Washington to determine that there is less reason to allow publicly-assisted home owners from exercising their prerogative to demonstrate prejudice towards other citizens of Washington than to allow owners whose homes represent entirely their own finances to do so, justifiably responds to the difference between the groups in the extent of involvement of their legitimate "private" interests.

(c). The responsibility of the state to make certain that *public* funds are not used so as to perpetuate racial discrimination is arguably greater than its responsibility to make certain that *private* funds are not so used. This argument is partly a corollary to the immediately preceding one. Spelled out, it amounts to this: FHA, PHA, and urban renewal funds are raised by the state and federal government through taxation of all the people, Negroes and whites alike. A sense of fairness requires that the state should not permit the use of public funds, some of which are contributed by Negroes, in a manner which hurts some of the very people who contributed these funds. When the state uses public funds to provide a white person with a home, and then allows that person to discriminate against some of the people who contributed the funds which made his home ownership possible, it is in some measure a breach of trust by the state, an abrogation of its responsibilities. Thus, for Washington to determine that public assistance shall not be used by its recipients to discriminate, while leaving other home owners who received no such assistance free to exercise an independent judgment, may rest on a reasonable distinction.

(d). Both the New York and New Jersey courts relied upon a "step-at-a-time" rationale to support anti-discrimination laws which did not embrace all private housing.<sup>34</sup> The courts felt that it was

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<sup>34</sup> New York State Comm'n Against Discrimination v. Pelham Hall Apts., Inc., 10 Misc. 2d 334, 170 N.Y.S.2d 750 (Sup. Ct. 1958); Levitt & Sons v. Division Against Dis-



reasonable for a state legislature to approach a given social problem diffidently, attempting to correct it in stages, and to wait to determine what additional measures might be required. Most of the critics of the *O'Meara* case felt that this alone would support the classification employed by the Washington legislature.<sup>35</sup>

(e). As noted in the fairly comprehensive article by Arnold Forster and Sol Rabkin,<sup>36</sup> limiting the effect of the law to publicly-assisted housing may also be reasonable because it is realistic in that it provides a more efficient means for *enforcing* the law, drawing upon the involvement of the FHA and lending institutions to secure its observance. Any of these bases to distinguish the separate treatment of publicly-assisted from unassisted home owners might be persuasive. Collectively, they appear quite compelling, deserving at least of some attention by the courts.

But even assuming that these distinctions are only mildly persuasive as to the reasonableness of distinguishing publicly-assisted from unassisted home owners, are they not at least sufficient to meet the demands of the 14th Amendment's equal protection clause? The answer proceeds, ironically enough, from the very case on which Judge Hodson himself purportedly relied, *Patson v. Pennsylvania*.<sup>37</sup> The case involved an alien who contested the constitutionality of a state law which prohibited the killing of wild game by unnaturalized foreign-born residents, and which enforced the prohibition by making the possession or ownership of a shot gun or rifle by unnaturalized foreign-born residents a misdemeanor. The statute did not apply to anyone else, however, and thus the defendant introduced the same argument which was to be repeated forty-four years later by Commander O'Meara, *i.e.*, that the statute denied equal protection in that it arbitrarily imposed restrictions on a few persons without imposing similar restrictions on others who were indistinguishable in their likelihood to commit the offense. There was no evidence to

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crimination, 56 N.J. Super. 542, 153 A.2d 700 (App. Div. 1959), *aff'd*, 31 N.J. 514, 158 A.2d 177, appeal dismissed, 80 Sup. Ct. 1257 (1960). That proscriptions of racial discrimination in publicly-assisted housing are not necessarily meant to be a legislature's final effort in the field is indicated by the recent extension of the New York City Ordinance to cover a substantial amount of private housing as well. See 5 N.Y.C. Admin. Code § X41 (Supp. 1961); 6 Race Rel. L. Rep. 877 (1961). State laws presently reaching beyond publicly-assisted housing include those of Colorado, Connecticut, Massachusetts, New Jersey, and Oregon. McEntire, *Residence and Race* 266-68 (1960); 6 Race Rel. L. Rep. 1187 (1961).

<sup>35</sup> See, e.g., Forster and Rabkin, *The Constitutionality of Laws Against Discrimination in Publicly Assisted Housing*, 6 N.Y.L.F. 38, 56-57 (1960); McGhee and Ginger, *The House I Live In—A Study of Housing for Minorities*, 46 Cornell L.Q. 194, 233-35 (1961).

<sup>36</sup> *Op. cit. supra*.

<sup>37</sup> 232 U.S. 138 (1914).

offset defendant's argument, but Justice Holmes nevertheless affirmed the conviction for a near-unanimous Court, employing the following language:

A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. *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.*<sup>38</sup>

The lack of evidence distinguishing the affected class of persons from the unaffected class, and the boldness of Justice Holmes' position, make the decision more than sufficient to sustain the Washington statute. While there were *dicta* to mitigate the rigor of the phrase just quoted,<sup>39</sup> and while the Supreme Court has required more by way of reasonable classification in other contexts,<sup>40</sup> the *Patson* case has generally been followed.<sup>41</sup>

Thus, in *Railway Express Agency v. New York*,<sup>42</sup> a municipal regulation forbade the use of panelled, business delivery vehicles for commercial advertising, but made an exception where the advertisement was connected with the business of the trucking company itself. Plaintiff attacked the ordinance as a denial of equal protection, persuasively asserting that the classification was arbitrary in view of the purpose of the law to lessen traffic hazards by reducing eye-catching distractions; vehicles advertising their own products were no less likely to distract attention than vehicles advertising the products of other businesses. Moreover, distractions provided by fixed displays along the streets of New York, most notably the garish signs in Times Square, presented at least as substantial a hazard as panel advertisements, compounding the apparent unreasonableness of the classification and arbitrarily depriving plaintiff of prospective profits in using his trucks for advertising purposes. Nevertheless, the Court sustained the statute, deferring to the city's legislative judgment, and employing language followed in the *Levitt* and *Pelham Hall* cases but disregarded in *O'Meara*:

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<sup>38</sup> *Id.* at 144 [Emphasis added.]

<sup>39</sup> *Ibid.*

<sup>40</sup> See, e.g., *Morey v. Doud*, 354 U.S. 457 (1957); *Brown v. Board of Educ.*, 347 U.S. 483, 38 A.L.R.2d 1180 (1954); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Hartford Co. v. Harrison*, 301 U.S. 459 (1937); *McCabe v. Atchison T. & S.F.R. Co.*, 235 U.S. 151 (1914); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

<sup>41</sup> *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Railway Express Agency v. New York*, 336 U.S. 106 (1949); *Goeseaert v. Cleary*, 335 U.S. 464 (1948); *Kotch v. Bd. of River Port Pilot Comm'rs*, 330 U.S. 552 (1947).

<sup>42</sup> *Op. cit. supra.*

It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.<sup>43</sup>

The problem has its analogues in virtually every field including that of zoning, where property owners have complained that equal protection was denied where similar property situated elsewhere in the same community was not similarly zoned.<sup>44</sup> As observed by one writer when infant zoning laws were receiving their baptism in the courts:

As for the equality clause of the Fourteenth Amendment, though it is discussed in some cases, no ordinance seems to have been invalidated for discriminatory treatment of different sections of the city or of different lots within a district. The principle, that a measure does not violate the equality clause simply because the legislation does not cover the whole possible field of the subject, has been applied to zoning ordinances, as, for instance, the holding that an ordinance is not unconstitutional for excluding laundries from one district while not excluding them from other districts similarly situated.<sup>45</sup>

One need not entirely agree with the resolution of these cases and their gingerly treatment of the equal protection clause to conclude that the *O'Meara* courts erred in failing to account for them. Nor need one take his stand on the argument that the equal protection clause demands very little to support differences established by way of legislative treatment in cases of this kind, for surely the reasons we have previously reviewed to support the difference in treatment under the Washington statute were quite substantial. And finally, were we to concede that the case was in fact a close one, it might have been more consistent with judicial enlightenment to resolve the doubt according to these felicitous expressions of Justice Frankfurter:

We have here a prohibition of discrimination . . . on account of race, creed, or color. A judicial determination that such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment . . . . Of course a State may leave abstention from such discrimination 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 be to stultify that Amendment. Certainly the insistence by individuals on their private prejudices as to race, color or creed, . . . ought not to have a higher constitutional sanction than the determination of a State to extend the area of non-discrimination beyond that which the Constitution itself exacts.<sup>46</sup>

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<sup>43</sup> 336 U.S. at 110.

<sup>44</sup> Illustrative cases are collected in Rhyne, *Municipal Law* 818 n.18 (1957).

<sup>45</sup> Bettman, *Constitutionality of Zoning*, 37 *Harv. L. Rev.* 834, 850 (1924).

<sup>46</sup> *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 98 (1945) (Frankfurter, J. concurring).