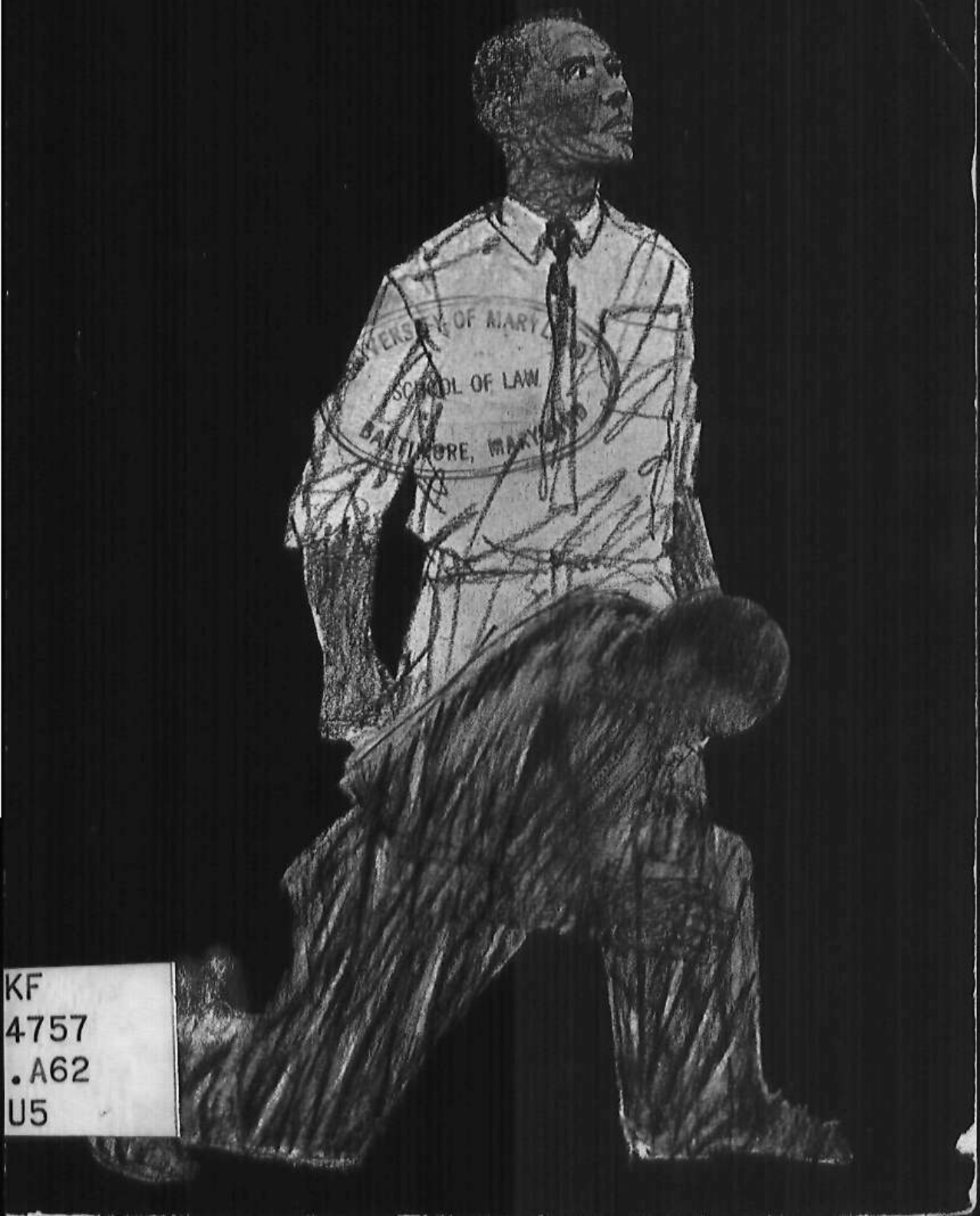
FREEDOM TO THE FREE

1863 *Century of Emancipation* 1963



And by virtue of the power, and for the purpose aforesaid, I do order and declare that all persons held as slaves within said designated States and parts of States, are, and henceforward shall be free; and that the Executive government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons.

From the Emancipation Proclamation
January 1, 1863

U. S. Commission on Civil Rights.

FREEDOM TO THE FREE

1863 *Century of Emancipation* 1963

A Report to the President by the
United States Commission on Civil Rights

Members of the Commission

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Letter of Transmittal

THE UNITED STATES COMMISSION ON CIVIL RIGHTS
Washington, D.C., February 12, 1963

TO: THE PRESIDENT OF THE UNITED STATES

When the Commission met with you to present its statutory report in November 1961, you requested, in connection with the commemoration of the 100th anniversary of the Emancipation Proclamation, a report on the civil rights progress of the Nation during the past century. This document is the result of our efforts toward that end.

Your request gave the Commission the unique opportunity of placing the Nation's recent civil rights progress in its historical context. As we reviewed the record of earlier periods, the progress of the past two decades took on new significance. Surely the Nation is at the threshold of a new birth of freedom.

We have used the words of Lincoln for the title of this report. The civil rights story of the century since the Emancipation Proclamation has indeed been one of securing "freedom to the free."

The Commission has greatly benefited from its review of the Nation's civil rights progress. It is our hope that our efforts have met your request and that the report will contribute to a better understanding of one of our Nation's most pressing domestic problems.

Respectfully yours,

JOHN A. HANNAH
For the Commission

Acknowledgments

In responding to the President's request for a report on civil rights in America since the Emancipation Proclamation, the Commission called upon some of the Nation's leading historians for assistance. For inextricably merged with the civil rights story is the historic march of our Nation to its present world position in the family of nations. It was necessary to assess those social, political, and economic factors that have determined the form and substance of our progress toward equality since this Nation's beginnings.

We acknowledge with gratitude the contribution of Dr. John Hope Franklin, Chairman of the History Department, Brooklyn College, who, under contract with the Commission, developed a basic manuscript upon which the Commission relied in the preparation of this report. Our appreciation is also expressed to three distinguished historians, Dr. Rayford W. Logan, Dr. Allan Nevins, and Dr. C. Vann Woodward, who served as consultants to Dr. Franklin.

Further thanks are owed to Dr. Charles H. Wesley and his colleagues, Drs. Paul McStallworth, Jerome W. Jones, and Prince Wilson at Central State College, Ohio, and Dr. Butler A. Jones of Ohio Wesleyan University for their research papers on particular aspects of the period of history under consideration.

Our gratitude is also expressed to Robert Denny for his editorial assistance and to Warren Pfaff for his cover design.

It is impossible to acknowledge individually the contributions made by members of the Commission staff under the leadership of Berl I. Bernhard, Staff Director. Their dedi-

cation and perseverance in meeting the report deadlines while carrying forward their other work cannot be too strongly praised. It is appropriate, however, to single out for acknowledgment the work of Dr. Cornelius P. Cotter, Assistant Staff Director for Programs, who bore the major responsibility for the development of the report in its present form.

We hope that the work of these distinguished citizens has been adequately translated by us into a report that will serve as a source of enlightenment and hope concerning one of our most serious and persistent national problems.

Our heartfelt thanks to all who have so generously contributed of their time, knowledge, and experience.

Contents

Introduction

THE rise of the American Negro from slavery to citizenship is one of the most dramatic chapters of American history. It is also a continuing process, the pace of which has at times been a source of national disgrace.

Slavery is now a curious and archaic word. To the heirs of slave and master there has been left a legacy of shame and triumph, pain and joy, that constitutes a unique record of the indomitability of the human spirit. With this 100-year-old legacy has come the task of continuing the quest for full citizenship.

The purpose of this report is to follow this quest from the time of the Emancipation Proclamation until the present. Its scope is the breadth of the Negro's aspiration for true equality and freedom. It embraces all those whom history chose to play a part in the evolution of civil rights in America.

During the closing years of the Civil War, responsible leaders began to talk about the rights to which the freedman would be entitled, and they began to call them civil rights. The term was widely used in the years following the war, and Congress recognized the relevance of civil rights to the status of Negroes by enacting in 1866 the first "Civil Rights" law with the specific purpose of protecting the freed Negro from discrimination. For 100 years the question of civil rights has been intimately connected with the Negro in the United States.

In confining the report to Negroes we in no way suggest that the record presented has relevance only for that group of the population. In placing special emphasis on civil rights we mean to stress those individual rights protected against

denials based upon such characteristics as race, color, religion, or national origin. The groups identified for purposes of such protection, and the range of activities protected, are defined by State and Federal law, as well as by constitutional provisions and judicial interpretation.*

In advancing toward a position of relative social, economic, and political equality in the United States, the Negro has not been a passive element of the population, operated upon for good or for bad by government. There is an impressive record of individual and group achievement, largely self-initiated and self-sustained, which has contributed to the total well-being and enrichment of the Nation. Private groups, as well as government, have provided the aegis for progress in the American tradition, and every attempt is made to record this effort.

While taking into account the tremendous strides that have been made since 1863, the report also recognizes the existence of periods of disturbing lack of progress, of retrogression, and instances of violence and abuse. A gap between our recorded aspirations and actual practices still remains.

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*Such terms as civil rights, civil liberties, constitutional rights, and political and human rights are employed in contemporary literature sometimes in such a manner as to suggest they are synonymous in meaning, sometimes as if to suggest there are important differences in meaning among them. Rarely is an effort made to define these differences. Suffice it to say for the purpose of this study that by civil liberties, as distinguished from civil rights as defined in the text above, we refer to that broad and changing body of substantive liberties and procedural guarantees which Justice Cardozo referred to as "of the essence of a scheme of ordered liberty." *Palko* v. *Connecticut*, 302 U.S. 319 (1937). These are liberties which any individual, without regard to group identity, may find himself defending against incursion by government or by private action. The standard for identifying such liberties is necessarily vague. The line between a liberty which is essential to the preservation of a free society and one which is not is necessarily a wavering one. When persons speak of constitutional rights, political and human rights, they may be speaking of civil liberties or civil rights, depending upon the context.

But in each of the periods reported since the turn of this century, significant progress has been made toward closing this gap. In the decades since the Second World War the pace of progress has accelerated until today, for all the contradictions, all the transitional dislocations, all the temporary setbacks and stalemates, governments at all levels as well as private associations and individuals are pressing determinedly and successfully toward the goal of equality before the law and equal opportunity for all.

Prelude to Emancipation

THE Emancipation Proclamation must be understood in the perspective of the events preceding it, and as a catalyst of events to come. While it formalized the changed legal status of the Negro, emancipation did not of its own weight secure to him an equivalent change in economic, social, and political status. Antecedent to emancipation were some two centuries of struggle, and of changing legal and political institutions.

Dramatic as emancipation may have been in 1863, it followed efforts by Negroes, working in slavery and subjection, to gain freedom for themselves by purchase, by flight, by insurrection, and by the good will of slaveholders. It also followed decades of individual and organized activities by abolitionists, white and Negro, from both North and South.

The introduction of slavery into this country set in motion a historical process leading directly to the Emancipation Proclamation. In this connection, Frederick Douglass, distinguished Negro American abolitionist, has said: [1]

> No one can tell the day of the month, or the month of the year, upon which slavery was abolished in the United States. We cannot even tell when it began to be abolished. Like the movement of the sea, no man can tell where one wave begins and another ends. The chains of slavery with us were loosened by degrees.

When the artist was giving conception to the Freedmen's Memorial to Abraham Lincoln for erection in Lincoln Park,

[1] Douglass, *Life and Times of Frederick Douglass* 608 (1884).

Washington, D.C., in 1876, his original cast represented the slave kneeling in a completely passive position, receiving his freedom at the hands of Lincoln, his liberator. Under criticism, this conception was changed, so that the slave, although kneeling to receive freedom at the hands of the emancipator, was also represented as exerting his own strength to break his chains.[2] This change in symbolism is supported by a brief review of the slave's struggle for equality prior to emancipation.

Early History[3]

In 1619, John Rolfe, secretary and recorder of the Virginia colony, reported that "about the last of August there came to Virginia a Dutch man of warre that sold us twenty negers."[4] The first Negroes were not regarded as slaves. Prior to 1661, there was no legal sanction for slavery in the colony of Virginia. During this early period the Negro was looked upon as an indentured servant, a bondsman for a period who could look forward to his freedom after a term of years.

One of the Negroes in the first shipment, Anthony Johnson, received his freedom in a few years. He became a landowner and a man of wealth who, at one time, was himself an owner of "slaves."[5] It was not long, however, before the Negro, unlike the white indentured servant, was regarded as a bondsman for life. Once given legal recognition, the institution of slavery was firmly established.

Hundreds of Negroes obtained freedom by flight. They not only fled to the Indian tribes, to Canada, and to the Spaniards in Florida, but also made their way to northern colonies where slavery was not so fixed as in the southern

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[2] See generally Durman, *He Belongs to the Ages; The Statues of Abraham Lincoln* 45 (1951).

[3] Phillips, *American Negro Slavery* (1918); Woodson and Wesley, *The Negro in Our History* (1962).

[4] Davie, *Negroes in American Society* 17 (1949).

[5] Woodson and Wesley, *op. cit. supra* note 3, at 82.

colonies.[6] The open country and its unsettled areas made possible an extensive use of this avenue of escape. Free Negroes and whites gave shelter to the runaway slaves. Penalties were placed upon the free Negroes for this action, but this method was in use from the colonial era until emancipation.

The United States came late to the worldwide movement for the abolition of slavery. In England the institution had been attacked in the 18th century by individuals such as John Locke, Daniel Defoe, Alexander Pope, Adam Smith, Thomas Paine, and John Wesley. The Society of Friends became the first group to petition Parliament for the abolition of slavery in 1784.[7] At the urging of the 20-year-old Society for the Abolition of the Slave Trade, Britain forbade the trade by act of Parliament in 1808.[8] The critics then beban to agitate for the abolition of slavery itself in British colonies and territories. After a conditional emancipation plan launched in 1834 proved unsatisfactory an act providing immediate emancipation for all slaves in British territories was passed in 1838.[9] Other European nations took similar steps during this period and in 1841, by the Treaty of London, the leading European powers attempted to stamp out the remnants of the slave trade.[10]

Slavery was also abolished in the newly independent South American nations. Chile, Colombia, Bolivia, Guatemala,

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[6] Arnold, *History of Abraham Lincoln and the Overthrow of Slavery* 35 (1866); Dumond, *Antislavery: The Crusade for Freedom in America* 335 (1961); Franklin, *From Slavery to Freedom: A History of American Negroes* 250 (1956).

[7] Greenidge, *Slavery* 127–29 (1958).

[8] *Id.* at 132, 138.

[9] Wilson, *Emancipation: Its Course and Progress* 17–18 (1882).

[10] Greenidge, *op. cit. supra* note 7, at 172. During the Civil War the United States entered into a similar treaty with Great Britain. *Id.* at 172–73.

Mexico, Uruguay, Argentina, and Peru had acted by 1854.[11] But the United States lagged behind, although sentiment for the freedom of the Negro had begun almost with his enslavement and had continued throughout American history. Slavery was attacked on moral, religious, and philosophical grounds. However, except for the organized Quaker agitation, the anti-slavery movement in the early colonial period was largely the work of individuals. It took nearly a century after the first of the organized protests, the Germantown protest of 1688, for organized protest to become widespread.[12]

The free Negro population was increased by individual manumissions, which were continuous over the decades of slavery. Several methods were used. One of these was by acts of the legislature and others were by deeds and wills. Manumissions by deeds grew out of the custom of granting papers to indentured servants on the expiration of their terms of service. Some slaveholders manumitted their slaves because slavery was contrary to their religious beliefs and they thought it morally wrong. As the practice grew, manumissions were opposed and discouraged in State after State. Legislation often forbade manumission and, when permitted, bond was required so that the slave manumitted would not become a community charge.[13]

Some Negroes secured their freedom by purchase. They were often permitted to work as artisans and mechanics and to labor outside of the hours due their masters. They were also hired to other masters. If they were allowed to keep and save a portion of the earnings, they could eventually pay for their own freedom.[14]

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[11] Wilson, *op. cit. supra* note 9, at 13, 21; Booth, *Zachary Macaulay: His Part in the Movement for the Abolition of the Slave Trade and of Slavery* 73 (1934).

[12] 2 Channing, *History of the United States* 395-97 (1930).

[13] Simkins, *A History of the South* 117 (1953); Franklin, *op. cit. supra* note 6, at 214–15 (1956).

[14] Franklin, *op. cit. supra* note 6, at 214.

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By the first quarter of the 18th century, as slave labor began to be necessary to agriculture and native industry, the social privileges of the free Negroes were gradually diminished. In this period the tradition also was fixed that the manumitted slave could not rise to a place of equality with white persons.

The free Negro was seldom as free as was the white citizen. There were those who exercised political rights, but property and special qualifications were barriers to general participation by free Negroes in the exercise of the suffrage. They were often restricted in their personal movements and were not allowed to travel without passes. They were subject to special jurisdiction in the courts and did not have the privilege of trial by jury in most colonies. They could maintain actions at law in the colonial courts, but they were limited in the giving of evidence before the courts. Generally speaking, free Negroes occupied a status of their own somewhere between bondage and enjoyment of the rights and privileges of the population at large.

Several colonies passed laws which prohibited the slave trade.[15] By 1778, this practice had been prohibited in the New England States, the Middle Atlantic States, and in Maryland and Virginia. All the States had taken some action toward suppressing the slave trade by 1798 although the trade was afterwards revived in South Carolina and Georgia.[16] By 1804, eight States had provided for emancipation either by constitution or statute.[17] However, the abolition or restriction of the foreign slave trade made the domestic traffic in slaves more important economically to some States and thus served to draw the issue more sharply between the pro- and anti-slavery forces.

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[15] *Id.* at 215.

[16] Davie, *op. cit. supra* note 4, at 18.

[17] Vt., Mass., N.H., R.I., Conn., Pa., N.Y., and N.J. Arnold, *op. cit. supra* note 6, at 28–29.

The Declaration of Independence was a foundation document in the cause of freedom. On July 2, 1776, a resolution declaring independence was adopted by the Continental Congress,[18] but stricken from the document was the passage which arraigned the King for forcing the slave trade on the colonies. This original draft, attributed to Thomas Jefferson, condemned George III for waging a cruel war against human nature itself, violating its "most sacred rights of life and liberty of a distant people, who never offended him, captivating and carrying them into slavery in another hemisphere or to incur miserable death in their transportation thither." [19] This clause was taken out of the declaration in deference to the opinions of the Representatives of South Carolina, Georgia, and those of the North concerning whom Jefferson said that "though their people had very few slaves themselves, yet they had been pretty considerable carriers of them to others." [20]

The Declaration of Independence has remained the classic argument for freedom, emphasizing that the natural rights of man cannot be limited by act of government, and that all men are equal in these rights. The early abolition movement used effectively the famous statement of the declaration: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."

During the decade after the adoption and publication of the Declaration of Independence, reaction against the slave trade and slavery increased. The period saw the first significant organization of abolition sentiment. The first abolition society was formed in Pennsylvania in 1774. Benjamin

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[18] 5 *Journals of the Continental Congress* 507 (1906).

[19] 2 Ford, *The Works of Thomas Jefferson* 211–13 (1904).

[20] Boyd, *The Declaration of Independence: Evolution of the Text* 35 (1943).

Franklin later became its president. Similar societies were soon organized in New York, Rhode Island, Connecticut, New Jersey, Delaware, Maryland, and Virginia. The New York Abolition Society, organized in 1785, listed John Jay as the first president and Alexander Hamilton as the second.[21]

The struggle to become independent of Great Britain brought a new dimension to the popular concept of the role and status of the Negro. This was the interest in the Negro as a soldier. In the Revolutionary War, as in all of our wars, the Negro served with distinction. Although originally barred from General George Washington's army, the service of Negroes later was accepted and in fact solicited by most of the former colonies. It is estimated that over 5,000 Negroes fought with the Continental Army in the Revolution.[22]

In this connection it is of interest to note that the first "emancipation proclamation" in the New World was issued on November 7, 1775, by Lord Dunmore, Governor General of the Colony and Dominion of Virginia. Lord Dunmore declared free all those in bondage who were willing and able to bear arms for the King in putting down rebellion in the colony.[23] It was not long before General Washington approved the enlistment of free Negroes. Slaves who served as soldiers on either side in the War for Independence were often granted their freedom.[24]

Through the various means noted above, the free Negro population steadily increased. According to the First Census reports in 1790, there were then 757,181 Negroes in the United States, of whom 59,557, or 7.9 percent, were recorded as free. While most of these were concentrated in the larger

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[21] Arnold, *op. cit. supra* note 6, at 29.

[22] Litwack, *North of Slavery: The Negro in the Free States, 1790–1860* at 11 (1961).

[23] 1 Williams, *History of the Negro Race From 1619 to 1800* at 336 (1882).

[24] *Id.* at 337; Franklin, *op. cit. supra* note 6, at 138.

cities of New England and the Middle Atlantic States, 12,866 free Negroes were found in Virginia.[25]

Although most of the agricultural work on the plantations was performed by the slave population, free Negroes were employed by some planters for this type of labor. Some of these planters were opposed to the use of slave labor. In the western parts of Virginia and North Carolina, there were those who preferred the labor of free Negroes to slave labor. In the Northern and Middle States, it was not uncommon to see free Negroes at work in the fields. A small portion of these Negroes were landowners and farmers who had come into possession of their lands either by bequest or purchase.

There were free Negroes who were artisans. In the towns and cities, they were barbers, coopers, carpenters, cabinetmakers, wheelwrights, bricklayers, tanners, plasterers, painters, shoemakers, blacksmiths, millers, sawyers, wood-dealers, draymen, hucksters, garden workers, and household workers. Some of the best mechanics were free Negroes and were rated as master workers in both northern and southern cities. A few of these hired slaves and others owned slaves. Some were property owners and substantial citizens as a result of the savings from their wages and small businesses. They worked in the iron foundries and in the factories as forgemen, firemen, and helpers.

Competition between the races for work on these levels was keen, and opposition developed among white workers against Negro workers. As early as 1721, a petition was presented to the Pennsylvania State Assembly protesting the practice of employing Negroes. The petition reasoned that the employment of Negroes was harmful to the job prospects of persons who immigrated to Pennsylvania from Europe. The assembly declined to pass an act restricting the employment of Negroes and expressed the opinion that such a principle

[25] U.S. Bureau of the Census, *Negro Population 1790–1915* at 57 (1918).

would be injurious to the public and unjust to those who owned and hired out slaves. However, the legislature refrained from repealing a duty imposed earlier upon Negroes imported into the State.[26]

Many Negroes found opportunities for self-expression in spite of the depressing impact of slavery upon any latent capacity for cultural and intellectual development. Among free Negroes, the closing decades of the 18th century saw the rise of organized life, as individuals among them demonstrated capacities of leadership and a drive for achievement as artisans and professionals.

Slavery and the New Nation

The new nation was not long to be spared the task of attempting to reconcile the "self-evident" truths of the Declaration of Independence with the equally self-evident institution of chattel slavery. While the Constitutional Convention was meeting in Philadelphia in 1787, the Congress, operating under the Articles of Confederation, enacted the Northwest Ordinance. Article VI of the Ordinance, joined in by northern and southern members of the Congress, prohibited slavery and involuntary servitude in the Territory now comprising the States of Ohio, Indiana, Illinois, Wisconsin, and most of Michigan.[27] Southern members are believed by some authorities to have agreed to the slavery prohibition in the hope that this would greatly reduce the prospect of economic competition with the South.[28] This ordinance, which played a significant role in the settlement of the Territories northwest of the Ohio River, was also an im-

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[26] Turner, *The Negro in Pennsylvania: Slavery—Servitude—Freedom 1639–1861* at 5 (1911).

[27] 36 *Journals of Continental Congress* 343 (1930); 3 Channing, *History of the United States* 543 (1935).

[28] McLaughlin, *The Confederation and the Constitution 1783–1789* at 123–24 (1905).

portant milestone in the progress of America toward freedom and individual liberty.

To the abolitionists and others with anti-slavery sentiments the new Constitution of 1787 came as a disappointment. Despite the fact that 6 of the original 13 States had previously acted to abolish slavery,[29] the Federal Constitution contained no such provision. In fact it recognized slavery as a firmly entrenched institution by providing for the counting of three-fifths of the Negro slaves in determining the basis of taxation and representation [30] and by the fugitive slave provision requiring that a slave escaping into a free State be "delivered up on a claim of the party to whom . . . service or labour may be due." [31] Further, the Constitution precluded Congress from prohibiting the importation of slaves prior to 1808, although it authorized a tax or duty of up to $10 for each slave brought in.[32]

As the new nation began to function under its Constitution, three controversies developed that ultimately were to be resolved by Civil War; the issue of abolition gained prominence as the abolitionist movement gained new life and organization, the status of the runaway slave was bitterly argued and contested, and the issue of slavery in the Territories and new States threatened the Nation's unity and development.

With the acquisition of new territories the westward expansion of the Nation began. Newly populated areas applied for admission to the Union as States. The status of the new States as "slave" or "free" often became the most hotly contested issue involved in their admission.

By 1818 there were 11 free States and 11 slave States. In that year, Missouri, part of the Louisiana Territory purchased

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[29] Conn., N.H., Mass., R.I., Vt., and Pa. had either provided for gradual or outright emancipation.

[30] U.S. Const. art. I, sec. 2.

[31] U.S. Const. art. IV, sec. 2.

[32] U.S. Const. art. I, sec. 9.

from France in 1803, applied for admission to the Union. Northerners contended that a prohibition of slavery should be a condition of admission. Southerners, while not disputing congressional power to regulate slavery in the Territories, insisted that Congress had no power to place such internal restrictions on new States. The issue was joined and the contending forces might have remained deadlocked indefinitely if Maine had not applied for admission at the same time.

Under the Missouri Compromise of 1820, both States were admitted without reference to the slave issue. This amounted to the admission of a free State and a slave State. But it was stipulated that in the remainder of the Louisiana Territory lying north of Missouri's southern boundary "slavery and involuntary servitude . . . [were] forever prohibited." [33]

Crisis, for the moment, was avoided. But the storm clouds of a future conflict were gathering. Northerners elevated the statutory compromise to the status of a sacred compact, and southerners began to argue that the whole compromise was unconstitutional since Congress had no specific power to exclude slavery from the Territories.[34]

As Congress wrangled, sounds of agitation and discontent were heard with increasing frequency from outside the legislative forum. As early as the 1780's, societies had been formed to work for the abolition of slavery. Petitions were sent to Congress, speeches made, and resolutions passed. Although educators like Horace Mann and ministers like Theodore Parker had generally taken the lead in organizing and supporting these groups, their ranks were gradually joined by political leaders and statesmen like Salmon P. Chase and Charles Francis Adams.[35] A more radical group of abolition-

[33] Act of Mar. 6, 1820, 3 Stat. 545.

[34] Swisher, *American Constitutional Developments* 234 (1954).

[35] Arnold, *op. cit. supra* note 6, at 43–44; 2 Williams, *op. cit. supra* note 23, at 48.

ists achieved prominence in the 1830's and 1840's. William Lloyd Garrison founded The Liberator in 1831 and sounded the call for greater militancy.[36]

> [Y]ea, till every chain be broken, and every bondsman set free! Let Southern oppressors tremble—let their secret abettors tremble—let their Northern apoligists tremble—let all the enemies of the persecuted blacks tremble.

In the West, the students of Theodore Weld established a center of abolitionism at Oberlin College which became an important station on the Underground Railroad. Garrison was supported in his stand by the outstanding New England lawyer, Wendell Phillips.[37] Free Negroes played a significant role in the abolition movement, and as the Underground Railroad developed, Negroes were prominent among the thousands of workers on the "road." [38]

During this period anti-slavery literature appeared in increasing quantities. Easily the most famous work was Harriet Beecher Stowe's *Uncle Tom's Cabin*. Ultimately translated into some 20 languages and distributed throughout the world, the novel vividly, if melodramatically, portrayed the costs of slavery in terms of brutality and human degradation. John Greenleaf Whittier and James Russell Lowell contrib-

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[36] The (Boston) Liberator, Jan. 1, 1831, p. 1.

[37] Franklin, *op. cit. supra* note 6, at 245 (1956).

[38] Aptheker, *The Negro in the Abolitionist Movement* 14–15 (1941). "Among those who led in the movement were William Still in Philadelphia, David Ruggles in New York, Stephen Myers in Albany, Frederick Douglass in Rochester, Lewis Hayde in Boston, J. W. Loguen in Syracuse, Martin R. Delany in Pittsburgh, George De Baptist in Madison, Indiana, John Hatfield in Cincinnati, William Goodrich in York, Pennsylvania, Stephen Smith, Williams Whipper and Thomas Bessick in Columbia, Pennsylvania, David Ross and John Augusta in Norristown, Pennsylvania, Samuel Bond in Baltimore and Sam Nixon in Norfolk." *Id.* at 35.

uted anti-slavery poems, while Benjamin Lundy, a New Jersey Quaker, sought to buttress emotional appeals with practical arguments.

The fugitive slave provision of the Constitution had been implemented by the Fugitive Slave Act of 1793,[39] prescribing procedure for the recovery of slaves and punishment for persons aiding in their escape. This statute was continually abused by both pro- and anti-slavery interests. Northerners continued to help slaves escape, and southerners often "recaptured" free Negroes in Northern States and took them south as slaves.[40]

In an effort to help fugitives and prevent the capture of free Negroes, Pennsylvania in 1826 passed a statute requiring slave owners to present evidence of their legal claim to a magistrate before they could remove a fugitive from the State. The law was tested before the United States Supreme Court in 1842,[41] and was invalidated as being in conflict with the Federal Fugitive Slave Act. The Court went on to declare that since the Constitution and the 1793 act had preempted the subject of fugitive slaves, the States were precluded from taking any legislative action whatsoever. The South was the nominal beneficiary of the decision, but in fact its position was temporarily weakened by a dictum expressed by Justice Joseph Story. He expressed doubt that State officers could be required to enforce the Federal law. This meant that until Federal enforcement provisions were strengthened, the law was virtually meaningless.[42]

Northern States were not long in grasping the implications of the decision and passed "personal-liberty laws" denying the Federal Government access to State jails and other

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[39] Act of Feb. 12, 1793, 1 Stat. 302.

[40] Swisher, *op. cit. supra* note 34, at 231–32.

[41] *Prigg* v. *Pennsylvania,* 41 U.S. (16 Pet.) 539 (1842).

[42] 2 Warren, *The Supreme Court in United States History,* 87 (1926).

agencies of justice for the apprehension of slaves.[43] Southerners immediately began to agitate for amendments to strengthen the 1793 act. This issue became entangled with the controversy over the status of the Territories recently acquired in the Mexican War. Texas had already been admitted as a slave State in 1845 and California was now ready to come into the Union. The Wilmot Proviso, to the effect that slavery would not be permitted in the Territories acquired from Mexico, was passed in the House of Representatives but rejected in the Senate and both issues were temporarily resolved in the Compromise of 1850—a substantial victory for the southern position.

The Compromise provided for the immediate admission of California and the organization of the Mexican territories without the Proviso.[44] The 1850 acts also provided that the slave trade could no longer be carried on in the District of Columbia.[45] Slavery was still permitted, however. From the northern point of view the most offensive portion of the Compromise of 1850 was a new fugitive slave law which attempted to set up complete Federal machinery for the enforcement of the act, and even forbade testimony by the fugitive in hearings before Federal Commissioners.[46] So strong was the reaction in some parts of the North that President Millard Fillmore found it necessary to issue a Presidential proclamation calling upon citizens and governmental officials to maintain the law.[47]

The issue of slavery in the northern portions of the Louisiana Territory had been deemed settled by the Missouri Compromise of 1820. It was reopened, however, in 1854, when

[43] Swisher, *op. cit. supra* note 34, at 238–39.

[44] Act of Sept. 9, 1850, 9 Stat. 446; act of Sept. 9, 1850, 9 Stat. 452.

[45] Act of Sept. 20, 1850, 9 Stat. 467.

[46] Act of Sept. 18, 1850, 9 Stat. 462.

[47] 6 Richardson, *Messages and Papers of the Presidents* 2637–42, 2645–46 (1897).

Senator Stephen A. Douglas of Illinois introduced legislation to organize the Territories of Kansas and Nebraska. As finally passed, the Kansas-Nebraska Act specifically repealed the Missouri Compromise and, applying the popular sovereignty principle of the 1850 Compromise, permitted the newly organized Territories to determine whether they would be free or slave.[48] The Supreme Court was shortly to find that the Congress, which had adopted a doctrine of nonintervention in the Territories, lacked constitutional authority to determine whether a Territory would be free or slave.[49]

The fundamental question presented in the *Dred Scott* case was that of the legal status of slaves who had lived in free territory and subsequently returned to the State of their original owners. Actually this had been decided six years earlier in *Strader* v. *Graham.*[50] The Court had ruled that the Negro's status depended entirely on the law of his State of current residence. Thus, if the laws of the State to which he returned still considered him a slave, a slave he was. But what created the interest in *Dred Scott* was the presentation of the question of the constitutionality of the Missouri Compromise of 1820.

Scott had lived in the free State of Illinois and the Territory of Minnesota and claimed that this residence entitled him to freedom in Missouri, the State to which he subsequently returned. According to one constitutional historian the Court, by confining itself to the *Strader* doctrine, could have settled the matter without provoking great controversy.[51]

Scott sued for his freedom in a Federal court under the provision of the Constitution giving Federal courts jurisdiction to hear suits between "Citizens of different States."

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[48] Simkins, *op. cit. supra* note 13, at 196–97.

[49] *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393 (1857).

[50] 51 U.S. (10 How.) 82 (1851).

[51] Swisher, *op. cit. supra* note 34, at 243.

The first issue to be decided in his case was whether Scott was a citizen in this constitutional sense. The Constitution, as it stood in 1857, had no provision defining citizenship, State or Federal, for any purpose. Second, if Scott was a citizen and therefore had properly brought his suit in a Federal court, the court would then have to determine whether he was free or slave by following the *Strader* rule or by creating a new rule. These issues were argued before the Court in 1856. Reargument was ordered to avoid rendering an opinion relating to the controversial issue of the Missouri Compromise until after the Presidential election of 1856. The long awaited decision came in 1857.

The Court actually disposed of the case by holding that Scott as a Negro could not be a citizen as the meaning of the word was understood by the framers of the Constitution.[52] Chief Justice Taney wrote that "for more than a century" prior to the adoption of the Constitution the Negro had been regarded as inferior and "had no rights which the white man was bound to respect." [53] This historical judgment was of course not the holding of the case and consequently was not, from a technical standpoint, a statement of law. Nonetheless, Taney's assertion symbolized in the public mind what the Supreme Court had said and done. Typical of the reaction was the editorial comment of the New York Tribune. This opinion, said the Tribune, "will be found to exhibit all the characteristics that have marked his [Taney's] career. It is subtle, ingenious, sophistical, and false. It is the plea of a tricky lawyer and not the decree of an upright judge." [54]

Of these and similar remarks, one Supreme Court historian comments: "Such ridicule and abuse, published and republished and quoted by other newspapers throughout the Northern States, could not fail to weaken the Court's status

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[52] *Dred Scott* v. *Sandford, supra* note 49, at 406.
[53] *Id.* at 407.
[54] New York Tribune, Mar. 17, 1857, p. 5.

with the people." [55] Moreover, Taney's assertion that the Missouri Compromise was unconstitutional became the tragic prologue for the Civil War.

Emergence of Lincoln

While the slaveholding interests welcomed the *Dred Scott* decision, disapproval was vocal and active among anti-slavery elements. Among the Court's critics was an Illinois lawyer, Abraham Lincoln, who declared, in June 1857, that the decision was unsound, that the Court had often overruled its decisions in the past and that "we shall do what we can to have it to over-rule this." [56]

The following year Lincoln contested with Stephen A. Douglas for election to the United States Senate from the politically pivotal State of Illinois. Their campaign gave rise to the famous Lincoln-Douglas debates in which slavery was the most prominent issue. The interest of the entire country centered on these debates which saw an eloquent Democratic Senator with aspirations to the Presidency pitted against a rising spokesman of the new Republican Party. Lincoln's position was that the Republic could not exist forever divided into free and slave States and that slavery must be accepted everywhere or done away with entirely.[57] Lincoln lost the election but his party captured the congressional elections of that year. Both Lincoln and Douglas gained national stature and momentum toward their Presidential candidacies in 1860.

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[55] 2 Warren, *op. cit. supra* note 42, at 319.

[56] 2 Basler, *The Collected Works of Abraham Lincoln* 401 (1953).

[57] See, *e.g.*, 3 *id.* at 117. During Lincoln's term in the House of Representatives in 1848, he introduced a bill providing that no person from without the District should be held to slavery and all children of slaves subsequently born in the District of Columbia would be free and authorized compensation for their owners. Cong. Globe, 30th Cong., 2d Sess. 212 (1848).

In 1860, the Republican Party adopted a pragmatic slavery platform taking a position against the further extension of slavery into the Western Territories but also adopting a policy of no interference with the institution of slavery in the States. Lincoln was nominated on the third ballot and went on to triumph in the November elections of that year.

The reaction of the slaveholding States to Lincoln's election was swift. On December 20, 1860, a convention summoned by the South Carolina Legislature met at Charleston and unanimously declared "that the Union now subsisting between South Carolina and other states under the name of 'The United States of America' is hereby dissolved." [58] By the time of Lincoln's inauguration on March 4, 1861, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas had followed South Carolina into secession and the Confederate States of America had been formed. The new President's inaugural address contained the following conciliatory passage on the burning slavery issue: [59]

> I have no purpose, directly or indirectly, to interfere with the institution of slavery, in the states where it now exists. I believe I have no lawful right to do so, and I have no inclination to do so.

But just one month later the sectional differences erupted into civil war. During the early months of the war, Lincoln was repeatedly urged to abolish slavery in the rebellious States. On several occasions Congress attempted to act, but the bills failed to pass.

Soon, however, the events of the war served as a catalyst for action toward emancipation. One of the first steps was the Confiscation Act of August 6, 1861, declaring that when slaves were used in the military service of those in rebellion,

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[58] Journal of the Convention of the People of South Carolina, Held in 1860, 1861 and 1862, ch. 8, vol. 283, at 42–43 (1862).

[59] 7 Richardson, *op. cit. supra note* 47, at 3206.

the claims of the owners to such slaves were forfeited.[60] In April 1862, Congress passed the District of Columbia Emancipation Act [61] containing the features favored by Lincoln. The act provided for gradual emancipation with compensation to slaveowners. The act also authorized the appropriation of funds for colonization of the gradually freed slaves. In July, Congress provided that slaves taking refuge within the lines of the Union Army and those deserted by the rebels were to be declared free.[62]

By this time, many northerners had grown impatient with the President's apparent inaction and Horace Greeley addressed "The Prayer of Twenty Millions" to Lincoln informing him that "what an immense majority of the loyal millions of your countrymen require of you, is a frank declared, unqualified, ungrudging execution of the law of the land." [63] The President replied: [64]

> My paramount objective in this struggle *is* to save the Union, and *not* either to save or destroy slavery. If I could save the Union without freeing any slave, I would do it, and if I could save it by freeing *all* the slaves, I would do it; and if I could do it by freeing some and leaving others alone I would also do that. What I do about slavery, and the colored race, I do because I believe it helps to save the Union; and what I forbear, I forbear because I do *not* believe it would help to save the Union.

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[60] Act of Aug. 6, 1861, 12 Stat. 319.

[61] Act of Apr. 16, 1862, 12 Stat. 376. Congress also passed a law appropriating funds to effectuate the emancipation. Act of July 16, 1862, 12 Stat. 582.

[62] Act of July 16, 1862, 12 Stat. 589, 591.

[63] 2 Greeley, *The American Conflict: A History of the Great Rebellion in the United States of America 1860–64*, at 249–50 (1886).

[64] 5 Basler, *op. cit. supra* note 56, at 388.

It was not generally known that Lincoln had already notified his Cabinet of his intention to issue an emancipation proclamation at the appropriate time.

Just one month later, on September 22, 1862, Lincoln signed the preliminary proclamation abolishing slavery in those States which on January 1, 1863, continued in rebellion against the United States.[65]

The abolitionists were still not wholehearted in their approval. Garrison wrote that "this proclamation is not all that the exigency of the times . . . require . . . still it is an important step in the right direction." [66] However, the issuance of the final proclamation on January 1, 1863, was met with watch meetings and celebrations in the halls and churches of the North.[67]

Since the Constitution gave explicit recognition to the institution of slavery, the best resolution of the issue lay in constitutional amendment. Within a year after the proclamation several amendment proposals were presented to the Congress. On February 10, 1864, Senator Lyman Trumbull of Illinois reported an amendment based on the wording of section VI of the Northwest Ordinance of 1787.[68] On April 8, 1864, this proposal passed the Senate by substantially more than the necessary two-thirds majority but two months later it failed in the House of Representatives.

In June 1864, the Union National Convention which nominated Lincoln for a second term adopted a resolution stating: [69]

> We are in favor, furthermore, of such an amendment to the Constitution to be made by the people in conformity with its provisions as shall terminate and for-

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[65] 12 Stat. 1267.

[66] The (Boston) Liberator, Sept. 26, 1862, p. 2.

[67] Quarles, *Frederick Douglass* 199–202 (1948).

[68] Cong. Globe, 38th Cong., 1st Sess. 553 (1864).

[69] Porter and Johnson, *National Party Platforms: 1840 to 1956* at 35 (1956).

ever prohibit the existence of slavery within the limits of jurisdiction of the United States.

Referring to the amendment that failed in the House the previous year, Lincoln, in his last annual message to Congress in December 1864, said: [70]

> . . . without questioning the wisdom or patriotism of those who stood in opposition, I venture to recommend the reconsideration and passage of the measure at the present session.

In the House, Representative Rollins of Missouri remonstrated that "we can never have an entire peace in this country as long as the institution of slavery remains as one of the recognized institutions of the country." [71] Within the month the proposed amendment passed the House and was submitted to the States for ratification. The States acted with dispatch and on December 18, 1865, Secretary of State Seward certified the adoption of the 13th amendment. The new amendment provided: [72]

> SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction. SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

The announcement of the adoption of the amendment was hailed in the halls of Congress and by the forces that had worked so long in the abolition movement. It was hailed in William Lloyd Garrison's paper as "the final crowning

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[70] 8 Basler, *op. cit. supra* note 56, at 149.

[71] Cong. Globe, 38th Cong., 2d Sess. 260 (1865).

[72] 13 Stat. 774; Corwin, *The Constitution of the United States of America* 44 (1953).

and completion of the labors of the American abolitionists." [73] However, the editorial stressed that the struggle for equality was not ended and gave the following admonition: [74]

> We are now to concentrate the whole power of American law, justice, conscience, sense of consistency and duty, and bring all to bear on the work of making the freedmen in every sense a freeman and citizen.

The institution of slavery was abolished. But Abraham Lincoln did not live to see the fruits of what is now recognized as his greatest achievement. Eight months earlier, an assassin's bullet had ended his life.

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[73] The (Boston) Liberator, Dec. 22, 1865, p. 2.
[74] *Ibid.*

1865
Freedom, Reunion, and Reconstruction
1875

THE war was over. Lincoln was dead. The responsibility for defining the status of more than three and one-half million southern Negroes, no longer slaves, fell upon a war-weary Congress and a Unionist, but southern, President.[1] For President Andrew Johnson it was probably an unwelcome responsibility. However, it was one which he would discharge by attempting to adhere to the reconstruction policy laid down by Lincoln.

Large sections of the former Confederate States had been laid waste. Union force had succeeded in annihilating the doctrines of secession and slavery, but the southern dogmas of States rights and Negro inferiority remained. The challenge was clear. If the Emancipation Proclamation was not to be reduced to sentiment, a program had to be formulated to make Negro freedom a reality. Into the postwar fabric of economic desolation, social hostility, and political chaos, there had to be woven the threads of civil equality. The problem of determining the relation of the freedman to society was not simple.

President Lincoln's Reconstruction Plan, proclaimed December 8, 1863, went no further than to declare, "that any provision which may be adopted by such [former Confederate] State government in relation to the freed people of such State which shall recognize and declare their permanent freedom, provide for their education, and which may yet be consistent as a temporary arrangement with their present condition as a laboring, landless, and homeless class, will not be objected to by the National Executive." [2]

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[1] Milton, *The Age of Hate: Andrew Johnson and the Radicals* 176–89 (1930).

[2] 7 Richardson, *A Compilation of the Messages and Papers of the Presidents* 3415 (1897).

In the closing months of the Civil War, Congress sought to develop a program of assistance for Negroes by establishing the Bureau of Refugees, Freedmen, and Abandoned Lands.[3] But the work of the Freedmen's Bureau, as it was commonly called, was largely in the area of relief. Only its educational program, which established schools and sought to protect the employment rights of freedmen, looked to long-range improvement in their status.[4]

In the meantime, conditions began to deteriorate in parts of the South. In the weeks and months following the surrender at Appomattox, organized bands of whites terrorized Negroes throughout the South. In the absence of Federal intervention, the road stood all but wide open, as Wilbur J. Cash has said, "to the ignoble hate and cruel itch to take him [the Negro] in hand which for so long had been festering impotently in the poor whites." [5]

A Reluctant President

It was no easy matter to assess the implications of the northern victory and the emancipation. People in both North and South were more anxious to return to their peacetime pursuits than to work out monumental reforms. Despite his strong Unionist feelings and joy over the northern victory, President Johnson was not sympathetic to the idea of Federal protection [6] of equal rights for Negroes. A States rights Democrat, he believed that issues such as the protection of civil rights were reserved to the States by the Constitution.

The President's reconstruction program closely followed the broad outlines developed by his predecessor. During a long recess of Congress, which began on the day he took

[3] Act of Mar. 3, 1865, 13 Stat. 507.
[4] Bentley, *A History of the Freedmen's Bureau* 214 (1955).
[5] Cash, *The Mind of the South* 113 (1941).
[6] McKitrick, *Andrew Johnson and Reconstruction* 85–92 (1960).

office, President Johnson proclaimed amnesty for all former rebels who would swear or affirm allegiance to the Union and agree to "abide by and faithfully support all laws and proclamations which have been made during the existing rebellion with reference to the emancipation of slaves." [7] He then appointed provisional Governors for the former Confederate States. It was the chief duty of the Governors to call constitutional conventions in which only persons loyal to the United States would be allowed to serve. The proclamation also provided that State legislatures might prescribe qualifications for voting and office-holding—"a power the people of the several States composing the Federal Union have rightly exercised from the origin of the Government to the present time." [8] By the time Congress reconvened in December, all the former Confederate States except Texas had been reconstituted. The President had achieved his aim—to restore the seceded States to their normal functions in the shortest possible time. He had also laid the groundwork for a return to power by former Confederate leaders.

The Black Codes

In 1865 and 1866, the southern State legislatures enacted a series of laws, varying in harshness, to define the status and rights of Negroes. The so-called Black Codes "showed the combined influence of the old laws for free Negroes, the vagrancy laws of the North and South for whites, the customs of slavery times, the British West Indies legislation for ex-slaves, and the regulations of the U.S. War and Treasury

[7] 8 Richardson, *op. cit. supra* note 2, at 3509. Fourteen classes of persons, mostly leaders of the Confederacy, were excepted. But members of these groups were permitted to make a special application for pardon, "and such clemency will be liberally extended." *Id.* at 3509–10.

[8] 8 Richardson, *op. cit. supra* note 2, at 3510–12, 3512–14, 3516–18, 3519–21, 3521–23, 3524–26, 3527–29.

Departments and of the Freedmen's Bureau." [9] In general, they recognized the right of Negroes to hold property, to sue and be sued, and to contract legal marriages and have legitimate offspring. There were important qualifications. In certain States, Negroes were competent witnesses only in cases where one or both parties were Negroes.[10] Negroes with no visible means of support were vagrants and were to be taken up, fined, and turned over to persons who would pay their fines; Negroes were to possess no firearms or alcoholic beverages. In some States, Negroes were not permitted within the town limits without special permission. In some, Negroes had to be off city streets by a given hour. Mississippi forbade the purchase of land by Negroes except in incorporated towns; in other States their purchases were confined to the countryside. In South Carolina they could not engage in any trade, except for agricultural or domestic work, without a special permit. Most of the laws employed such terms as "master" and "servant," and strongly resembled those previously regulating the relationship of master and slave.[11]

Florida condoned whipping and the pillory as punishment for petty offenses, while South Carolina permitted a master to "moderately correct" servants less than 18 years old. The effect of the Black Codes was to consign the Negro to a position of legal inferiority.[12] This position was reinforced by the fact that he could not vote.

In his last public address, President Lincoln had said: "I would myself prefer that it [the elective franchise] were now

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[9] Fleming, *The Sequel of Appomattox* 94 (1919).

[10] These laws were not without precedent; five northern States, prior to the war, had statutes forbidding the testimony of a Negro in "any action concerning a white person." Johnson, *The Development of State Legislation Concerning the Free Negro* 22 (1919).

[11] Johnson, *op. cit. supra* note 10, at 92, 94–95; Simkins, *A History of the South* 267 (1953).

[12] 1 Fleming, *Documentary History of the Reconstruction* 273–312 (1906); Simkins, *op. cit. supra* note 11, at 267–68.

conferred on the very intelligent [Negro], and on those who serve our cause as soldiers." [13] President Johnson had hoped that for "tactical reasons" this might be done on a limited scale. But as long as the former Confederates were in power, enfranchisement of Negroes was not seriously considered.

The perpetration of violence against Negroes, the dispatch with which the former Conferedate States acted to limit their civil rights, and the failure of the Federal Government to take action to protect them led Negroes to band together to speak out in their own behalf. In the summer and fall of 1865, Negroes held several conventions in the South. In Charleston, Mobile, Nashville, Raleigh, and in Mississippi Negroes demanded the vote, the abolition of the Black Codes, and the protection of their basic rights.[14] Northern Negroes joined in. At its first annual meeting in October 1865, the National Equal Rights League declared the question of enfranchisement to be all-important and asked for a constitutional amendment which would provide, "That there shall be no legislation within the limits of the United States or Territories, against any civilized portion of the inhabitants, native-born or naturalized, on account of race or color, and that all such legislation now existing within said limits is anti-republican in character, and therefore void." [15]

Many white citizens supported Negroes in their claim for civil rights. Perhaps the whites' most important effort was the "radical" Union League of America, organized in the North during the war to rally citizen support for the Union

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[13] 8 Basler, *The Collected Works of Abraham Lincoln* 403 (1953).

[14] Franklin, *From Slavery to Freedom: A History of American Negroes* 302 (1956).

[15] *First Annual Meeting of the National Equal Rights League Held in Cleveland, Ohio, October 19, 20, 21, 1865; Proceedings* 21, 52 (1865), quoted in Franklin, *Civil Rights in The United States: A Chapter in the Emancipation of the Negro, 1863–1963,* Aug. 1962 (unpublished manuscript in U.S. Commission on Civil Rights Library).

cause. After the war ended, the League worked for the adoption of a Republican policy to extend equal political and legal rights to Negroes.[16] In November 1865, its New York State Council adopted a resolution embodying these principles. It provided: [17]

> Resolved that all persons, without distinction of color, are alike equally entitled to the benefit of those clauses of the Federal Constitution, designed for the protection and maintenance of *personal* rights; and that it is the duty of Congress to give effect to those clauses by additional legislation wherever in the case of any class of persons the rights intended to be so secured are known to be invaded or endangered, whether by positive acts . . . in any State, or by their indisposition or inability to repress the lawlessness. . . .

Copies of the document were sent to members of Congress and to other influential persons.

Congress Responds

In December 1865, Congress established the Joint Committee on Reconstruction "to inquire into the condition of the States which formed the so-called Confederate States of America and report whether they, or any of them, are entitled to be represented in either house of Congress."

While the committee was hearing testimony from scores of witnesses, white and Negro, northerner and southerner, Congress enacted legislation extending the life of the Freedmen's Bureau and enlarging its powers within those States "in which the ordinary course of judicial proceedings has been interrupted by the rebellion." The bill established military

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[16] Franklin, *op. cit. supra* note 14, at 321–22.

[17] Quoted in Franklin, *op. cit. supra* note 15.

jurisdiction over all parts of the United States containing refugees and freedmen, extending it in 11 States to all cases affecting freedmen and refugees discriminated against "by local law, custom, or prejudice." White persons charged with depriving a freedman of "any civil rights or immunities belonging to white persons" were to be tried by a military judge, without jury, and if convicted, could be imprisoned, fined or both. The bill referred to certain of the Johnson Reconstruction States as not "fully restored in all their constitutional relations to the United States." It was predictable that President Johnson would exercise his veto power. When he did, he inaugurated open warfare with the powerful but as yet untried "Radical" wing of Congress.[18]

On March 13, 1866, after weeks of debate in both Houses, Congress adopted civil rights legislation embracing many of the "objectionable" provisions of the Freedmen's Bureau Bill. It provided, in part:[19]

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States, and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be sub-

[18] 8 Richardson, *op. cit. supra* note 2 at 3596–603; McKitrick. *op. cit. supra* note 6, at 315–16.

[19] Act of Apr. 9, 1866, 14 Stat. 27. See note 24, *infra.*

ject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

Congressional authority to declare a native-born person a citizen was questioned. Senator Peter G. Van Winkle of West Virginia declared that the provision could not be justified under the power of Congress to pass uniform laws of naturalization, for "it involves not only the Negro race, but other inferior races that are now settling on our Pacific coast, and perhaps involves a future immigration to this country of which we have no conception." [20] Senator Lyman Trumbull of Illinois argued that there was no doubt of the constitutional authority of Congress to declare native born persons citizens. Such a declaration he considered necessary to remove any doubt that might persist in any of the former Confederate States.[21]

Further debate centered on whether the legislation carried with it the right to vote and whether it violated the right of the States to establish qualifications for citizenship. Those who opposed the bill answered both questions in the affirmative. Senator Jacob Howard of Michigan, a member of the Judiciary Committee when the 13th amendment was drafted, declared that there was no invasion of the "legitimate rights of the States. It contemplates nothing of the kind; but it simply gives to persons who are of different races or colors the same civil rights. We will not say to the emancipated slave, 'We set you free, but beyond this we give you no protection; we allow you again to be reduced to slavery by your old masters, because it is the right of the State which has enslaved you for two hundred and fifty years.' " [22]

On March 27, 1866, President Johnson vetoed this legislation. His message to the Senate set the tone that was to per-

[20] Cong. Globe, 39th Cong., 1st Sess., 475 (1866).
[21] *Id.* at 497.
[22] *Id.* at 504.

meate Executive policy for the remainder of his term in office:[23]

> In all our history, in all our experience as a people living under Federal and State law, no such system as that contemplated by the details of this bill has ever before been proposed or adopted. They establish for the security of the colored race safeguards which go infinitely beyond any that the General Government has ever provided for the white race. In fact, the distinction of race and color is by the bill made to operate in favor of the colored and against the white race. They interfere with the municipal legislation of the States, with the relations existing exclusively between a State and its citizens, or between inhabitants of the same State—an absorption and assumption of power by the General Government which, if acquiesced in, must sap and destroy our federative system of limited powers and break down the barriers which preserve the rights of the States. It is another step, or rather stride, toward centralization and the concentration of all legislative powers in the National Government. The tendency of the bill must be to resuscitate the spirit of rebellion and to arrest the progress of those influences which are more closely drawing around the States the bonds of union and peace. . . .

On April 9, 1866, Congress overrode the President's veto.[24] The Civil Rights Act of 1866 became law.

The President did nothing to implement the act. Supporters who might have agitated for vigorous enforcement turned their efforts instead toward incorporating the provisions of the act into the 14th amendment. In this manner,

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[23] 8 Richardson, *op. cit. supra* note 2, at 3610–11.

[24] Cong. Globe, 39th Cong., 1st Sess. 1861 (1866).

they hoped to answer questions of constitutionality and avert any prospect of repeal by a subsequent Congress.[25]

Radical Rule

Anticipating an inevitable attack on the constitutionality of the Civil Rights Act of 1866, the Joint Committee on Reconstruction on April 30, 1866, formulated a set of resolutions which ultimately became the 14th amendment to the Constitution of the United States.[26] The proposed legislation enjoined the States from abridging the privileges or immunities of citizens of the United States, depriving any

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[25] Flack, *The Adoption of the Fourteenth Amendment* 75–87 (1908).

[26] The full text of the 14th amendment is as follows:

SECTION 1. 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.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies

persons of life, liberty, or property without due process of law, or denying any person equal protection of the laws. It also proposed to reduce the congressional representation of any State denying or abridging the franchise of any male citizen over 21 years of age in the proportion which the number of the disenfranchised bore to the whole number of adult male inhabitants of a State. The Senate added a new section which defined citizenship.

A leading Radical, Senator Charles Sumner of Massachusetts, feared that the proposed amendment would not provide adequate guarantees for Negro suffrage. Other northerners in States where Negroes could not vote feared that the amendment might go too far and lead to national Negro suffrage. But most talk of Negro suffrage was submerged in the broader debate over whether to follow the Radical approach to readmission of the Southern States. The Radicals maintained that the proposed amendment was necessary to the prompt and orderly readmission of the Southern States.[27]

On June 13, 1866, Congress proposed the 14th amendment. Of the Southern States, Tennessee alone ratified the proposed amendment and was readmitted on July 19, 1866. Before the end of the year, the governments of Texas, South

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thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

[27] 2 Rhodes, *History of the United States* 90 (1920); Woodson and Wesley, *The Negro in Our History* 397–98 (1962).

Carolina, Georgia, and North Carolina had rejected it. In the first months of 1867 they were joined by Virginia and Louisiana, together with the border States of Kentucky and Maryland.[28] Governor D. S. Walker of Florida expressed the southern position when he said: [29]

> Look around you and see how few persons will be left in office after this Amendment is adopted, and you will see that to vote for it is to vote for the destruction of your State Government. After taking out all the proscribed officers, there will not be enough left to order elections to fill the vacancies, and a Military Government will become necessary.

The constitutional requirement for adoption of amendments is ratification by three-fourths of the States. By March 1, 1867, with the admission of Nebraska to statehood, the total number of States in the Union, including those of the old Confederacy, was 37, of which 28 would have to ratify the 14th amendment to bring it into effect. Only 20 States, including but 1 Southern State, had ratified the amendment as of that time. The Radicals in Congress insisted upon ratification of the 14th amendment and inclusion of Negro suffrage provisions in State constitutions as a condition to readmission of Southern States. They feared that unless the Negro was enfranchised, Democrats and ex-rebels would gain control of the National Government.[30] This insistence found legislative expression in the First Reconstruction Act designed to "provide for a more efficient government of the Rebel States." The act declared that "no legal State governments or adequate protection for life or property now exists" in 10 of the "rebel" States. It established provisional military governments and made return

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[28] Corwin, *The Constitution of the United States of America* 45 (1953).

[29] N.Y. Times, Nov. 22, 1866, p. 1.

[30] Simkins, *op cit. supra* note 11, at 269.

of control to the States dependent upon their ratification of the 14th amendment and the extension of elective franchise to all adult males: [31]

> . . . of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election, except such as may be disfranchised for participation in the rebellion or for felony at common law . . . .

The act was vetoed by the President and passed over his veto by Congress.

In his veto message on the First Reconstruction Act, President Johnson said: [32]

> The purpose and object of the bill—the general intent which pervades it from beginning to end—is to change the entire structure and character of the State governments and to compel them by force to the adoption of organic laws and regulations which they are unwilling to accept if left to themselves. The Negroes have not asked for the privilege of voting; the vast majority of them have no idea what it means. This bill not only thrusts it into their hands, but compels them, as well, as the whites, to use it in a particular way. If they do not form a constitution with prescribed articles in it and afterwards elect a legislature which will act upon certain measures in a prescribed way, neither blacks nor whites can be relieved from the slavery which the bill imposes upon them. Without pausing here to consider the policy or impolicy of Africanizing the southern part of our territory, I would simply ask the attention of Congress to that manifest, well-known, and universally ac-

[31] Act of Mar. 2, 1867, 14 Stat. 428.

[32] 8 Richardson, *op. cit. supra* note 2, at 3705.

> knowledged rule of constitutional law which declares that the Federal Government has no jurisdiction, authority, or power to regulate such subjects for any State. To force the right of suffrage out of the hands of the white people and into the hands of the Negroes is an arbitrary violation of this principle. . . .

Constitutional questions of this magnitude were an open invitation to challenge the act and with it the entire basis of Radical Reconstruction.

Besides, if Congress could force the former Confederate States to enfranchise Negroes, it could only hope that other States would do likewise. Some of them, however, had no intention of doing so. In the spring of 1867, the New Jersey Assembly rejected a resolution to delete "white" from its suffrage requirements. Later in the year, Maryland adopted a new constitution giving the vote to whites only, and Ohio rejected a Negro suffrage amendment. These steps convinced the President that the country did not completely support the idea of Negro suffrage. If Negro suffrage was not established in the North, there was no reason for establishing it in the South. The Negroes of the South, Johnson said, not only had no regard for the rights of property, but were "so utterly ignorant of public affairs that their voting can consist in nothing more than carrying a ballot to the place where they are directed to deposit it." [88]

However, the act accomplished the congressional purpose. Arkansas, Florida, North Carolina, Louisiana, South Carolina, Alabama, and Georgia came into line and ratified the amendment between April and July 1868, as the price of readmission, and on July 28, 1868, Secretary of State Seward

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[88] *Id.* at 3763. See (Trenton, N.J.) Daily State Gazette, April 11, 1867, p. 2; Constitution of the State of Maryland, art. I, sec. 1, as adopted Sept. 18, 1867; N.Y. Times, Oct. 10, 1867, p. 1.

certified that the 14th amendment was a part of the Constitution.[84]

The year 1868 also marked the Radicals' attempt to rid themselves of the obstreperous President who had been a constant thorn in their side. Congress had passed a law, again over Presidential veto, which in effect subjected the President's power to remove appointed Federal officials to the advice and consent of the Senate.[85] Without consulting the Senate, President Johnson dismissed Secretary of War Stanton, a Radical sympathizer. For violating the act, and for publicly condemning the legislative branch of the Federal Government, the Radical-controlled House of Representatives brought Articles of Impeachment against the President.[86]

The impeachment trial centered around the question of whether the President was bound to execute all the laws of the land, or whether, when he believed a law to be unconstitutional, he could refrain from observing it.[87] Conviction failed by one vote in the Senate.[88] The point had been made, however. For the remainder of his term, President Johnson would not again engage in open warfare with Congress.

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[84] By July 1868 New Jersey and Ohio had "withdrawn" their earlier ratification (the effectiveness of such withdrawal being a matter of dispute). By this time also, however, Massachusetts, Nebraska and Iowa had ratified, bringing the total of unchallenged ratifications to the needed 28. Corwin, *op. cit. supra* note 28, at 45.

[85] Act of Mar. 2, 1867, 14 Stat. 430.

[86] 8 Richardson, *op. cit. supra* note 2, at 3907–16. Ironically enough, in a case involving dismissal of a postmaster by President Wilson in 1920, the Supreme Court, in 1926, speaking through Chief Justice Taft, declared "that the Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so." *Myers* v. *United States,* 272 U.S. 52, 176 (1926).

[87] Corwin, *The President: Office and Powers 1787–1957* at 64–65 (1957).

[88] *Id.* at 65.

On February 26, 1869, Congress proposed a 15th amendment to the Constitution of the United States, the first section of which provided:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude.

In less than one year, ratification was completed and on March 30, 1870, Secretary of State Fish certified that it had become a part of the Constitution.[39]

Southern Resistance

The Negro was enfranchised. He held many important posts in the governments formed under the four Reconstruction Acts of 1867.[40] Louisiana, Mississippi, and South Carolina had Negro lieutenant governors. The speaker of the House in Mississippi and the superintendent of public education in Florida were Negroes. Between 1869 and 1901, 22 Negroes were sent from the South to Congress. Hiram R. Revels and Blanche K. Bruce served in the Senate representing Mississippi. Of the 20 Negroes who were elected to the lower House, South Carolina sent 8; North Carolina 4; Alabama 3; and Florida, Georgia, Louisiana, Mississippi and Virginia, 1 each.[41]

The Negro also secured access to the judicial process. In an effort to eliminate the legal disabilities suffered by the Negro both under slavery and the Black Codes, Congress in

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[39] 16 Stat. 1131. All 10 Radical Reconstruction governments were among the ratifying States. Ohio, N.J., and Del. ratified after having first rejected the amendment. N.Y. "withdrew" its assent after first having ratified. Calif., Ky., Md., Oreg., and Tenn. rejected the amendment. See Corwin, *op. cit. supra* note 28, at 47.

[40] Act of Mar. 2, 1867, 14 Stat. 428; act of Mar. 23, 1867, 15 Stat. 2; act of July 19, 1867, 15 Stat. 14; act of Mar. 11, 1868, 15 Stat. 41.

[41] Franklin, *op. cit. supra* note 14, at 316.

the Civil Rights Act of 1866 declared that all persons would have the same right "to make and enforce contracts, to sue, be parties, and give evidence." [42] Several Radical Reconstruction governments enacted similar legislation. Arkansas, in 1866, and Mississippi, in 1867, guaranteed equal treatment for the Negro in State courts, and in time other States eliminated their constitutional and statutory disabilities on Negro participation.[43] These provisions were to remain in effect when other Reconstruction legislation fell at the hands of the Redeemers.[44]

While Radical leadership brought about changes in the fundamental law of the land, resulting in national suffrage for the Negro from 1870 on, it failed to cope with mounting southern opposition to the exercise of the franchise by Negroes. The general organization of the Ku Klux Klan was strengthened in the spring of 1867 and it became a powerful organization with "dens" in many parts of the South. As its first Grand Wizard, General Nathan Bedford Forrest said in August 1868 that the Klan was opposed to Negro suffrage under any and all circumstances.

When the Klan failed to achieve its goal of white supremacy and fell into the hands of local terrorists, many of its prominent members resigned. In 1869, the Grand Wizard announced the formal disbandment of the Klan, but it continued to exist as a secret society and stepped up underground activities to prevent the Negro from exercising his

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[42] 14 Stat. 27 (1866).

[43] Johnson, *op. cit. supra* note 10, at 68, 131 (1919); Wharton, *The Negro in Mississippi 1865–1890* at 93 (1947).

[44] Johnson, *op. cit. supra* note 10, at 69, 131. Redemption is C. Vann Woodward's term for the period following the withdrawal of Federal troops from the South in 1877. The leaders of the white South during this year credited with delivering the South from the evils of Reconstruction were known similarly as the Redeemers. See generally, Woodward, *Origins of the New South, 1877–1913,* ch. 1 (1951). The influence of this group came to an end probably by 1890 with the Populist movement and the agrarian revolt.

vote and enjoying other rights. In Tennessee, Alabama, and several other States, the legislatures had enacted "Ku Klux laws" in an effort to bring the secret societies under control. They did not succeed.[45] By 1870, the entire Radical Reconstruction program—less than three years old—was on the brink of collapse in many parts of the South and the rights of freedmen were seriously jeopardized.

It became clear that, without additional Federal action, the new constitutional amendments would be merely words on a piece of paper. In the weeks following the ratification of the 15th amendment, pressure mounted for the enactment of enforcement legislation.[46] Opposition was vigorous, many asserting that the Federal Constitution did not give Congress the power to implement the amendments. In May 1870, a law was passed. It declared that all citizens of the United States who are otherwise entitled to vote in any State election, municipality or other subdivision, shall be entitled to vote without distinction of race, color, or previous condition of servitude. States setting up prerequisites for voting were required to give all citizens an equal opportunity to meet them. Persons hindering, obstructing, or exercising control over qualified electors in the exercise of their franchise were made subject to fine, imprisonment, or both. Violators were to be prosecuted in the courts of the United States, and Federal officials—ranging from special commissioners to Supreme Court Justices—were to facilitate the law's enforcement.[47]

In the Presidential election of 1868, General Ulysses S. Grant defeated his Democratic opponent, Horatio Seymour, former Governor of New York, by a margin of 306,000 votes, with the Negro vote probably deciding the election. In

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[45] Horn, *The Invisible Empire: The Story of the Ku Klux Klan 1866–71*, at 414 (1939); Simkins, *op. cit. supra* note 11, at 285, 288; Franklin, *Reconstruction After the Civil War* 155–63 (1961).

[46] Cong. Globe, 41st Cong., 2d Sess. 3661–68 (1870).

[47] Act of May 31, 1870, 16 Stat. 140.

the winter of 1870–71, while Congress debated additional legislation to curb the Klan, President Grant took stock of the situation. He had been optimistic when, earlier in the year, Secretary Fish certified that the 15th amendment had become a part of the Constitution. Its ratification, he said, "completes the greatest civil change and constitutes the most important event that has occurred since the nation came into life." [48] But by December he had to admit that "a free exercise of the elective franchise has by violence and intimidation been denied to citizens in exceptional cases in several of the States lately in rebellion and the verdict of the people has thereby been reversed." [49] On February 28, 1871, the Second Enforcement Act became law. Under it, supervisors of elections were appointed by Federal courts and interference with the discharge of their duties became a Federal offense. Federal courts were given jurisdiction over the election supervisors and their work.[50]

Before this law could be tested, a new session of Congress convened. Sentiment in favor of maintaining the new southern governments, by Federal force, if necessary, grew even stronger. There were reports of civil strife in many parts of the South. Riots in South Carolina confirmed the President's growing conviction that life and property were insecure and that the carrying of mails and the collection of revenue were endangered. In a special message to Congress he indicated his belief that the States' ability to meet the problem effectively was inadequate and his own powers might not be sufficient. He urgently recommended "such legislation as in the judgment of Congress shall effectually secure life, liberty, and property and the enforcement of law in all parts of the United States," [51] and issued a proclamation

[48] 9 Richardson, *op. cit. supra* note 2, at 4010.
[49] *Id.* at 4050.
[50] Act of Feb. 28, 1871, 16 Stat. 433.
[51] 9 Richardson, *op. cit. supra* note 2, at 4081.

condemning the lawless elements in South Carolina and ordering them to disperse within 20 days.[52]

Congress responded. On April 20, 1871, it enacted the Third Enforcement Act. Because the primary purpose of the "Ku Klux Act," as it was commonly referred to, was to restrict the activities of secret societies such as the Klan, it forbade conspirators to go in disguise upon a public highway or upon the premises of another to deprive any person of equal protection of the law or equal privileges or immunities under the law. Any action under color of law which deprived persons of their rights under the laws or Constitution of the United States was also made subject to criminal sanctions. Its broad provisions prohibited conspiracies to overthrow the Government of the United States; to prevent the execution of its laws; to use force or threat to prevent any person from holding office or discharging the duties of any office under the United States; to deter any party or witness from testifying in any United States court; or to influence a juror in any United States court. The President was given authority to suppress violence resulting in the deprivation of constitutional rights if State authorities were either unable or unwilling to do so. In areas where unlawful combinations to obstruct Federal justice were "so numerous and powerful" as to be able to overthrow or defy the constituted governments, the President could suspend the privilege of the writ of habeas corpus and proclaim martial law.[53]

The President issued a proclamation calling public attention to the new legislation and warned that, while he would be reluctant to exercise the powers granted him, he would use them "whenever and wherever it shall be necessary to do so." In October, he suspended the writ in nine South Carolina counties which had been especially chaotic and violent in the summer of 1871.[54]

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[52] *Id.* at 4086–87.

[53] Act of Apr. 20, 1871, 17 Stat. 13.

[54] 9 Richardson, *op. cit. supra* note 2, at 4088–89, 4090–92.

Only the Civil War itself exceeded in turbulence and near chaos the decade ending in 1875. The postwar decade saw not the conciliation of aroused feelings and conflicting interests generated by the war but rather the deepening and festering of war-caused wounds in the national consciousness. Efforts toward conciliation were countered and overwhelmed by an irresistible tide of determination to take revenge upon the vanquished. The legal guarantees of emancipation and enlargement of constitutional rights for the new freedmen came close to being made a travesty by uncompromising former masters who refused to recognize in the Negro any semblance of equality. By the end of the period, radical reconstruction governments were all but in a state of collapse. Within a few years the withdrawal of Federal troops was to deprive them of crucial support and inevitably result in their downfall. At the end of this century, some 25 years later, the wounds of this period would still throb in memory; by that time, also, the former masters would have mastered techniques of maintaining separation of the races through the agencies of the law.

1875
Reaction, Redemption, and Jim Crow
1900

IN 1875, Congress enacted the most far-reaching civil rights legislation it had ever considered. Senator Charles Sumner had introduced a bill five years earlier providing for equal rights in railroads, steamboats, public conveyances, hotels, licensed theaters, houses of public entertainment, common schools, all institutions of learning authorized by law, churches, cemetery associations, and juries in Federal and State courts. The Senate Judiciary Committee reported adversely on the bill in that session of Congress and the next. Sumner's appeal for enactment of the bill was, in a sense, a summary of the arguments advanced by all who had supported civil rights legislation since the close of the war:[1]

> I make this appeal . . . for the sake of peace, so that at last there shall be an end of slavery, and the rights of the citizen shall be everywhere under the equal safeguard of national law. . . . There is true grandeur in an example of justice, making the rights of all the same as our own, and beating down prejudice, like Satan, under our feet. Humbly do I pray that the republic may not lose this great prize, or postpone its enjoyment.

Sumner's bill was some years becoming law. But it was a new, high ground on which Congress stood when it enacted the Civil Rights Act of 1875. The preamble of this act proclaimed congressional recognition of "the equality of all men before the law," and recognized the responsibility of government to "mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political." It then declared that all persons within the jurisdiction of the

[1] 4 Pierce, *Memoir and Letters of Charles Sumner* 500 (1893).

United States "shall be entitled to the full and equal enjoyment of the acommodations, advantages, facilities, and privileges of inns, public conveyances on land and water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." [2]

But in 1875, the mood of the Nation was no longer favorable to the vigorous enforcement of civil rights. "The North had grown weary of the crusade for the Negro." [3] In the same year, when Mississippi requested more troops, President Grant was moved to reply: "The whole public are tired out with these annual Autumnal outbreaks in the South, and the great majority are ready now to condemn any interference on the part of the Government." [4] Radical reconstruction had reached its high water mark, but reaction had already set in. The next decades were to be the ebb tide in the Negro's struggle for equality under law.

Political Compromise and Federal Withdrawal

In the fall of 1876, what remained of Radical Reconstruction was pushed toward oblivion by a controversial Presidential election. Democratic Presidential candidate Samuel J.

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[2] Act of Mar. 1, 1875, 18 Stat. 335. Three States preceded the Federal Government in the enactment of laws banning discrimination in privately owned places of public accommodation: Mass. (1865); N.Y. (1874); and Kans. (1874). Konvitz and Leskes, *A Century of Civil Rights* 155–56 (1961). The District of Columbia, then possessing self-government, had also enacted broad prohibitions against discrimination. June 10, 1869, ch. 36, p. 22, Corp. Laws of Wash., 66th Council, secs. 1, 2; March 7, 1870, ch. 42, p. 22, Corp. Laws of Wash., 67th Council, sec. 3; Leg. Assem., June 20, 1872, sec. 1; 3 Leg. Assem., June 26, 1873, ch. 46, sec. 2. See *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100 (1953).

[3] Franklin, *From Slavery to Freedom: A History of American Negroes* 327 (1956).

[4] N.Y. Times, Sept. 17, 1875, p. 1.

Tilden of New York polled 250,000 votes more than Republican Rutherford B. Hayes of Ohio. The electoral votes of Florida, Louisiana, South Carolina, and Oregon were in dispute, however, since each State had dispatched two sets of election returns to Washington. Because of this, the Republicans refused to concede the election. Without the electoral votes of those four States, Tilden would fall one vote short of the majority required in the electoral college. On the subject of counting electoral votes, the Constitution provides that "The President of the Senate shall, in the presence of the Senate and the House of Representatives, open all certificates and the votes shall then be counted." [5] But it does not say who should count them. Therefore, a Republican Senate might have resolved the dispute in favor of Hayes, and a Democratic House in favor of Tilden.

The dilemma was resolved by creating an Electoral Commission composed of five members of each of the two houses of Congress, and five Supreme Court Justices, four of whom were designated in the bill and authorized to select a fifth. With the appointment of the fifth Justice, the political makeup of the Commission became eight Republicans and seven Democrats. The Commission decided for Hayes by a party vote of eight to seven. It was popularly understood that southern Democratic acceptance of this choice hinged on a promise to withdraw Federal troops from the South, and appoint a southerner to the Cabinet. David M. Key of Tennessee was appointed Postmaster General and in April 1877, the last Federal troops were withdrawn from the South. The remaining Radical Reconstruction governments promptly collapsed.[6] All that survived of these first efforts to establish racial equality in the United States were three consti-

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[5] U.S. Const. art. II, sec. 1.

[6] Woodward, *Reunion and Reaction* 235, 240 (Anchor ed. 1955); Logan, *The Negro in American Life and Thought: The Nadir 1877–1901* at 29 (1954).

tutional amendments and a panoply of unenforced Federal legislation.[7] A foundation, at least, had been laid, but it was not to receive Federal support in the years to come.

In 1880, Congress enacted legislation barring the use of military forces in elections.[8] Free of the threat of Federal armed intervention, the former Confederate States had all but completed the task of Negro disfranchisement. Now they sought to rid themselves of all possibility of Federal intervention. In September 1893, Representative Henry St. George Tucker of Virginia introduced a bill "to repeal all statutes relating to supervisors of elections and special deputy marshals, and for other purposes." Early in 1894, the bill passed both Houses and was signed by President Cleveland.[9] Among the measures repealed were those portions of the First Enforcement Act requiring voting qualifications to be equal for all persons, obliging election officials to receive the vote of all qualified persons, and providing punishment for any person found guilty of obstructing the exercise of the franchise by qualified voters. Also repealed were provisions of the Second Enforcement Act which specified the conditions and manner under which Federal elections were to be supervised. It was a signal victory for the opponents of Negro suffrage and a mainstay for States that planned to complete the process of disfranchising the Negroes through amendments to their constitutions.

The Presidents in the post-Reconstruction period were far more concerned with restoring peace and setting the country on the road to further economic development than with taking up the struggle for racial equality. In his annual

[7] The few civil rights laws which had been enacted by Northern States and Southern States during Reconstruction did not have the respect of the general community and did not enjoy vigorous enforcement by responsible officials. Berger, *Equality by Statute* 12–13 (1952).

[8] Act of May 4, 1880, 21 Stat. 113.

[9] Act of Feb. 8, 1894, 28 Stat. 36; Logan, *op. cit. supra* note 6, at 61–71.

message in 1872, President Grant complained that "reckless and lawless" men were depriving other citizens of their rights. However, he did not go beyond deploring the situation.[10]

President Rutherford B. Hayes, and his immediate successors, James A. Garfield (who was assassinated within months of his inauguration) and Chester A. Arthur, did not mention enforcement of the Civil Rights Act of 1875 in any of their official messages and statements. However, President Arthur indicated that he would approve any legislation "which the Constitution affords for the equal enjoyment of all citizens of the United States of every right, privilege, and immunity of citizenship."

Grover Cleveland (1885–1889, 1893–1897), as a Democratic President, could be expected to respect southern sentiments. When in 1894 Congress passed the act repealing much of the civil rights legislation, he signed the bill without comment. In his first annual message, President Benjamin Harrison (1889–1893) admitted that Negroes were, for the most part, deprived of their political and many of their civil rights. But he gave no indication that he would enforce the laws protecting these rights. Instead he asked Congress to enact legislation to secure to all people "a free exercise of the right of suffrage and every other civil right under the Constitution and laws of the United States." [11]

Disfranchisement Proceeds

Complete disfranchisement of the Negro became the universal aim in the South. By 1890, it had been so successfully attained that the Atlanta newspaperman, Henry W. Grady, said: "The Negro as a political force has dropped out of serious consideration." [12]

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[10] 9 Richardson, *A Compilation of Messages and Papers of the Presidents* 4153 (1897).

[11] 7 *id.* at 4775, 5490–91.

[12] Grady, *The New South* 244 (1890).

With the doors to the polls now closed, it remained only to bolt them securely. In 1890, Mississippi, the majority of whose population was Negro, led the way. A State constitutional convention was called and a suffrage provision was adopted which imposed a poll tax of $2, disfranchised persons convicted of bribery, burglary, theft, arson, perjury, forgery, embezzlement, obtaining money or goods under false pretense, or bigamy, and required that all electors be able to read the State constitution, or understand it when read, or give a reasonable interpretation of it. Upon convention approval, the Governor declared the new constitution in effect.[13] Six years later the Mississippi Supreme Court had occasion to review the constitutional convention of 1890 and said: "Within the field of permissible action under the limitations imposed by the federal constitution, the convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race. . . ." [14] It was also the opinion of the court that the poll tax was "primarily intended by the framers of the constitution as a clog upon the franchise." [15]

When Louisiana revised its constitution in 1898, it followed Mississippi's lead and went one step further by granting the franchise to any person who, although lacking the requisite education and property, had been eligible to vote on January 1, 1866, or who was the son or grandson of a person eligible to vote on that date.[16] In 1910, the young State of Oklahoma followed Louisiana's lead and wrote a "grandfather clause" into its constitution.[17]

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[13] Miss. Const. secs. 241, 243, 244, 249, 251 (1890). See also, Wharton, *The Negro in Mississippi 1865–1890* at 214–15 (1947); Kirwan, *Revolt of the Rednecks, Mississippi Politics 1876–1925* at 60 (1951).

[14] *Ratliff* v. *Beale,* 20 So. 865, 868 (Miss. 1896).

[15] *Id.* at 869.

[16] La. Const. art. 197 (1898). Concerning S.C.'s 1895 constitutional convention, see Key, *Southern Politics in State and Nation* 530 (1949).

[17] Okla. Const. art. III (1910). See also *Guinn* v. *United States,* 238 U.S. 347 (1915).

In 1900, North Carolina adopted a reading and writing qualification together with a temporary grandfather clause to accommodate illiterate whites.[18] In 1901, Alabama "refined" its suffrage provisions by setting up literacy, poll tax, and property tests and conferring wide discretionary powers on election registrars.[19] When the Virginia constitutional convention met in the early summer of 1901, Carter Glass, then a member of the Virginia Senate, stated its main purpose: "Discrimination: Why that is precisely what we propose; that, exactly, is what this convention was elected for—to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every Negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate." [20]

By the winter of 1902, the convention had achieved its purpose. By 1910, every former Confederate State had either disfranchised the Negro by constitutional amendments, or deprived him of his political effectiveness by means of the Democratic white primary. The Negro's voting rights had virtually disappeared.[21]

The New South

The southerners who resumed control of State governments after the withdrawal of Federal troops faced enormous State debts, a lagging economy, and a pressing need to work out some kind of accommodation between the races. An important element in any solution to these problems was thought

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[18] Mabry, " 'White Supremacy' and the North Carolina Suffrage Amendment," 13 *North Carolina Historical Review* 5–6 (1936).

[19] Ala. Const. art. VIII (1901).

[20] Quoted in Lewinson, *Race, Class, and Party: A History of Negro Suffrage and White Politics in the South* 86 (1932).

[21] Franklin, " 'Legal' Disfranchisement of the Negro," 26 *Journal of Negro Education* 241–48 (1957).

to be the unity of whites in a conservative Democratic party.[22] Republicanism was driven from the State capitals, and soon from the South itself.

Often under the leadership of former Confederate generals, the new governments allied with financial and mercantile interests in an effort to bring the material prosperity of the North to a new South.[23] The results of this alliance were graphic. Cotton mills and fertilizer plants appeared across the South; coal and steel made important gains around Birmingham; railroads extended their networks to serve new industries and thriving urban centers like Atlanta, Charleston, and Charlotte. Progress was coming to the South, but it was not without its costs. Land sales and concessions to railroad interests, the depletion of natural resources, and the consolidation of smaller industries into large industrial complexes weakened regional economic independence. In addition, prosperity was not filtered down to the working-class southerner. As C. Vann Woodward wrote, "to a large extent the expanding industrialization of the new South was based upon the labor of women and children who were driven into the mills and shops to supplement the low wages earned by their men." [24] Farmers labored under the evils of the crop-lien system and inadequate political strength.

The post-Reconstruction leaders withstood rural challenges through the 1880's. A white minority in the Black Belt counties of the lowland South maintained their control by casting themselves in the role of the Negro's protector from the up-country whites in order to win the votes of the few Negroes still enfranchised.[25] Later as poll taxes, confusing election schemes, and complicated balloting processes substantially reduced the Negro electorate, legislative gerrymandering continued to ensure that the white majority in the

[22] Simkins, *A History of the South* 313 (1953).
[23] *Id.* at 319.
[24] Woodward, *Origins of the New South 1877–1913* at 226 (1951).
[25] *Id.* at 209.

upland counties would remain a minority in the State legislatures.[26]

Poor-white antipathy toward the Negro, always high, was increased by these tactics, and was encouraged by the agrarian demagogues of the 1880's. When agricultural and laboring interests finally united in a "Populist" movement under leaders like "Pitchfork" Ben Tillman of South Carolina, and wrested control of the Democratic Party from the patricians in the 1890's, racial antagonisms had reached a new height. Exclusion of the Negro from the political process was no longer considered sufficient to keep him at the bottom of the social ladder. Racial disabilities would be extended into all forms of social intercourse by the new generation of political leaders. According to Woodward, "the barriers of racial discrimination mounted in direct ratio with the tide of political democracy among whites." [27]

The Jim Crow Laws

The Black Codes had attempted, by defining the rights of the newly freed Negroes, concomitantly to limit them. The purpose of Jim Crow legislation was to maintain a separation between whites and Negroes in the use of certain public facilities.

There had been some segregation, both in law and practice, during Reconstruction and in the following decade. But it was not nearly as extensive in the early years as it later became.[28] From its post-Civil War beginnings, the South's public school system had, with few exceptions, been segregated. The armed services were segregated during the Civil War and continued to be segregated thereafter. The first State segregation legislation, requiring segregation on public

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[26] Simkins, *op. cit. supra* note 22, at 348.

[27] Woodward, *op. cit. supra* note 24, at 211.

[28] Woodward, *The Strange Career of Jim Crow* 23 (1957).

carriers, was enacted by Mississippi and Florida in 1865. Texas followed in 1866, but repealed its act 5 years later.

A Tennessee law of 1881, sometimes referred to as the first "Jim Crow" law, directed railroad companies to provide separate cars or portions of cars for first-class Negro passengers, instead of relegating them to second-class accommodations as had been the custom.[29] By 1894, the five Southern States of Louisiana, Alabama, Arkansas, Georgia, and Kentucky had joined Tennessee, though not without substantial opposition by some Negroes and sympathetic whites.[30] In 1898, South Carolina passed a law segregating Negroes and whites on railroads. In 1899 and 1900, North Carolina and Virginia enacted similar legislation. By the time Oklahoma entered the Union in 1907, segregation laws had been enacted throughout the South.[31] Added to the expanding roster of places in which segregation became mandatory were waiting rooms, theaters, boardinghouses, water fountains, ticket windows, streetcars, penitentiaries, county jails, convict camps, institutions for the blind and deaf, and hospitals for the insane.[32]

Supreme Court Reaction

Even before the radical leadership of Congress had completed its legislative program that culminated in the Civil Rights Act of 1875, the Supreme Court of the United States had begun to restrict the scope of the 14th amendment.

Ironically, the first decision of major impact did not involve Negroes but a slaughterhouse that had been granted a

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[29] Laws of Tenn., ch. CLV, p. 211 (1881).

[30] For example, in Arkansas a Negro member of the House sought to ridicule the bill's supporters by insisting that, if whites did not want to associate with Negroes, there should be laws to divide the streets and sidewalks so that Negroes could go on one side and white people on the other. (Little Rock) Arkansas Gazette, Feb. 14, 1891, p. 6.

[31] Woodward, *op. cit. supra* note 28, at 81–82.

[32] *Id.* at 83–84. See discussion of *Plessy* v. *Ferguson,* note 51, *infra.*

charter by the Louisiana legislature together with the exclusive privilege of slaughtering animals in the New Orleans area. Incensed local butchers brought suit claiming the action of the Louisiana Legislature violated the privileges and immunities, due process and equal protection clauses of the 14th amendment.

The Supreme Court, in its 1873 opinion in the *Slaughter-House Cases,* upheld the action of the Louisiana Legislature.[33] Mr. Justice Miller, speaking for the majority, asserted that the equal protection clause of the 14th amendment probably afforded protection only against racial discrimination directed against the newly freed Negroes.[34] The Court's construction of the privileges and immunities clause was of little benefit to the Negro. It found that only the vaguely defined privileges of *national* citizenship were protected by the clause.[35] The fundamental rights of the citizen in his relationship to his community were found to be beyond the reach of the privileges and immunities clause. There is little doubt that this narrow interpretation was in direct contradiction to the intentions of the framers of the clause,[36] but there is also little doubt that the Supreme Court was becoming attuned to the changing temper of the times.

In 1875, the Supreme Court heard arguments in the cases of *United States* v. *Cruikshank* and *United States* v. *Reese.*

The *Cruikshank* case involved a test of the conspiracy section of the Enforcement Act of 1870, part of the Reconstruction legislation designed to implement the 14th and 15th amendments. That section provided:

> That if two or more persons shall band or conspire together, or go in disguise upon the public highway,

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[33] *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36 (1873).

[34] *Id.* at 80–81.

[35] *Id.* at 74–75.

[36] 2 Warren, *The Supreme Court in United States History* 539–41 (1926).

> or upon the premises of another, with intent to violate any provision of this Act, or to injure, oppress, threaten or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony . . . .

Cruikshank and others had been convicted of "banding" and "conspiring together" to intimidate Negroes from the free exercise of their "right and privilege" to peaceably assemble for lawful purposes. Applying the *Slaughter-House* rationale, Chief Justice Waite, in 1876, held that the phrase "right or privilege" in the statute referred to rights and privileges incident to national citizenship. The right "peaceably to assemble for lawful purposes" anteceded the United States Constitution and is not derivative from it, reasoned the Chief Justice. As distinguished from the first amendment guarantee of "the right . . . peacefully to assemble, and to petition the Government for a redress of grievances," the more general right "peaceably to assemble for lawful purposes" is secured to individuals in their capacity as citizens of States, not in their capacity as citizens of the United States. Therefore Cruikshank had not so acted as to deprive persons of a "right or privilege" under the Constitution.[87]

In the *Reese* case,[88] the Court struck down two provisions of the act relating to voting rights under the 15th amendment. It ruled that Congress should have limited its legislation under the amendment to State interference based on race, color, or previous condition of servitude. Since the sections of the statute were phrased broadly enough to cover any type of discrimination, they were found to be unconsti-

[87] 92 U.S. 542 (1876).
[88] 92 U.S. 214 (1876).

tutional. Concerning the purpose and meaning of the amendment, the Court said: [39]

> The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude.

Thus the Court found that the act of 1870 would not support a prosecution of State officials for preventing a qualified Negro from voting. While the words of the Court in the *Reese* case would seem to open the floodgate of disfranchisement by whim of local voting officials, some few years later, in *Ex parte Yarbrough,* the Court found that the 15th amendment "substantially confer[s] on the negro the right to vote, and Congress has the power to protect and enforce that right." [40]

The "Ku Klux Klan Act" of 1871 was substantially weakened by the Court in 1883, when it held that the 14th amendment had not authorized congressional action against such private activities.[41]

That the Civil Rights Act of 1875 would ultimately be tested in the courts was a foregone conclusion. Five cases challenging the act came before the Supreme Court in October 1883. Only one, which involved the use of a parlor car by a Negro in Tennessee, came from the area of the former Confederate States.[42] The Court found that the sections

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[39] *Id.* at 217.

[40] 110 U.S. 651, 665 (1884).

[41] *United States* v. *Harris,* 106 U.S. 629 (1883).

[42] Other cases involved incidents in Mo., Calif., Kans., and N.Y., and they ranged from the denial of hotel accommodations to Negroes to the refusal to seat them in the dress circle of a theater. *The Civil Rights Cases,* 109 U.S. 3 (1883).

of the act prohibiting racial discrimination in inns, public conveyances, and places of amusement were unconstitutional. Mr. Justice Bradley, speaking for the majority, held that the 14th amendment did not empower Congress to pass the act. The amendment was addressed only to deprivations of rights by States and did not encompass private acts of discrimination. Neither was such authority to be found in the 13th amendment. The Court held that the 13th amendment stood only as protection against the restoration of slavery and could not be used as a basis for congressional regulation of "social" discriminations.[43] The attitude of the Supreme Court was clearly stated by Mr. Justice Bradley: [44]

> When a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some state in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty, and property the same as white citizens; yet no one, at that time, thought that it was any invasion of his personal "status" as freemen because they were not admitted to all the privileges enjoyed by white citizens, or because they were subjected to discriminations in the enjoyment of accommodations in inns, public conveyances, and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery.

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[43] *The Civil Rights Cases, op. cit. supra* note 42.
[44] *Id.* at 25.

The sole dissenter, Mr. Justice Harlan, concluded, perhaps prophetically: [45]

> Today it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time it may be some other race that will fall under the ban. If the constitutional amendments be enforced, according to the intent with which as I conceive, they were adopted, there cannot be, in this republic, any class of human being in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant. The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination, in respect of civil rights, against freemen and citizens because of the race, color, or previous condition of servitude. To that decree—for the due enforcement of which, by appropriate legislation, congress has been invested with express power—every one must bow, whatever may have been, or whatever now are. his individual views as to the wisdom or policy, either of the recent changes in the fundamental law, or of the legislation which has been enacted to give them effect.

Several States responded to *The Civil Rights Cases* by enacting antidiscrimination public accommodations laws modeled on the Federal Civil Rights Act of 1875. Connecticut, Iowa, New Jersey, and Ohio passed such laws in 1884; Colorado, Illinois, Indiana , Michigan, Minnesota, Nebraska, and Rhode Island in 1885; Pennsylvania in 1887,

[45] *Id.* at 62.

Washington in 1890, Wisconsin in 1895, and California in 1897.[46]

Public opinion, North and South, generally approved the decision, but Negro leaders like Frederick Douglass excoriated the decision and John Mercer Langston, who in 1889 was to become the only Negro ever elected to the House of Representatives from Virginia, called it "a stab in the back." [47]

The 1875 act had also provided that no citizen possessing the requisite qualifications could be disqualified from jury service on account of "race, color or previous condition of servitude" either in Federal or State courts.[48] In 1880, the Court upheld the indictment of a Virginia judge who had discriminated in the selection of a jury.[49] On the same day, the Court had struck down a West Virginia statute which restricted jury service to whites. It based its holding on the equal protection clause of the 14th amendment: [50]

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens and may be in other respects fully qualified, is practically a brand upon them, affixed by law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

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[46] Konvitz and Leskes, *op. cit. supra* note 2, at 157. In numerous court tests, these laws were sustained as within the legitimate police power of the States. *Id.* at 158–59. Mass., N.Y., and Kans. had previously adopted such legislation. See note 2, *supra.*

[47] Quoted in Logan, *op. cit. supra* note 6, at 46.

[48] The Civil Rights Act of 1875, 18 Stat. 336.

[49] *Ex parte Virginia,* 100 U.S. 339 (1880).

[50] *Strauder* v. *West Virginia,* 100 U.S. 303, 308 (1880).

In this case the Court found sufficient "State action" to support the invocation of the equal protection clause.

The tide of segregation had risen. Already at its high watermark in 1896, it then received new and important Supreme Court sanction in the case of *Plessy* v. *Ferguson*.[51] This involved an 1890 Louisiana law providing that "all railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white and colored races." The Louisiana Supreme Court upheld the conviction of a Louisiana resident of "one-eighth African blood" for boarding a coach reserved for whites. He had been ordered to a colored coach, but refused to move. His arrest and subsequent conviction brought the constitutionality of Jim Crow laws squarely before the Supreme Court. Speaking for the majority, Mr. Justice Brown held that the statute offended neither the 13th nor the 14th amendments to the Constitution. As to the 13th amendment, he ruled that a "statute which implies merely a legal distinction between the white and colored races . . . has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude." [52] The Court's ruling on the 14th amendment followed naturally upon this. "The object of the [14th] amendment," the Justices reasoned, "was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." The Court continued:[53]

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored

[51] 163 U.S. 537 (1896).
[52] *Id.* at 540.
[53] *Id.* at 544, 551.

> race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. . . . The argument assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured by the Negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences and to attempt to do so can only result in accentuating the difficulties of the present situation. . . . If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane. . . .

In his dissent, Mr. Justice Harlan rejected the majority's assumption that a legislative body or judicial tribunal may distinguish between races by statute or decision.[54] He maintained that "in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." [55] The Justice's words were to have far greater meaning for the middle of the 20th century than for the end of the 19th.

The last years of the 19th century were the crowning age of imperialism. Europe set about to complete its domination of Asia and Africa. The partition of Africa and the development of the notion of the "white man's burden" in

[54] *Id.* at 554–55.
[55] *Id.* at 559.

so-called backward areas buttressed the argument of those who sought to relegate the Negro to an inferior position in American life. White people were moving into backward areas and dominating darker peoples. In the same way, it was argued, whites of the South were entitled to have dominion over the Negroes who lived among them. The North was in no mood to refute this argument. "If the stronger and cleverer race," said the editor of the *Atlantic Monthly,* "is free to impose its will upon 'new-caught sullen peoples' on the other side of the globe, why not in South Carolina and Mississippi?" [56]

Why not indeed? Scrutiny of judicial decisions and State statutes at the end of the century suggests that such was already the case. Was he not restricted to "other" public carriers and public accommodations? Were his children not consigned to separate, but hardly equal, schools? [57]

At the very zenith of this age of individualism, the Negro found himself both rejected and degraded.[58] The basic right

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[56] Quoted in Woodward, *op. cit. supra* note 28, at 54–55.

[57] Harlan, *Separate and Unequal: Public School Campaigns and Racism in the Southern Seaboard States 1901–1915* at 12–13 (1958).

[58] The decline of civil rights in the twilight of the 19th century was not peculiar alone to the Negro. Interrelated were the civil rights deprivations of other minority groups. Helen Hunt Jackson's book *A Century of Dishonor* 336–42 (1881) elicited considerable public sentiment for the plight of the American Indian. After 1870, Orientals increasingly became the victims of violence and repressive and restrictive State legislation in the Western States. Wittke, *We Who Built America: The Saga of the Immigrant* 458–63 (1939); Gittler, *Understanding Minority Groups* 84–85 (1956). Anti-Catholic sentiment and anti-Semitism were rising at a pace almost in proportion to the accelerating rate of immigration from Eastern and Southern Europe. Handlin, *The Uprooted: The Epic Story of the Great Migration That Made the American People* 252–58, 270–80, 286–93 (1951); McWilliams, *A Mask for Privileges: Anti-Semitism in America* 13, 16, 47–48 (1948).

to live was about all he had left, and even that was a matter of doubt in some places. From 1882 to the end of the century, the number of lynchings per year fell below 100 only once. The total for the 18-year period was 2,743, and 1,645 of the victims were Negroes.[59] The very concept of civil rights seemed to have passed out of existence, and the prospects for the future were not encouraging.

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[59] 5 *1961 Report of the U.S. Commission on Civil Rights, Justice* 267 (1961).

1900
Movements For and Against Civil Rights
1929

705-043—63——6

WRITING for the *Atlantic Monthly,* Woodrow Wilson chose the Civil War and Reconstruction as the benchmarks against which to measure the position of the United States at the turn of the new century:[1]

> It is now full thirty years, and more, since the processes of Reconstruction were finished, and the southern states restored to their place in the Union. Those thirty years have counted for more than any other thirty in our history, so great have been the speed and range of our development, so comprehensive and irresistible has been the sweep of change amongst us. We have come out of the atmosphere of the sixties. The time seems remote, historic, not of our day. We have dropped its thinking, lost its passion, forgot its anxieties, and should be ready to speak of it, not as partisans, but as historians.

But, he cautioned, those who delved into the Reconstruction period, would "find it like a banked fire, still hot and fiery within, for all it has lain under the ashes of a whole generation; and a thing to take fire from." [2]

The Civil War and Reconstruction were, perhaps, not of the day of those who welcomed the new century. However, the passions which they had inflamed continued to smolder in the breasts of Wilson's contemporaries, and the problems to which they gave rise were not yet resolved, or within view of resolution.

The year 1900 was straddled by major race riots which

[1] Wilson, "The Reconstruction of the Southern States," 87 *Atlantic Monthly* 1 (1901).
[2] *Ibid.*

broke out in Greenwood, S.C., and Wilmington, N.C., in 1898; Statesboro, Ga., and Springfield, Ohio, in 1904; Atlanta, Ga., Greensburg, Ind., and Brownsville, Tex., in 1906; and Springfield, Ill., in 1908. These incidents were widely discussed in the press and elsewhere. "The Brownsville Affair," which involved a few members of a Negro army regiment who, while absent without leave, shot up the town of Brownsville, Tex., was considered at length on the floor of the United States Congress.[3]

Federal Indifference

At home and abroad, President Theodore Roosevelt was known for his outspoken views and the vigor with which he approached problems of national concern. In the area of civil rights, particularly as they pertained to the Negro, his policy was ambivalent.

Negro troops had fought at the side of Theodore Roosevelt in the Spanish American War and he was profuse in his praise of their gallantry; later he made adverse remarks about their services and even implied they were cowards. He offended the white South in 1901 by inviting Booker T. Washington to dine with him at the White House, but later delighted that same group by dishonorably discharging three companies of Negro soldiers involved in "the Brownsville Affair." [4]

The administration reflected the President's attitude. When, on the occasion of the Statesboro, Ga., riot of 1904, a Wall Street broker wrote to the President urging him to send "all the military power at your disposal to arrest the leaders of the mob who should be punished for a crime which is a

[3] See, *e.g.*, 41 *Cong. Rec.* 2, 37, 55, 97, 192, 674, 1213, 1252, 1433, 1485, 1502, 1511 (1907).

[4] Franklin, *From Slavery to Freedom: A History of American Negroes* 414–16 (1956); Woodward, *Origins of the New South 1877–1913* at 463–67 (1951).

burning disgrace," [5] the Attorney General replied that his Department "cannot, at the present time, take any action in the matter." [6] An Assistant United States Attorney subpenaed witnesses and prepared evidence to present to a grand jury. But the Attorney General advised the court and the Attorney that the Federal Government did not have jurisdiction. Although the Department of Justice withdrew this advice the next day, it was too late. The grand jury had been discharged and the matter was at an end and so, for the time being, was Federal intervention in race riots.

Negro Protests

The failure of Federal authorities to fill the void in civil protection which State and local inaction had created convinced many Negroes that only through their own legal and political efforts could equality before the law be secured. Some began to point out, as Justice Harlan had done earlier, that continuing inequality before the law endangered the very existence of the American system.

One Negro wrote: [7]

> In the degree that they [the southern people] stand by in silence and see the Negro stripped of his civil and political rights by a band of unscrupulous men . . . they compromise their own civil and political freedom, and put in jeopardy the industrial progress of the South. . . . If by a mere technicality one class of citizens can be deprived of the rights and

[5] Letter from Fred P. Gordon to President Theodore Roosevelt, Aug. 17, 1904, on file in National Archives (Dept. of Justice file No. 40036, Statesboro, Ga., Lynching).

[6] Letter from the Acting Attorney General to Fred P. Gordon, Aug. 26, 1904, on file in National Archives (Dept. of Justice file No. 40036, Statesboro, Ga., Lynching). The correspondence on this matter extends from Nov. 28, 1904, to Dec. 8, 1904, and is on file in National Archives (Dept. of Justice file No. 40036, Statesboro, Ga., Lynching).

[7] Love, *The Disfranchisement of the Negro* 25–26, 27 (1899).

> immunities guaranteed by the organic law of the nation, what is to prevent any other class from sharing the same fate?

Another Negro pointed out that in the South "the disfranchisement of the black operates practically everywhere . . . as a disenfranchisement of the great body of the whites likewise. For disuse of a power, whether physical or political, begets in time disinclination and then incapacity for exercising the same." [8]

The rising Negro press added its voice to the existing literature which sought to describe Negro contributions to American culture and justify their inclusion in American society.[9] T. Thomas Fortune's New York Age; W. Monroe Trotter's Boston Guardian; the Washington Bee; the Baltimore Afro-American; and the Chicago Defender attacked injustices and condemned the Federal Government for its failure to take positive action.[10] When, in 1904, the Atlanta Constitution, said of the Atlanta Voice of the Negro: "The law ought to find a way to suppress a pestilent nuisance like this," the Negro editor retorted: "Will the mind of the South be forever hag-ridden with fratricidal hatred? . . . It is our duty to counsel moderation, to seek by right living to secure the confidence of the better element of the white people. . . ." [11]

An increasing number of Negroes began to think in terms of a program of action through which specific plans to secure their rights could be put into effect. The group's most articulate spokesman, W. E. B. Du Bois, rejected much of Booker T. Washington's educational and political philosophy and

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[8] American Negro Academy, *The Negro and the Elective Franchise* 8 (1905).

[9] See, *e.g.*, Williams, *History of the Negro Race in America* (1883); Johnson, *A School History of the Negro Race in America* (1890); Alexander, *History of the Colored Race in America* (1887); Washington, *The Story of the Negro* (1909).

[10] Detweiler, *The Negro Press in the United States* (1922).

[11] Quoted in Aptheker, *A Documentary History of the Negro People in the United States* 850 (1951).

believed the Negro could move toward equality only by demanding his rights as a citizen. In the summer of 1905 a conference of Negro leaders was held at Niagara Falls, Canada. From this meeting emerged the "Niagara Movement." Its declaration of principles provided in part: [12]

> *Suffrage:* . . . [We] believe that this class of American citizens [Negroes] should protest emphatically and continually against the curtailment of their political rights. We believe in manhood suffrage; we believe that no man is so good, intelligent or wealthy as to be entrusted wholly with the welfare of his neighbor.
>
> *Civil Liberty:* We believe also in protest against the curtailment of our civil rights. All American citizens have the right to equal treatment in places of public entertainment according to their behavior and deserts.
>
> *Courts:* We demand upright judges in courts, juries selected without discrimination on account of color and the same measure of punishment and the same efforts at reformation for black as for white offenders. . . .
>
> *"Jim Crow" Cars:* We protest against the "Jim Crow" car, since its effect is and must be to make us pay first-class fare for third-class accommodations, render us open to insults and discomfort and to crucify wantonly our manhood, womanhood and self-respect. . . .
>
> *Help:* At the same time we want to acknowledge with deep thankfulness the help of our fellowmen from the Abolitionist down to those who today still stand for equal opportunity and who have given and still give of their wealth and of their poverty for our advancement.

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[12] *Id.* at 901–04.

The Springfield riot of 1908 was a cause of great concern to many people, both white and Negro. In the words of Mary White Ovington, a white social worker: [13]

> In the summer of 1908, the country was shocked by the account of the race riots at Springfield, Illinois. Here, in the home of Abraham Lincoln, a mob containing many of the town's "best citizens," raged for two days, killed and wounded scores of Negroes, and drove thousands from the city. Articles on the subject appeared in newspapers and magazines. Among them was one in *The Independent* of September 3, by William English Walling, entitled "Race War in the North." After describing the atrocities committed against the colored people, Mr. Walling declared:
>
> "Either the spirit of the abolitionists of Lincoln and of Lovejoy must be revived and we must come to treat the Negro on a plane of absolute political and social equality, or Vardaman and Tillman will soon have transferred the race war to the North."

In January 1909, Miss Ovington relates, she met with Mr. Walling and Dr. Henry Moskowitz and the three selected February 12, Lincoln's birthday, for the issuance of a call "for a national conference on the Negro question." The Lincoln's birthday call, Miss Ovington continues, was drafted by Oswald Garrison Villard, then president of the New York Evening Post Co., and said in part: [14]

> If Mr. Lincoln could revisit the country in the flesh, he would be disheartened and discouraged. . . . The

[13] Ovington, *How the National Association for the Advancement of Colored People Began* 1 (1914) (National Association for the Advancement of Colored People reprint).

[14] *Id.* at 2.

> spread of lawless attacks upon the Negro, North, South and West—even in Springfield made famous by Lincoln—often accompanied by revolting brutalities, sparing neither sex nor age nor youth, could but shock the author of the sentiment that "government of the people, by the people, and for the people, should not perish from the earth." Silence under these conditions means tacit approval. . . . Hence, we call upon all the believers in democracy to join in a national conference for the discussion of present evils, the voicing of protests, and the renewal of the struggle for civil and political liberty.

Among the 60 signers of this call were Jane Addams, John Dewey, John L. Elliott, William Lloyd Garrison, Rev. Francis J. Grimke, Rabbi Emil G. Hirsch, Rev. John Haynes Holmes, Rev. Frederick Lynch, Rev. Charles H. Parkhurst, J. G. Phelps Stokes, Lincoln Steffens, Rabbi Stephen S. Wise, Bishop Alexander Walters, William English Walling, and Lillian D. Wald.

To continue in the words of Miss Ovington: [15]

> We have had five conferences since 1909 [her account was written in 1914], but I doubt whether any have been so full of a questioning surprise, amounting swiftly to enthusiasm, on the part of the white people in attendance. These men and women, engaged in religious, social, and educational work, for the first time met the Negro who demands, not a pittance, but his full rights in the commonwealth. . . . In May, 1910, we held our second conference in New York, and again our meetings were attended by earnest, interested people. It was then that we organized a permanent body to be known as the National Asso-

[15] *Id.* at 4.

> ciation for the Advancement of Colored People . . . pledged to a nationwide work for justice to the Negro race.

The new National Association for the Advancement of Colored People (NAACP) stated its purpose to be: [16]

> To promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to advance the interest of colored citizens; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law.

Shortly after its organization, the NAACP formed a Legal Committee which, four years later, was to come under the chairmanship of Arthur B. Spingarn of New York. Within five years, committee activity grew from the filing of a petition of pardon for a Negro sharecropper in South Carolina to the filing of a friend-of-the-court brief in the Supreme Court of the United States attacking the constitutionality of Oklahoma's "grandfather clause." From then on it was only a matter of time before NAACP lawyers were arguing civil rights cases before the highest court in the land.[17]

During this period another private organization dedicated to the eradication of racial discrimination was in its formative years. In 1905, an organization called the League for the Protection of Colored Women was founded by Frances Kellor and Mrs. William H. Baldwin, Jr., to help penniless and homeless Negroes from southern rural areas, particularly women, to find employment and homes in New York. The League, which gave industrial training and offered employment opportunities to both men and women, inspired the

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[16] Hughes, *Fight for Freedom: The Story of the NAACP* 23 (1962).
[17] *Id.* at 23–24, 27, 28, 29, 29–30.

formation of the Committee on Industrial Relations Among Negroes. By 1910, Mrs. Baldwin and a young doctor of philosophy named George Edmund Haynes organized the Committee on Urban Conditions Among Negroes because they believed that the problem of adapting the rural, southern Negro to his new, urban, industrial, northern environment was broader than just finding jobs. The new committee arranged for the education and training of social workers to organize local Leagues across the country. The following year a merger of the three interracial agencies was effected and the new organization subseqently became known as the National Urban League. In the words of Eugene Kinckle Jones, its executive secretary for 30 years, the ultimate goal of the Urban League was, "To work itself out of a job." [18]

Federal Reaction

In his inaugural address in 1909, President William Howard Taft said:[19]

> Personally, I have not the slightest race prejudice or feeling, and recognition of its existence only awakens in my heart a deeper sympathy with those who have to bear it or suffer from it, and I question the wisdom of a policy which is likely to increase it. Meantime, if nothing is done to prevent it, a better feeling between the Negroes and the whites in the South will continue to grow.

President Taft also told the Nation that "while the Fifteenth Amendment has not been generally observed in the past, it ought to be observed, and the tendency of Southern legislation today is toward the enactment of electoral qualifications

[18] National Urban League, *Building for the Future* (1956).
[19] 44 *Cong. Rec.* 5 (1909).

which shall square with that amendment." [20] His administration saw the beginning of a voting case which culminated in the outlawing of the "grandfather clause" by the Supreme Court.

During the midterm elections of 1910, officials of the State of Oklahoma enforced the newly added "grandfather clause" of the State's constitution. Negro citizens, who would have been entitled to vote under the original constitutional provision, were denied access to the polls on the ground that they could not "read and write any section of the constitution." But the great majority of whites were exempted from the test because they or their ancestors were entitled to vote or were living in a foreign nation on January 1, 1866. A number of State election officers were convicted for violation of a provision of the Civil Rights Act of 1870. On appeal, the Supreme Court struck down the clause stating: [21]

> . . . [W]e seek in vain for any ground which would sustain any other interpretation but that the provision [is] . . . in direct and positive disregard of the 15th Amendment.

As a candidate for the Presidency in 1912, Woodrow Wilson openly appealed for the support of Negroes, who were gradually moving back into the political arena. During the campaigning, Wilson wrote that he wished to see "justice done them [the Negroes] in every matter; and not mere grudging justice, but justice executed with liberality and cordial good

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[20] *Id.* at 4.

[21] *Guinn* v. *United States,* 238 U.S. 347, 365 (1915). The Court went on to hold that, since the State intended the literacy test requirement to apply only to persons not excepted by the clause, the entire State constitutional amendment must fall. *Id.* at 366–67. In connection with this case, the NAACP appeared for the first time before the Supreme Court.

feeling." [22] Many Negro leaders, long loyal to Republicanism, turned their support to Wilson.[23]

After he was elected, Wilson listened sympathetically to the proposal of Oswald Garrison Villard that he appoint a National Race Commission to conduct a "non-partisan, scientific study of the status of the Negro in the life of the nation." Within a few months, Wilson had decided against the move and was too embarrassed to meet Villard and tell him of his decision. Already, as Arthur Link tells us, southern segregation concepts and practices had gained ascendancy in the Wilson administration.[24]

In the first few months of Wilson's administration, certain members of Congress introduced a number of bills directed toward establishing a national policy of segregation. In June 1913, Representative James B. Aswell of Louisiana introduced a bill "to effect certain reforms in the civil service by segregating clerks and employees of the white race from those of African blood or descent. . . ." In the same month, Representative William S. Howard of Georgia sought to regulate the carriage of passengers in the District of Columbia by requiring transportation companies to provide separate accommodations for whites and Negroes. In the Senate, William J. Stone of Missouri presented a resolution requesting the Senate Committee on Civil Service and Retrenchment to inquire into and report "as to the number of negroes employed in the classified civil service, showing the number employed in each department or other governmental establishment in the District of Columbia and at other places, giving aggregate sala-

[22] Letter to Bishop Alexander Walters reprinted in the New York American, Oct. 23, 1912, p. 4; see 1 Link, *Wilson: The Road to the White House* 505 (1947); see also Walters, *My Life and Work* 194–95 (1917).

[23] Du Bois, *Dusk of Dawn* 233–37 (1940).

[24] Link, *Wilson: The New Freedom* 243–54 (1956).

ries paid, and as far as possible showing the kind of service in which such employees are engaged . . ." [25]

While these bills were not enacted into law, they indicated the feeling of members of Congress whose importance and influence in the new administration were increasing. Although Wilson did not approve of the demagoguery of his more rabid southern supporters, he shared their view on race relations. He made it clear to his cabinet that he wished to have the segregation matter adjusted in a way which caused least friction.[26] Soon the Post Office Department and Treasury Department instituted segregation in offices, shops, restrooms, and lunchrooms. Within a matter of months, the National Capital and offices of the Federal Government had about as many practices of segregation and discrimination as any capital in the former Confederate States. The New Freedom of Wilson had meant nothing to Negroes.[27] Booker T. Washington, after spending several days in Washington in 1913, commented significantly: "I have never seen the colored people so discouraged and bitter as they are at the present time." [28]

Throughout the country, Negroes protested developments in the National Capital. Representative of the sentiments were the declarations of the Negro Protective League of Pennsylvania. "This very day in Washington," the group declared, "the majority of the United States Congress is hostile to the civic interests of our Race. . . . [T]here have been attempts to segregate the colored employees in the various governmental departments, and to introduce into the street cars of the capital of the Nation the nefarious separate seat law of the South. We have seen nearly every prominent

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[25] 50 *Cong. Rec.* 875, 1985, 2013 (1913).
[26] Link, *op. cit. supra* note 24, at 246–47.
[27] *Id.* at 247–48, 254.
[28] *Id.* at 248–49.

office holder of color of the Nation put out of office. . . . We have seen segregation laws spread all over the country." [29]

The dark days of racial strife in the early years of the Wilson administration gave way in the later years to the dark days of world war. This, indeed, was not the climate for enforcement or protection of civil rights; and since Wilson was not inclined to do anything about it, one could not expect his first Attorney General, J. C. McReynolds of Tennessee, or his second, Thomas Gregory of Texas, to go beyond their leader in the matter. Not until the ugly racial incidents attending the riot of 1917, did Wilson speak out against lynching and mob violence. But his words were louder than his actions; and he neither ruffled his white southern supporters nor soothed his erstwhile Negro friends.

During this period large numbers of Negroes began to move from the South to northern and border State urban areas. Many cities responded to this migration by adopting ordinances designed to effect and maintain residential segregation.[30] One type, used in Baltimore, Md., Atlanta, Ga., and Greenville, S.C., designated all-white and all-Negro blocks in areas where both races lived. Another type, established in 1912 by the Virginia Legislature, designated separate dis-

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[29] Negro Protective League of Pennsylvania, *What Will You Do About This?* 10–17 (1925), quoted in Franklin, *Civil Rights in the United States: A Chapter in the Emancipation of the Negro, 1863–1963,* Aug. 1962 (unpublished manuscript in U.S. Commission on Civil Rights Library).

[30] The earliest residential segregation ordinance found was adopted by San Francisco in 1890. It required that all Chinese inhabitants reside in specified areas of the city, regardless of where they lived previous to the ordinance. In the year of its adoption, a Federal court declared it unconstitutional as a violation of the 14th amendment and a treaty with China. *In re Lee Sing,* 43 Fed. 359 (Cir. Ct. N.D. Cal. 1890). This ordinance was preceded by two earlier ordinances which, although directed at the use of business property, had the effect of encouraging residential segregation. See *In re Quong Woo,* 13 Fed. 279 (Cir. Ct. Calif. 1882); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886).

tricts for white and Negroes and made it unlawful for either race to live in the other's district. A third type of ordinance declared a block white if a majority of the residents were white, or colored if a majority were colored. In a fourth type, the color of the block was determined by ownership as well as occupancy.[81]

The constitutionality of these ordinances came under Supreme Court scrutiny when a Negro who had contracted to purchase a lot from a white owner refused to go through with the sale. He asserted that the Louisville, Ky., ordinance forbade him to live on the lot and pointed out that the contract permitted him to back down under these circumstances. The owner sued to compel the buyer to go through with his agreement, alleging that the Louisville ordinance was in conflict with the 14th amendment and hence no defense. The Kentucky Court of Appeals ruled for the buyer on the ground that the ordinance was valid and of itself gave him a complete defense. The Supreme Court disagreed. Admitting that "there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration," the Court noted that, nevertheless, "such legislation must have its limitations, and cannot be sustained where the exercise of authority exceeds the restraints of the Constitution." It held: [82]

> We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law.

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[81] Johnson, *Patterns of Negro Segregation* 173–75 (1943).
[82] *Buchanan* v. *Warley*, 245 U.S. 60, 80–82 (1917).

While the Louisville case was pending before the Supreme Court, the United States entered World War I. At the time, there were about 10,000 Negroes in segregated army units of the regular Army and another 10,000 in the National Guard.[33] During the war more than 350,000 Negroes served in segregated units; of this total, 42,000 saw combat.[34] Negroes were barred from the Marine Corps and were permitted to serve only in menial capacities in the Navy.[35] Negroes seeking to become candidates for officer training ran into difficulties. Congress had created training camps for white officers, but had made no provisions for the training of Negroes. A committee of citizens headed by Joel Spingarn conferred with military authorities without success. When Spingarn took up the matter with General Leonard Wood, the general said that if 200 Negro applicants could be found at the college level he would see to it that a training camp was established for them. Early in May 1917, a Central Committee of Negro College Men was set up at Howard University. Within 10 days it had a list of 1,500 Negro college men who wanted to become officers. A camp was established at Fort Des Moines, Iowa, where on October 15, 1917, 639 Negroes received commissions in the Army.[36]

During the war years tensions mounted at home. Many Negroes moved to urban industrial communities in search of jobs in defense industries. In some communities, as for example, East St. Louis, Ill., the migration resulted in an oversupply of workers and intensified competition for available jobs. By mid-1917, unemployment among white workers in East St. Louis was disproportionately high in comparison to Negro unemployment. Unemployed white

[33] Franklin, *op. cit. supra* note 4, at 447–48 (1956).
[34] Work, *Negro Year Book, 1931–32* at 331 (1931).
[35] Franklin, *op. cit. supra* note 4, at 448–50 (1956).
[36] *Ibid.*

workers were called to a public meeting on May 28, 1917. After the meeting some whites began to attack Negroes in the streets of the town. A month later, indiscriminate shooting of Negro homes triggered general rioting, resulting in hundreds of deaths. Almost without exception the death toll was confined to Negroes, and several days elapsed before order could be restored. The incident touched off a wave of national concern.[37]

The Governor of Kansas wrote to President Wilson to recommend that the Department of Justice conduct a thorough investigation of the riot.[38] Representative L. C. Dyer of Missouri wrote to tell the President that more than five hundred people had been murdered in East St. Louis and that he had received many letters from citizens of the city who begged the Government to take immediate action to relieve the situation. When the President asked the Attorney General to advise him whether the disturbances in East St. Louis did not "under existing law" fall within Federal jurisdiction,[39] the latter replied: "Up to this time no facts have been presented to us which would justify Federal action though it is conceivable that a condition which would justify it may develop later on." [40]

In the Senate Charles S. Thomas of Colorado asked: "What right has the Government to call upon any man to offer his life and give his time and his services to his country if the flag does not protect him on the field and his family at home?" Representative Dyer offered a resolution creat-

[37] Chicago Commission on Race Relations, *The Negro in Chicago* 71–78 (1922).

[38] Letter from Gov. Capper to President Woodrow Wilson, July 6, 1917, on file in National Archives (Dept. of Justice, File No. 186835).

[39] Letter from President Woodrow Wilson to the Attorney General, July 23, 1917, on file in National Archives (Dept. of Justice, File No. 186835).

[40] Letter from the Attorney General to President Woodrow Wilson, July 27, 1917, on file in National Archives (Dept. of Justice, File No. 186835).

ing a joint committee "to investigate the causes that led to the murdering, the lynching, the burning, and the drowning of innocent citizens of the United States at East St. Louis, Illinois, on July 2, 1917." The resolution was not adopted. The House passed a resolution offered by Representative Edward W. Pou of North Carolina to appoint a House committee to investigate conditions in Illinois and Missouri that interfered with commerce between the States. But in October, the Attorney General refused to give the committee access to his files on the riot. He stated it was not in the public interest to do so. In March 1918, it was agreed that a report would be made in the House but that the testimony would not be printed. On July 6, 1918, the report was read to the House by Representative Ben Johnson of Kentucky. On July 15, 5,000 copies were ordered printed, and the matter was considered closed.[41]

The President and the Attorney General were flooded with protests against the riots and lynchings and requests that something be done. President Wilson issued a strong statement against mob violence and lynching.[42] But the Department of Justice in answer to the numerous requests for Federal action continued to offer the explanation that under existing law and judicial decisions, the matter of lynchings and murders was a subject which lay within the jurisdiction of the several States, and not within the jurisdiction of the Federal Government.[43]

Later, in 1923, the Negro did get some Federal help against violence when the Supreme Court overruled the con-

[41] 55 *Cong. Rec.* 4699, 4879, 5085, 5150–53, 5774, 5954–55, 6061–67, 6961 (1917); 56 *Cong. Rec.* 1653–55, 3153–54, 8826–30, 9139 (1918).

[42] President's Proclamation of July 26, 1918, entitled "In Denunciation of Lynchings and the Mob," Official Bulletin No. 370. See also Baker and Dodd, 3 *The Public Papers of Woodrow Wilson: War and Peace* 238–40 (1927).

[43] Letter from the Attorney General to Charles A. Karch, U.S. District Attorney, July 27, 1917, on file in National Archives (Dept. of Justice File No. 186835).

viction of five Negroes in Phillips County, Ark., due to mob domination of the judicial process.[44] The Court described the trial: [45]

> The Court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. The counsel . . . had had no preliminary consultation with the accused, called no witnesses for the defense, although they could have been produced, and did not put the defendants on the stand. The trial lasted about three quarters of an hour, and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree.

The conduct of a trial in such an atmosphere, the Supreme Court ruled, was so inherently unfair as to violate the due process clause of the 14th amendment.

With the war over, international peace did not bring domestic tranquility. During the last six months of 1919, there were some 25 race riots.[46] During July there were three days of violence in the Nation's Capital.[47] Later in the month, Chicago fell victim to 13 days of lawlessness. The State militia was called out on the fourth day of the rioting. The Chicago death toll was 38—15 whites and 23 Negroes.[48] During the same fateful July, there were several attempts in Congress to bring about Federal action. Representative Henry I. Emerson of Ohio introduced a joint resolution authorizing the President to use military force to preserve order in Washington, D.C. Representative William N. Vaile of Colorado offered a resolution requesting the President to

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[44] *Moore* v. *Dempsey,* 261 U.S. 86 (1923).

[45] *Id.* at 89.

[46] Franklin, *op. cit. supra* note 4, at 472.

[47] *Ibid.*

[48] *Id.* at 474; Chicago Commission on Race Relations, *The Negro in Chicago* (1922).

declare martial law in the District of Columbia. Senator Charles Curtis of Kansas and Representative L. C. Dyer of Missouri presented resolutions calling for a congressional investigation of the race riots in Washington and other cities. Senator Harry S. New of Indiana introduced a bill "making it unlawful for any person to wear the uniform of the United States Army, Navy, Marine Corps, or Coast Guard while participating in a riot, mob, or public disturbance." None passed.[49]

Postwar Efforts by Private Groups

Not all civil rights battles were fought in the courtroom, on the floors of Congress, or in the high councils of the executive branch. As early as 1900, a group of southern whites had formed the Southern Society for the Promotion of the Study of Race Conditions and Problems in the South. The society did not endure, however. At the first Southern Sociological Congress held in 1912 at Nashville, Tenn., there had been some discussion of racial questions. Negroes were admitted to membership in the Congress, and were invited as speakers, but could not significantly participate in its administration. In the same year, a University Commission on the Southern Race Question had been organized by representatives from 11 State universities to "keep informed in regard to the relations existing between the races." Sometimes the commission met at Negro institutions and frequently had Negroes participate in its programs. In 1918, the Southern Publicity Committee was formed "to advertise among ourselves some of the South's constructive work in racial matters." These organizations provided background and experience for the formidable task certain southerners set for themselves in the post-World War I years.[50]

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[49] 58 *Cong. Rec.* 3015, 3171, 6312, 7109 (1919).

[50] Dykeman and Stokely, *Seeds of Southern Change, The Life of Will Alexander* 58–59 (1962).

In an effort to cope with the problems overwhelming the South even before the end of World War I, a group met in Atlanta, Ga., to see what it could do. Most of those in attendance were southern whites—John J. Eagan, a steel manufacturer; M. Ashby Jones, an Atlanta minister; James H. Dillard, president of the Jeanes and Slater Fund; Will Alexander, executive secretary of the Army YMCA; Willis D. Weatherford, international student secretary of the YMCA; and Richard H. King, of the War Work Council. Two nonsoutherners present were Thomas Jesse Jones, director of the Phelps-Stokes Fund, and Wallace Buttrick, president of the General Education Board. They hoped "to quench if possible the fires of racial antagonism which were flaming at that time with such deadly menace in all sections of the country." [51] Alexander described the plan of the group in the following way: [52]

> The plan we had hit on was an effort to substitute reason for force. Our plan was unique in that it was an effort to deal with the problem not by resolution, or general proclamation, but at the county level through groups of citizens well known in their localities and to each other. We were further trying a new method in appealing jointly to white and colored citizens to work together in solving the problem.

The group came to be called the Commission on Interracial Cooperation. In July 1919, they met at Blue Ridge and listened to reports of meetings held throughout the South. Matters to be discussed included legal justice, educational equality, sanitary housing, economic opportunity, and adequate travel and recreational facilities. It was not until March 1920, however, that the commission became truly

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[51] Franklin, *op. cit. supra* note 4, at 480.

[52] *Id.* at 65.

interracial. At that time it invited two Negroes, Robert R. Moton and Bishop Robert E. Jones, to become members. Later, other Negro members including John Hope, president of Morehouse College in Atlanta, and John Gandy, president of Petersburg Institute (later Virginia State College), were admitted. A Department of Women's Work was established and southern white and Negro women began to work together to solve some of the region's problems.[53]

The Commission on Interracial Cooperation had no desire to revolutionize the South. Its program can best be described as one of amelioration within the framework of southern traditions. The Commission felt that one of the worst enemies to peace and justice in the South was the Ku Klux Klan and it undertook to fight the Klan with all the resources at is disposal. It urged a congressional investigation of the Klan, charging it with income tax evasion, improper and illegal use of the mails, conspiracy to intimidate citizens in the exercise of their constitutional rights, and obstruction of the exercise of religious freedom. The proposal failed but other efforts met with some success. The commission kept a file of Klan activities and made it available to the press. It also exposed local cases of terrorism and economic injustices with considerable success.[54]

The Hooded Knights

The Ku Klux Klan was revived in the Southern States as early as 1915. Its growth was slow until the war neared an end. Then it came forth with a broad program for "uniting native-born white Christians for concerted action in the preservation of American institutions and the supremacy of the white race." With this as impetus it grew from an organization of a few thousand members to a militant union of more

[53] Dykeman and Stokely, *op. cit. supra* note 50, at 67, 68, 96.
[54] *Id.* at 102.

than 100,000 whitehooded "knights." It declared itself against Negroes, Orientals, Roman Catholics, Jews, and all foreign-born persons.[55]

The Klan capitalized on the isolationist reaction which followed the war. It spread into areas where there had previously been few manifestations of race hatred. It assumed responsibility for punishing persons it considered dangerous and spearheaded the drive for violence and intimidation against Negroes. Within 10 months after the close of the war, the Klan made more than 200 appearances in 27 States. Cells flourished in several New England States as well as in New York, Indiana, Illinois, Michigan, and other Northern and Midwestern States.[56] Throughout the South and Southwest, Negroes were terrorized by hooded bands of night riders who burned crosses. In the West, the Klan was especially active against the Japanese population.[57]

The Klan regarded itself as the protector of white, Protestant, native Americanism as defined by the Klan. Since the possibility existed that Jews, Negroes, Catholics, and the foreign-born would become politically influential, the Klan assumed responsibility for driving those groups out of politics. In the early 1920's, it became politically active in many States, especially in Georgia, Alabama, Texas, Oregon, Indiana, Illinois, Pennsylvania, and Connecticut. In some communities, it endorsed a slate of candidates. In others it was content to campaign against all candidates belonging to groups it was pledged to attack.[58] There were numerous instances of intimidation and violence to prevent Negroes, Jews, Catholics, and the foreign-born from voting. In 1925, the *National Kourier,* the official organ of the Klan,

[55] Franklin, *op. cit. supra* note 4, at 471.

[56] See Loucks, *The Ku Klux Klan in Pennsylvania* 15–44 (1936); Duffus, "The Ku Klux Klan in the Middle West," 46 *World's Work* 363–72 (1923).

[57] Franklin, *op. cit. supra* note 4, at 471–72.

[58] Rice, *The Ku Klux Klan in American Politics* 30, 58–73 (1962).

warned both political parties that before very long they would have to reckon with the "Invisible Empire." One of the Klan leaders, addressing the Second Imperial Klonvokation in 1924, said: "They talk about eliminating the Klan from politics. When you have eliminated the Polish bloc from politics in America, and the Italian bloc, and the Negro bloc, and the Jewish bloc . . . then with reason you can begin to talk about the elimination of other blocs." [59] Thus, as if in echo of the words of Negro leaders of a quarter century earlier, the Negro's battle for civil and political equality was quickly becoming everybody's battle.

Sophisticated Discrimination

By 1920 zoned residential segregation had been struck down. The "grandfather clause" technique of disfranchisement had been condemned. As a result, those opposed to full civil rights for minorities were obliged to devise less blatant measures.

Because it was unlawful to keep blocks or districts white by city or State legislation,[60] and since other groups besides Negroes were considered undesirable neighbors, property owners and real estate groups resorted to racial and religious exclusionary covenants. Such a covenant is a private contract entered into by property owners in a neighborhood or community. It provides that specified racial, religious, or ethnic groups may not occupy residences in the area. These agreements received important backing in 1926 when the Supreme Court ruled that they did not fall within the provisions of the fifth amendment, since only the action of private individuals was involved.[61]

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[59] *Id.* at 30–31.

[60] *City of Richmond* v. *Deans,* 281 U.S. 704 (1930); *Harmon* v. *Tyler,* 273 U.S. 668 (1926).

[61] *Corrigan* v. *Buckley,* 271 U.S. 323 (1926). The Court also asserted that, for the same reason, they did not fall within the prohibitions of the 14th amendment. *Ibid.*

Whether restrictive ordinances and covenants existed or not, Negroes experienced difficulty moving into communities or areas where they were not wanted. They were met with resistance ranging from minor harassment to property damage. Between 1917 and 1921 there were 58 bombings of Negro homes in Chicago. The home of Jesse Binga, a Negro bank president living on Chicago's South Parkway, was bombed six times.[62] Many of the riots which occurred during the 1920's in cities such as Cleveland, Philadelphia, Kansas City, Scranton, Kalamazoo, and Seattle began when Negro families bought and moved into homes in all-white neighborhoods.

The most widely publicized incident involving the housing problem occurred in Detroit in 1925. Dr. O. H. Sweet, a Negro who had recently returned from several years' study in Vienna, bought a house in an all-white neighborhood. A mob gathered around Dr. Sweet's home and began to throw stones at it. An answering burst of gunfire killed a white man. Dr. Sweet and 10 others who had arrived to help him were arrested and brought to trial on charges of homicide. The NAACP came to their defense employing Clarence Darrow and Arthur Garfield Hays, among others, as defense attorneys. They were finally acquitted.[63]

The decision in the 1915 "grandfather clause" case [64] gave Negroes some hope of becoming politically active, but there still were the hurdles of the literacy and understanding tests. Soon another refinement preempted the field, and became a long-term method of keeping the Negro from participating in the political life of the community. Where Negroes continued to vote, especially in the southern black-belt counties (counties in which Negroes comprised a majority of the popu-

[62] Chicago Commission on Race Relations, *op. cit. supra* note 37, at 122–23.

[63] Lilienthal, "Has the Negro the Right of Self-Defense?" 121 *Nation* 724–25 (1925); Hughes, *Fight for Freedom: The Story of the NAACP* 43 (1962).

[64] See p. 83, *supra.*

lation), there was always the chance that a Negro might be sent to public office or a white man elected who was favorably disposed to Negroes. The simplest way to nullify the Negro's influence was to choose candidates in a party primary from which Negroes were excluded. Since nomination by the Democratic Party was tantamount to election in statewide contests in the South, exclusion from the nominating process was, in effect, disfranchisement. Although the white primary antedated the 1920's, it was during the twenties that it became legally regulated and thus a part of the established elective procedure. By 1930, Negroes were barred from the Democratic primary in Alabama, Arkansas, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. While there were no statewide rules in Florida, North Carolina, or Tennessee, the rules of local Democratic committees generally had the same effect.[65]

Despite the white primary rules, a small number of Negroes was permitted to participate even where State law clearly forbade it. No risk was involved, however, since participation was always regarded as a privilege extended to "certain" Negroes and could be withdrawn at will.

Negro organizations, especially the NAACP, began a systematic attack on the white primary early in the 1920's and continued the assault for two decades. Texas gave these groups their first opportunity for attack in the courts when, in 1923, it enacted a law providing that "In no event shall a Negro be eligible to participate in a Democratic Party primary election held in the State of Texas, and should a Negro vote in a Democratic primary election, such ballot shall be void and election officials shall not count the same." When election officials denied a Negro physician's request to vote in El Paso, he sued an election judge for damages. The plaintiff, Dr. L. A. Nixon, argued that the Texas law violated the

[65] Lewinson, *Race, Class and Party* 111–20 (1932); Key, *Southern Politics in State and Nation* 619–21 (1949).

14th and 15th amendments. The Supreme Court did not consider the question of the act's constitutionality under the 15th amendment, but held it to be a denial of equal protection of the laws guaranteed under the 14th amendment. It would be difficult to imagine "a more direct and obvious infringement" of the 14th amendment, the Court said.[66]

In an effort to circumvent the Supreme Court decision, Texas in 1927 repealed its law excluding Negroes from the Democratic primary and authorized each party to prescribe qualifications for its own members. Dr. Nixon again sought to vote in the primary and was again denied a ballot. When the case reached the Supreme Court, the Court did not deal with the question of whether the party could exclude Negroes. Since the committee acted under authority granted by the State legislature, the Court said, "Whatever power of exclusion has been exercised by the members of the [State executive] committee has come to them . . . not as delegates of the party, but as the delegates of the state." The action was, therefore, as much a denial of equal protection of the laws as the previous action had been.[67] By the time the matter again came before the Court in 1935, Texas had repealed all of its laws dealing with the primary. The Democratic party thus came into court as a private voluntary association which claimed the right to determine who its members should be. As a private association, the Supreme Court concluded, the party might exclude Negroes from its primaries without violating the equal protection clause, which applied only to State action.[68] For the time being, at least, Negroes were effectively excluded from most primary elections in the South.

The movement of a great number of Negroes to northern

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[66] *Nixon* v. *Herndon,* 273 U.S. 536(1927); Key, *op. cit. supra* note 65, at 60, 620–22 (1949).

[67] *Nixon* v. *Condon,* 286 U.S. 73, 85 (1932).

[68] *Grovey* v. *Townsend,* 295 U.S. 45 (1935). See pp. 109–110, *infra.*

cities in the decade which included World War I [69] began to have a significant effect on political life in those communities. When Oscar DePriest, a Chicago Negro, was elected alderman from the densely populated South Side in 1915, political leaders there realized that the Negro vote had become potent. In New York, Negroes had gained sufficient strength by 1917 to send Edward A. Johnson to the State assembly. In other cities where Negro strength was not reflected in the election of Negroes to office, both major parties nonetheless recognized the importance of the Negro vote. Many of these communities began to enact ordinances looking toward protecting the civil rights of Negroes and guaranteeing equal protection of the laws.[70]

Increased Federal Concern

In the 1st session of the 67th Congress in 1921, Representative L. C. Dyer of Missouri introduced a bill "to assure to persons within the jurisdiction of every State the equal protection of the laws and to punish the crime of lynching." [71] The passage of this bill was intended to give the U.S. Department of Justice clear authority to investigate and prosecute participants in mob action and lynching. The introduction of the bill set off an extended debate in the House and evoked widespread comment and reaction in many parts of the country. The NAACP, under its secretary James Weldon Johnson, threw its full weight behind the bill. More than 2,000 public meetings were held during 1921 and the press, both white and Negro, did much to underscore the need for the legislation.[72]

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[69] The percentage of Negroes living in the North increased from 10.5 percent in 1910 to 14.1 percent in 1920 (20.3 percent in 1930).

[70] Drake and Clayton, *Black Metropolis: A Study of Negro Life in a Northern City* 105–16 (1945).

[71] 61 *Cong. Rec.* 81 (1921).

[72] Johnson, *Along This Way* 362–75 (1933). See also Letter from John R. Shillady of the National Conference on Lynching to Attorney General A. Mitchell Palmer, Sept. 26, 1919, on file in National Archives (Dept. of Justice, File No. 203477).

After extended debate, the bill was passed in the House of Representatives by a vote of 231–119. Action in the Senate was blocked by filibuster and Congress adjourned before further action was taken.[73] Attempts were made in the 68th Congress to win passage of the anti-lynching bill, but they were not successful.[74]

The need for increased Federal action in the area of civil rights was also noted by the executive branch. In 1921, in a special message to an extraordinary session of Congress, President Warren G. Harding said: [75]

> Congress ought to wipe the stain of barbaric lynching from the banners of a free and orderly, representative democracy. We face the fact that millions of people of African descent are numbered among our population, and that in a number of states they constitute a very large proportion of the total population. It is unnecessary to recount the difficulties incident to this condition, nor to emphasize the fact that it is a condition which cannot be removed. . . . I am convinced that in mutual tolerance, understanding, charity, recognition of the interdependence of the races, and the maintenance of the rights of citizenship lies the road to righteous adjustment.

In his annual message of December 1923, President Calvin Coolidge struck the same note. He asserted that under the Constitution of the United States, the rights of Negroes were "just as sacred as those of any other citizen," and it was "both a public and private duty to protect those rights." The President called upon Congress "to exercise all its powers of pre-

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[73] 61 *Cong. Rec.* 13142 (1921); Johnson, *op. cit. supra* note 72, at 366–73.

[74] The first House bill proposed during this session concerned anti-lynching. 65 *Cong. Rec.* 25 (1923) (H.R. 1). See also 65 *Cong. Rec.* 26, 1180, 10538 (1923) for subsequent bills.

[75] 61 *Cong. Rec.* 169, 170 (1921).

vention and punishment against the hideous crime of lynching." [76]

Federal officials were again beginning to take notice of the Negro's aspiration for political and civil equality; but by the end of the first three decades of the 20th century there had been little tangible progress. Continued Negro efforts and growing support by other citizens in both North and South had nurtured the seeds of equality, but the long process of breaking down the rigid attitudes of Federal, State, and local officials had hardly begun. Americans sensitive to civil rights problems had little objective basis for optimism and few, if any, anticipated the steady acceleration of progress which would characterize the next three decades.

[76] 65 *Cong. Rec.* 96, 98 (1923).

1929
National Crises and Civil Rights
1948

THE stock market plunge of 1929 set off a chain reaction that produced one of the most serious crises in the Nation's history. By March 1931, 8 million workers were unemployed. "Through the winter of 1931–32," as bread lines grew, "relief resources, public and private, dwindled toward the vanishing point." [1] With the fall of the economy, President Hoover's hope that government could be "an umpire instead of a player in the economic game" was dashed.[2]

The great depression had a broad impact on people at every economic level. Especially hurt, however, were those engaged in low-income, usually unskilled, jobs. A disproportionate number of Negroes could qualify only for such jobs. The toll on Negroes was, in consequence, especially heavy. Largely concentrated in hard-hit agricultural, domestic, and personal service occupations [3]—the first areas of employment to feel the effects of reduced purchasing power—Negroes stood to suffer severely from a prolonged depression.

By 1932, unemployment had reached 12 million. Wages had declined sharply. The Hoover administration took one step toward recovery with the establishment of the Reconstruction Finance Corporation (RFC) which was authorized to make loans to banks and railroads. Since capital was the real need, however, and since RFC provided no direct aid to segments of the economy other than banking and railroads, its influence was small.

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[1] 1 Schlesinger, *The Age of Roosevelt: The Crisis of the Old Order* 174 (1957).

[2] *The New Day, Campaign Speeches of Herbert Hoover* 155 (1928).

[3] U.S. Dept. of Commerce, Bureau of the Census, *Negroes in the United States 1920–1932* at 289 (1935).

The election of Franklin Delano Roosevelt in 1932 did not immediately produce a well-defined program of economic reform. But Roosevelt's ideas were infused with the spirit of action and a willingness to experiment.[4] Within days after assuming office in 1933, he began to barrage Congress with requests for emergency action to halt the continuing economic downturn. He also pressed for far-reaching legislative measures to bolster the economy against future crises. Congress responded quickly. A number of the new administration's proposals were enacted, and the Federal Government moved into areas previously free from national regulation.

Policy and Practice

While the Federal Government was promoting, regulating, and participating in business on an unprecedented scale, it was also condoning practices of racial discrimination: [5]

> Under AAA, Negro tenant farmers and sharecroppers were the first to be thrown off farms as a consequence of the crop-reduction policy. Under NRA, Negroes either had to accept racial differentials in wages or run the risk of displacement by unemployed white men; in the case of jobs still reserved for Negroes, a complicated system of exemptions minimized the application of the codes; and local control of compliance machinery made it almost impossible for the Negro to seek effective redress. . . .

The Tennessee Valley Authority hired Negroes only for unskilled positions and excluded them from the TVA training program and the TVA town of Norris, Tenn.[6] The Federal housing programs, while making decent housing available to many impoverished Negro families, also intensi-

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[4] Rosenman, *Working With Roosevelt* 64–66 (1952).

[5] 3 Schlesinger, *The Age of Roosevelt: The Politics of Upheaval* 431–32 (1960).

[6] *Ibid.* See also Selznick, *TVA and the Grass Roots* 112–13 (1949).

fied segregated housing patterns in many communities. Federal officials encouraged the use of racial and religious exclusionary covenants on the ground that "if a neighborhood is to retain stability, it is necessary that the properties shall continue to be occupied by the same social and racial groups." [7] The majority of low-rent public housing projects were maintained on an all-white or all-Negro basis.[8] Yet with Washington's expanding role as guardian of the national welfare came greater Federal concern for denials of equal participation to Negroes. On the occasion of the dedication of a building at Howard University in 1936, President Roosevelt himself emphasized the breadth of his program:[9]

> As far as it was humanly possible, the Government has followed the policy that among American citizens there should be no forgotten men and no forgotten races. It is a wise and truly American policy.

Secretary of the Interior Harold L. Ickes, a past president of the Chicago branch of the NAACP, told the association's 1936 convention: "I feel at home here."[10] In a message to the NAACP's 1938 convention, President Roosevelt wrote: [11]

> I have watched with interest the constructive efforts of your organization, not only in behalf of the Negro people in our nation, but also in behalf of the democratic ideals and principles so dear to our entire nation. For it is evident that no democracy

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[7] FHA Underwriting Manual, sec. 937 (1938).

[8] McEntire, *Residence and Race* 317–18 (1960); Weaver, *The Negro Ghetto* 158 (1948).

[9] 5 Rosenman, *The Public Papers and Addresses of Franklin D. Roosevelt* 537–39 (1938).

[10] Schlesinger, *op. cit. supra* note 5, at 435.

[11] 7 Rosenman, *op. cit. supra* note 9, at 401.

> can long survive which does not accept as fundamental to its very existence the recognition of the rights of its minorities.

The problem was to square ideal with practice.

As a first step, many Negroes were appointed to administrative positions in the Government. Robert L. Vann, editor of the Pittsburgh Courier, became a Special Assistant to the Attorney General; William H. Hastie, dean of Howard University's School of Law, served first as an assistant solicitor for the Department of the Interior and then as judge of the District Court of the Virgin Islands. Robert C. Weaver was the first Negro to fill the position of racial adviser to the Department of the Interior. Eugene Kinckle Jones, executive secretary of the National Urban League, and Lawrence A. Oxley, a social worker, held similar posts in the Departments of Commerce and Labor. "The list of Negroes in such positions in the Federal Government," historian John Hope Franklin observed, "could be expanded almost indefinitely."[12]

In 1939, the administration took an epochal step by creating a Civil Rights Section in the Criminal Division of the Department of Justice. In his annual report of that year, Attorney General Frank Murphy described the revitalized Federal civil rights policy:[13]

> The maintenance of civil liberties of the individual is one of the mainstays and bulwarks of democracy. It is fundamental that in the United States certain civil rights are guaranteed by the state governments, while others are assured by the Federal Government. In respect to the latter group the Department of Justice

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[12] Franklin, *From Slavery to Freedom: A History of American Negroes* 520–21 (1956).

[13] 1939 Atty. Gen. Ann. Rep. 2.

> has an important function to perform. With that end in view, I caused to be organized a Civil Liberties Unit in the Criminal Division of the Department. One of the functions of this unit is to study complaints of violations of the Civil Rights Acts and to supervise prosecutions under those statutes.

In the years that immediately followed, the small Civil Rights Section took action in relatively few of the 8,000 to 14,000 complaints it received annually. However, its establishment was of signal importance, and 18 years later the Attorney General was to establish a Civil Rights Division in the Department of Justice in implementation of the Civil Rights Act of 1957.[14] In the words of the Executive Secretary of the 1947 President's Committee on Civil Rights, the Section "was expected to build a program to safeguard civil liberty throughout America, by using certain fugitive and largely moribund statutory provisions, all nearly 75 years old. Under these circumstances, it is not surprising that the new agency viewed the problem of clarifying its statutory powers and duties as second only in importance to unearthing and establishing the necessary constitutional principles upon which to base its program." [15]

Early in his administration, President Roosevelt joined his predecessors in speaking out against lynching and other forms of lawlessness.[16] However, Congress failed again in 1935 to enact Federal anti-lynching legislation.[17] Lynchings,

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[14] Act of Sept. 9, 1957, 71 Stat. 637.

[15] Carr, *Federal Protection of Civil Rights* 56 (1947).

[16] See, *e.g.*, his Dec. 1933 speech before the Federal Council of Churches recorded in 2 Rosenman, *Public Papers and Addresses of Franklin D. Roosevelt* 517, 519 (1938). For favorable public reaction to this stand, see the correspondence on file in National Archives (Dept. of Justice file No. 158260).

[17] 79 *Cong. Rec.* 5750, 6292, 6350–73, 6520–47 (1935).

meanwhile, had declined from 281 Negro deaths in the decade of the twenties to 119 in the thirties.[18]

The Supreme Court in Transition

Several Supreme Court decisions affected the cause of civil rights during this period.

While Negroes were voting in increasing numbers in the large cities of the North, they continued to be effectively disfranchised in many sections of the South. The "white primary," which was invalidated by the Court in 1927 and 1932, received judicial approval in 1935.[19] For the next decade, State conventions of political parties were relatively free to exclude Negroes from party membership and hence, from participation in primary elections.[20]

The next "white primary" challenge reached the Supreme Court in 1944. The Court overruled its 1935 decision and laid down a new rule:[21]

> We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the state insofar as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party.

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[18] In the twenties, there were 34 lynchings of white persons; 11 in the thirties. During the forties, lynchings further declined to 31 Negroes and 2 whites; by the fifties, to 6 Negroes and 2 whites. 5 *1961 Report of the U.S. Commission on Civil Rights, Justice* 268 (1961) (hereinafter cited as *1961 Justice Report*).

[19] See p. 99, *supra.*

[20] See *Grovey* v. *Townsend,* 295 U.S. 45, 53–54 (1935).

[21] *Smith* v. *Allwright,* 321 U.S. 649, 663 (1944). Three years earlier the Court had ruled that a primary election is an integral part of the electoral machinery. *United States* v. *Classic,* 313 U.S. 299 (1941).

Having crossed the bridge to State action, the Court had no difficulty in traversing the remaining ground to the conclusion that the white primary constituted a deprivation of the right to vote as guaranteed by the 15th amendment.[22] The era of the white primary was virtually at an end.

The question of equal protection in the field of education also received judicial consideration during this period. In 1935, Donald Murray, a Negro student, brought suit to compel his admission to the University of Maryland's School of Law. Maryland had no law school to which Negroes could be admitted, but did provide scholarships to enable Negroes to attend law schools outside the State. The Court of Appeals of Maryland held that this discrimination constituted a denial of equal protection.[23] The court reasoned that, since Maryland had undertaken the function of "education in the Law" but had "omitted students of one race from the only adequate provision made for it, and omitted them solely because of their color," [24] the out-of-State scholarship provision did not correct the defect. If those students were to be offered "equal treatment they must, at present, be admitted to the one school provided." [25] Accordingly, an order to admit the applicant was issued.

In 1938, a similar question was presented to the Supreme Court in a case which involved a Negro student in Missouri. In the landmark case of *Missouri ex rel Gaines* v. *Canada,* the Court, citing the Maryland case with approval, held that an out-of-State tuition scholarship was no substitute for equal treatment within the State. Chief Justice Hughes stated the controlling principle: [26]

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[22] *Smith* v. *Allwright, op. cit. supra* note 21, at 664–66.
[23] *Pearson* v. *Murray,* 182 Atl. 590 (Md. 1936).
[24] *Id.* at 594.
[25] *Ibid.*
[26] *Missouri ex rel Gaines* v. *Canada,* 305 U.S. 337, 349–50 (1938).

> The basic consideration is . . . what opportunities Missouri itself furnishes to white students and denies to Negroes solely upon the ground of color. . . . The question here is . . . [the State's] duty when it provides . . . [legal] training to furnish it to the residents of the State upon the basis of equality of right. . . . [T]he obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. . . . That obligation is imposed by the Constitution upon the States severally as governmental entities,—each responsible for its own laws establishing the rights and duties of persons within its borders.

Rejecting the university's contention that the situation would be rectified as soon as sufficient Negro demand for a law school arose, the Court concluded that the petitioner had been denied a constitutional right.[27]

The landmark cases of the 1930's, significantly expanding the protection afforded citizens in their relations with the agencies of justice, resulted from the appeals of Negro defendants against official abuse. In 1932, in one of the famous Scottsboro cases, the Supreme Court ruled that the failure of an Alabama court "to make an effective appointment of counsel" to "young, ignorant, illiterate" defendants, who were "surrounded by hostile sentiment" and "put in peril of their lives" was a "denial of due process within the meaning of the Fourteenth Amendment." [28] Three years later, in its second Scottsboro decision, the Court set aside a conviction on the grounds that Negroes had been deliberately excluded from the jury.[29] The Court would not permit the judicial

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[27] *Id.* at 351.

[28] *Powell* v. *Alabama,* 287 U.S. 45, 58, 70 (1932).

[29] *Norris* v. *Alabama,* 294 U.S. 587 (1935).

process to become an instrument of State-supported prejudice. Of the 18 convictions reversed on the grounds of racial discrimination in the selection of jurors between 1880 and 1961, 17 involved Negro defendants.[30]

The Private Sector

In the 1930's various groups initiated strong civil rights programs. In some cases the group's primary interest was unrelated to or much broader than the civil rights of Negroes. But it is significant that such diverse groups as labor unions, religious and ethnic organizations, and civic improvement groups deemed appropriate the establishment within their organizations of units concerned solely with the problem of equal protection for Negroes.

Industrial unions, which united in the Congress of Industrial Organizations (CIO) in 1935, sought to include *all* workers in a plant or industry and formed antidiscrimination committees.[31] The Catholic Interracial Council, established under the leadership of John La Farge, S.J., sought to stimulate interest among Catholics in the problems of the Negro, to solicit their active cooperation in helping to meet them, and to teach Negro Americans the truth concerning the Catholic

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[30] *1961 Justice Report* 243, n. 4. The eighteenth involved a defendant of Mexican descent. *Ibid.*

[31] For an analysis of the subject during this period, see Northrup, *Organized Labor and the Negro* (1944). For a historical view, see Wesley, *Negro Labor in the United States 1850–1925: A Study in American Economic History* (1927). For reports of union policies aimed at improving opportunities for Negroes, see: CIO Committee To Abolish Racial Discrimination, *Working and Fighting Together Regardless of Race, Creed, Color or National Origin,* Pub. No. 85 (1943); National Urban League, *Negro Membership in American Labor Unions* (1930); Weaver, "Recent Events in Negro Union Relationships," 52 *J. Pol. Econ.,* pp. 234 (1944); Bailer, "The Automobile Unions and Negro Labor," 59 *Pol. Sci. Q.* 548 (1944); Winn, Labor Tackles the Race Question, 3 *Antioch Rev.* 341 (1943); Hope, *Equality of Opportunity* 109–36 (1956); Greer, *Last Man In: Racial Access to Union Power* (1959).

Church and its teachings. In the columns of the *Interracial Review* and through its branches in major American cities, the Council sought to influence the opinion of Catholics in the area of race relations.[32]

The Anti-Defamation League and the American Jewish Committee were especially active in the field of civil rights. The Department of Scientific Research of the American Jewish Committee studied prejudice in the United States and solicited public support against it. The Anti-Defamation League established a Vocational Service Bureau to study the extent of discrimination in employment. Through the League's regional offices, it kept in touch with local civil rights problems and developed programs to combat segregation and discrimination.

Civic organizations dedicated to equal protection began to spring up in many parts of the country. The Atlanta Civil and Political League was founded in 1936 to stimulate Negroes to register and vote, equalize white and Negro teachers' salaries, win the appointment of Negro policemen and firemen, gain admittance of Negro physicians and nurses to the city hospital, and create more parks and playgrounds for Negroes. The North Carolina Committee on Negro Affairs adopted a motto in 1936, urging equality of educational opportunity and employment of professional and skilled Negroes in public and private agencies. In Virginia, the Negro Organization Society, founded in 1936, sought better homes, schools, farms, and health. Similar groups were formed in Alabama, Florida, Tennessee, Arkansas, Oklahoma, and Texas.[33]

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[32] La Farge, *Interracial Justice,* 182–85 (1937); La Farge, "The American Catholic," in Gittler, *Understanding Minority Groups* 27–29 (1956).

[33] Bunche, "The Problems, Ideologies, Tactics and Achievements of Negro Betterment and Interracial Organizations," Carnegie-Myrdal Study, *The Negro in America,* 587–640 (1940), manuscript in the Schomburg Collection, New York City Public Library.

The NAACP continued to fight for anti-lynching legislation, for Negro voting rights in the South, for impartial administration of justice, and for the elimination of discrimination in industry. "In the Tennessee Valley Authority projects where Negroes had been used only as unskilled laborers, NAACP intervention resulted in improved conditions and better jobs." [34] By 1940, the Association had branches in every important urban center in the United States. The branches varied greatly in strength and effectiveness, but they provided the most important organizational network for the protection of civil rights during that era.

The NAACP also financed the Joint Committee on National Recovery, formed to safeguard Negro rights in the evolving relief and recovery programs of the Federal Government. The committee, which was supported by 22 independent Negro organizations, protested wage differentials in industry and discriminatory administration of the agricultural programs.[35]

World War II

On the eve of World War II, "the Negro was more of a nonentity in the armed forces than at any time in the country's history." [36] Negroes were excluded from the Army Air Corps and the Marine Corps as well as from the Tank, Signal, Engineer, and Artillery Corps of the Army. They were restricted to menial jobs in the Navy and the Coast Guard. In 1940, "while recruiting officers were beating the bushes for white soldiers and sailors, Negro applicants were clogged upon a waiting list." [37]

The Selective Service Act of 1940 contained a nondiscrimination clause. Yet, despite this and a protest by Negro

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[34] Hughes, *Fight For Freedom: The Story of the NAACP* 81 (1962).
[35] Bunch, *op. cit. supra* note 33, at 45–47, 97.
[36] Byers, *Study of the Negro in Military Service* 5 (1950).
[37] *Id.* at 6.

leaders to President Roosevelt, the War Department on October 9, 1940, reaffirmed a segregation policy: [38]

> The policy of the War Department is not to intermingle colored and white enlisted personnel in the same regimental organizations. This policy has been proved satisfactory over a long period of years and to make changes would produce situations destructive to morale and detrimental to preparations for national defense.

The Department continued to operate separate units in each branch of the service and to establish personnel quotas for Negroes.

Between 1940 and 1945, discrimination eased. In the fall of 1940, one Negro achieved the rank of brigadier general; another was named civilian aide to the Secretary of War (subsequently resigning in protest against Department policy), and a third became executive assistant to the Director of Selective Service.[39] Late in 1940, the War Department announced that Negroes would be accepted for training as Army Air Force pilots and later set up a special school for Negro airmen at Tuskegee Institute. Beginning in 1942, the Navy accepted Negro enlistments for general service and as noncommissioned officers. Later Negroes were accepted in the Marines and, in 1944, as commissioned officers in the Navy.[40] With the exception of officer candidate schools, however, the facilities of the Military Establishment re-

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[38] Selective Service System Monograph No. 10, *Special Groups* 45–46 (1953).

[39] N.Y. Times, Oct. 26, 1940, p. 4; Jan. 19, 1943, p. 15; Nov. 21, 1940, p. 34. As to the resignation of William H. Hastie as civilian aide to the Secretary of War, see N. Y. Times, Feb. 1, 1943, p. 7.

[40] N.Y. Times, Oct. 16, 1940, p. 9; Apr. 8, 1942, p. 11; May 21, 1942, p. 11; Mar. 27, 1944, p. 21; Oct. 20, 1944, p. 12. See also Francis, *The Tuskegee Airmen: The Story of the Negro in the U.S. Air Force* (1956).

mained segregated. Not until the Battle of the Bulge in December 1944 did Negro and white soldiers serve in the same companies, although in separate platoons.[41] The tendency was to use as service troops even those few Negroes who had been trained for combat.

At home Negro civilians continued to face serious employment discrimination, even in crucial defense production industries.

> Both management and the unions practiced a policy of excluding Negroes from the new job openings. In 1941, the Bureau of Employment Security of the Social Security Board revealed that Negroes would not be considered by industry for 51 percent of 282,215 job openings that were expected to occur by February 1942.[42]

Labor leader A. Phillip Randolph proposed a protest march on Washington in 1941. When the efforts of the Secretaries of War and Navy and the President failed to dissuade Randolph from going ahead with the march, the President issued an Executive order declaring "there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, or national origin." [43] The march was called off.

A Fair Employment Practices Committee (FEPC) was set up within the Office of Production Management to receive and investigate complaints, but insufficient authority coupled with intense opposition rendered the Committee ineffective. Randolph again threatened a march.[44] A new

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[41] Franklin, *op. cit. supra* note 12, at 569, 570.

[42] U.S. Committee on Fair Employment Practice, *First Report* 89 (1945).

[43] Franklin, *op. cit. supra* note 12, at 562; Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941).

[44] Kesselman, *The Social Politics of FEPC* 19 (1948).

Executive order [45] was issued creating a second Fair Employment Practices Committee, an autonomous agency in the Executive Office of the President.

Between 1943 and 1946, the Committee held 30 public hearings and processed approximately 8,000 complaints; however, it lacked enforcement powers. A national committee with bipartisan political support continued to urge legislation to establish a permanent FEPC, but to no avail.[46] The Committee noted in its final report issued in 1946 that it had succeeded in increasing the number of minority group workers in the war effort.[47]

The Nation witnessed another outbreak of race riots during the war years. The most serious of these took place in Detroit in 1943. When the Governor hesitated to ask for troops, President Roosevelt proclaimed a state of emergency and sent 6,000 Federal soldiers to the scene.[48] During the riots, Negro and white workers in the automobile industry continued to work harmoniously together and integrated residential neighborhoods were untouched by violence. The riots resulted in the establishment of a Mayor's Interracial Committee, the first broadly based local civil rights commission in the country.[49] Several States, meanwhile, did what Congress had refused to do in the employment field. In 1945, New York established a State Commission Against Discrimination with power not only to investigate discrimination but to issue cease-and-desist orders that could be enforced by the courts.[50] New Jersey passed fair employment

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[45] Exec. Order No. 9346, 8 Fed. Reg. 7183 (1943).

[46] 3 *1961 Report of the U.S. Commission on Civil Rights, Employment* 11–12 (1961) (hereinafter cited as *1961 Employment Report*).

[47] Fair Employment Practice Committee, *Final Report* 2–3 (1946).

[48] Franklin, *op. cit. supra* note 12, at 581.

[49] *Hearings in Detroit Before the U.S. Commission on Civil Rights* 53, 197 (1960).

[50] Konvitz and Leskes, *A Century of Civil Rights* 199–200 (1961). The name of the Commission was changed in 1962 to the State Commission for Human Rights.

legislation in the same year and several other States followed suit in the years immediately after the war.[51]

Postwar Progress

Then, on December 5, 1946, President Harry S. Truman, who succeeded to the Presidency on the death of President Roosevelt, issued an Executive order creating the President's Committee on Civil Rights "to inquire into and to determine whether and in what respect current law-enforcement measures and the authority and means possessed by Federal, State, and local governments may be strengthened and improved to safeguard the civil rights of the people." [52]

When the Committee called on the President in January 1947, he told them.[53]

> I want our Bill of Rights implemented in fact . . . We are making progress, but we are not making progress fast enough.

The Committee's report, issued late that year, noted areas of progress but criticized its slow pace. The flaws in the Nation's record were serious and correction of the situation required greater leadership.[54] The Committee's recommendations, comprehensive and far-reaching, included: [55] (1) The reorganization and expansion of the Civil Rights Section of the Department of Justice; (2) the establishment of a permanent Commission on Civil Rights; (3) a Federal antilynching act; (4) a Federal fair employment practices

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[51] *Id.* at 201. The States were Mass. (1946); Conn. (1947); N.M., Ore., R.I., Wash. (1949); Mich., Minn., Pa. (1955); Calif., Ohio (1959). See pp. 132–34, *infra.*

[52] Exec. Order No. 9808, 11 Fed. Reg. 14153 (1946).

[53] Truman, *Years of Trial and Hope* 181 (1956).

[54] President's Committee on Civil Rights, *To Secure These Rights* 100 (1947).

[55] *Id.* at 151–73.

law; and (5) new Federal legislation to correct discrimination in voting and the administration of justice. Outside the South, the reaction was overwhelmingly favorable. Officers of the American Jewish Committee, the American Jewish Congress, and the NAACP enthusiastically endorsed the report and called for immediate implementation. Philip Murray, president of the CIO, termed it "an important milestone in the development and diffusion of American democracy." [56] The New York Herald Tribune said: [57]

> What gives the report its powerful impact is not the novelty of its proposals but the way in which it wraps all these issues up in a single program and lays it before the American people with the imperative of finding that the time for action is now.

Many southern newspapers ignored the Committee's report while others attacked it. Typical of the more moderate opposition was that voiced by the Atlanta Constitution: [58]

> We are still of the opinion that tolerance, like temperance, is not amenable to legislation. . . . We believe the Committee's insistence upon immediate action is especially unwise.

President Truman dispatched a special message to Congress on February 2, 1948, urging that the recommendations of the Committee be enacted into law. He concluded: [59]

> If we wish to inspire the peoples of the world whose freedom is in jeopardy, if we wish to restore hope to those who have already lost their civil liberties, if we

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[56] N.Y. Herald-Tribune, Oct. 30, 1947, p. 13; N.Y. Times, Oct. 30, 1947, pp. 15–16.

[57] N.Y. Herald-Tribune, Oct. 30, 1947, p. 22.

[58] Atlanta (Ga.) Constitution, Oct. 31, 1947, p. 12.

[59] 94 *Cong. Rec.* 929 (1948).

> wish to fulfill the promise that is ours, we must correct the remaining imperfections in our practice of democracy.

While the pace of future developments remained in doubt, their course was clear. Americans of every race, color, creed, and national origin had worked, paid, died, and otherwise sacrificed to achieve victory in a titanic war. The tightened bonds of national unity presaged a society in which status, opportunity, and aspiration would not be limited by the color of a man's skin, his religion, or his birthplace.

1948

Breakthrough Toward Equality

1962

705-043—63——9

AFTER 1948, progress toward equality accelerated rapidly. The gains were attributable to various factors: The emergence of the United States as leader of the free world,[1] the industrialization of the South, the unprecedented migration to urban areas, an increased sense of responsibility in government which grew out of World War II, the beginnings of economic security for a significant segment of the Negro population, and a prosperous economy for the Nation. The Supreme Court significantly broadened its interpretation of the 14th amendment. Political action by Negroes and their increasing participation in the electoral process evoked favorable response from the Executive and Congress. New techniques in community action began to erode the discriminatory traditions and practices of many communities.

One of the earliest and most positive postwar actions by government attacked discrimination in the Nation's Capital.

The Capital Desegregates

The report of President Truman's Committee on Civil Rights in 1947 had alerted the Nation to the critical importance of solving its civil rights problem. By so doing, it set the stage for a national awakening of the American conscience during the following decade. The report was especially critical of the civil rights picture in Washington, D.C., which was rapidly becoming the capital of the free world. "The District of Columbia should symbolize to our own citizens and to the people of all countries our great tradition of

[1] President's Committee on Civil Rights, *To Secure These Rights* 146–48 (1947).

civil liberty," the report stated. It called for an immediate end to all denials of civil rights in the Nation's Capital.[2]

Within a few months, a group known as the National Committee on Segregation in the Nation's Capital was organized and began to study the various forms and practices of segregation and discrimination in Washington. In its report, it described in detail what the President's Committee had pointed out. Housing was segregated and, with few exceptions, places of public accommodation were closed to Negroes; public education was completely separate; there was discrimination even in Federal employment.[3] Social and civic groups began to press for change in the important areas of public accommodations and education. Soon, the movement was strong enough to challenge both custom and law.

In his initial state of the Union message to Congress in 1953, President Eisenhower asserted he would "use whatever authority exists in the Office of the President to end segregation in the District of Columbia." [4] Three months later, the Federal Government, appearing as a friend of the court, argued before the United States Supreme Court that an 1873 District of Columbia antidiscrimination public accommodations law was still in effect. The case arose when a group of Negroes, led by Mrs. Mary Church Terrell, whose husband had been a municipal court judge in Washington during the Wilson administration, attempted to eat in a downtown Washington restaurant. When they were refused service, action was brought under the 1873 ordinance. In June, the Court ruled that the ordinance was enforceable.[5] In the same month, the National Capital Housing Authority

[2] *Id.* at 87–89, 171–72.

[3] National Committee on Segregation in the Nation's Capital, *Segregation in Washington* (1948).

[4] *Public Papers of the Presidents, Dwight D. Eisenhower: 1953* at 30.

[5] *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100 (1953).

"adopted a general policy of open occupancy for all public low-rent housing" in the District.[6] Almost immediately after the Supreme Court decision, racial discrimination and segregation was voluntarily ended in restaurants, hotels and theaters.[7] A local Negro newspaper carried the headline: "EAT ANYWHERE." Soon Negroes were not only eating everywhere, but were attending theaters which had been closed to them and were staying at hotels from which they had been barred for several generations. In 1954, the District Recreation Board desegregated all playgrounds. On May 3, 1956, the Board of Commissioners issued a regulation to make it clear that the antidiscrimination law extended throughout the District and not just the old "City of Washington." [8]

District officials moved with dispatch when the Supreme Court in 1954 handed down its school desegregation decisions.[9] President Eisenhower expressed hope that the District would become a "model" for the Nation in school desegregation.[10] On May 25, 1954, the Board of Education formally elected to desegregate without delay and the policy was implemented at the opening of the schools in September. All vestiges of compulsory school segregation were erased by

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[6] *Hearings in Washington, D.C., Before the U.S. Commission on Civil Rights, Housing* 260 (1962). The U.S. Commission on Civil Rights held hearings in April 1962 on housing discrimination and segregation in the Washington metropolitan area and recommended, *inter alia,* that the D.C. Board of Commissioners enact an antidiscrimination housing ordinance. See U.S. Commission on Civil Rights, *Civil Rights U.S.A., Housing in Washington, D.C.* (1962).

[7] See National Association of Intergroup Relations Officials, *Civil Rights in the Nation's Capital: A Report on a Decade of Progress* (1959).

[8] *Id.* at 76–77; Order No. 56–874, and see D.C. Code sec. 47–2901 (1961).

[9] The District of Columbia was involved in one of the five cases. *Bolling* v. *Sharpe,* 347 U.S. 497 (1954). See note 93, *infra.*

[10] So. School News, Sept. 3, 1954, p. 4.

the fall of 1955. No violence or other serious incidents accompanied desegregation of the Washington schools.[11]

In 1962, housing in the District and its suburbs was still largely segregated, and other problems of discrimination were still unresolved.[12] But Washington had made a long stride toward becoming a capital city with equal rights and opportunities for all its citizens.

The Armed Forces Desegregate

The Negro has fought for his country in every war including the Revolution. He has fought, too, for the privilege of serving his country, for the Armed Forces traditionally resisted Negro recruitment. The services segregated those Negroes who were accepted, generally grouping them together in service units. Although the opportunity for Negroes to defend their country greatly expanded during World War II and experiments in desegregation were conducted in Europe toward the end, the Armed Forces emerged from the war in a segregated state. President Truman regarded this as an important area of civil rights. On July 26, 1948, he directed in an Executive order "that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin." [13] Its legal effect was to nullify "separate but equal" recruitment, training, and service. At the same time, he created in the military establishment an advisory committee to be known as the President's Committee on Equality of Treatment and Opportunity in the Armed Services. Judge Charles Fahy, former United States Solicitor General, was named as chairman. The Committee was authorized to examine the rules, procedures, and practices

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[11] *Conference in Nashville, Tenn., Before the U.S. Commission on Civil Rights, Education* 54–66 (1959).

[12] See note 6, *supra.*

[13] Exec. Order No. 9981, 13 Fed. Reg. 4313 (1948).

of the armed services in order to determine "in what respect such rules, procedures and practices may be altered or improved with a view to carrying out the policy of this order."

In the report that it published in 1950 under the title *Freedom to Serve,* the Committee cited progress in all branches of the service. It stated that all "jobs and ratings in the naval general service now are open to all enlisted men without regard to race or color." [14] As a result of the new policy announced by the Air Force in May 1949, segregation in a majority of its units was eliminated by May 1950. In the Army, all job billets were opened as a result of a policy change adopted in September 1949. The Committee expressed the opinion that, in spite of the progress already made, much more should be done. Inequality, it concluded, contributed to inefficiency; and it recommended that every vestige of segregation and discrimination be eliminated. ". . . [T]he Committee is convinced that a policy of equality of treatment and opportunity will make for a better Army, Navy, and Air Force. It is right and just. It will strengthen the nation." The Korean War accelerated the process of integration in the armed services. Utilization of Negro personnel was increased and broadened throughout the defense establishment during the year 1951. A special report declared that integration of Negroes had resulted in an overall gain in efficiency for the Army.[15]

A decade later the Armed Forces were largely desegregated except for certain units of the Reserves and National Guard. In 1962, the Under Secretary of Defense issued a directive that called for abolition of the remaining segregated all-white and all-Negro reserve units.[16] By that time, another

[14] President's Committee on Equality of Treatment and Opportunity in the Armed Forces, *Freedom to Serve* 5–7, 54–67 (1950).

[15] Dept. of Defense, *Utilization of Negro Manpower* 6–10 (1959) (extracts from Official Reports of the Secretary of Defense 1947–57).

[16] Memorandum from Roswell Gilpatric, Deputy Secretary of Defense to the Under Secretaries of the Army, Navy, and Air Force, Apr. 3, 1962.

major problem area for the services was discrimination imposed upon servicemen by communities in which military bases were located. In many bases in the South, Negroes found themselves relegated to segregated schools, inadequate housing, and unsuitable recreational and transportation facilities. To consider these problems and the Armed Forces' responsibility for dealing with them, President Kennedy appointed a new Committee on Equal Opportunity in the Armed Forces.[17]

Expanding Employment Opportunity

Americans had learned from the 1930's that governmental action can have a profound effect on the economy and the social order. Government could lessen employment discrimination by ceasing to practice it. It could lessen it further by ceasing to subsidize it. This was the theory behind a series of Executive orders promulgated by Presidents Truman, Eisenhower, and Kennedy from 1948 to 1961.

On the same day that he banned segregation in the Armed Forces, President Truman issued Executive Order 9980.[18] The order proclaimed the "long established policy" of "fair employment throughout the Federal establishment, without discrimination because of race, color, religion or national origin" and established a Fair Employment Board within the Civil Service Commission to implement it with respect to civilian employment in the Executive branch.

In 1955, President Eisenhower replaced the Board with a Committee on Government Employment Policy which was composed of seven members and was to advise and assist the executive agencies in administering the fair employment policy of the Federal Government.[19] In creating the Committee, the President said the employment policy of the

[17] White House Release, June 24, 1962.
[18] 13 Fed. Reg. 4311 (1948).
[19] Exec. Order No. 10590, 20 Fed. Reg. 409 (1955).

Federal Government "necessarily excludes and prohibits discrimination against any employee or applicant for employment . . . because of race, color, religion, or national origin."[20] The Committee was ordered to report to the President periodically on progress and make recommendations for assuring uniformity in personnel practices. One of its functions was to review claims of discrimination and to render advisory opinions.[21] From January 18, 1955, to December 31, 1960, some 1,053 complaints of discrimination by Federal agencies were filed. Only 225 were referred for review and advisory opinion, "the remainder having been settled at the department or agency level." In 33 of these referrals, the Committee disagreed with the departments and agencies and recommended corrective action which was carried out in every instance.[22]

During World War II and the Korean crisis, the Federal Government, being industry's biggest customer, began to require businesses and industries holding Government contracts to maintain an employment policy of nondiscrimination. Following the outbreak of the Korean crisis, efforts to revitalize the nondiscrimination clause in Government contracts culminated in the issuance, on December 3, 1951, of Executive Order 10308, which created the Committee on Government Contract Compliance.[23]

In 1953, President Eisenhower replaced President Truman's Committee on Government Contract Compliance with his own Committee on Government Contracts[24] and appointed Vice President Richard M. Nixon as chairman. The Committee was authorized to receive complaints of dis-

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[20] *Ibid.*

[21] *Ibid.*

[22] 3 *1961 Report of the U.S. Commission on Civil Rights, Employment* 23 (1961) (hereinafter cited as *1961 Employment Report*).

[23] Exec. Order No. 10308, 16 Fed. Reg. 12303 (1951).

[24] Exec. Order No. 10479, 18 Fed. Reg. 4899 (1953), as amended by Exec. Order No. 10482, 18 Fed. Reg. 4944 (1953).

crimination in employment against Government contractors. The Presidential order required the Committee to send complaints to the Federal agency holding the contract with directions to investigate the charges and take appropriate action to eliminate any existing discrimination. The Committee encouraged the appointment of Contract Compliance Officers in each contracting agency. Eventually there were about 1,000 employees of contracting agencies engaged in compliance activities.

When President John F. Kennedy took office in January 1961, there were new demands for Federal action to protect civil rights. The Democratic and Republican Parties had adopted strong civil rights platforms in their 1960 conventions. At the instance of civil rights organizations which testified at the platform hearings, both parties called for new legislation to assure the right to vote, for equal employment opportunity, and for implementation of the Supreme Court's school desegregation decrees.

Particular attention was also focused upon steps which the executive branch might take without awaiting congressional authorization. In August 1961, the Leadership Conference on Civil Rights, an organization of some 50 civil rights groups headed by Roy Wilkins of the NAACP, presented to the President its "Proposals for Executive Action to End Federally Supported Segregation and other Forms of Racial Discrimination." [25] The document reviewed Federal assistance to State and local governments and to private institutions in the fields of employment, housing, education, health services, military affairs, and agriculture. Its thesis was simple. Where Federal funds were available for these activities, assistance should be withheld unless the intended recipient was willing to assure that it would be spent in a nondiscriminatory manner. The principle was established

[25] See also Southern Regional Council, *The Federal Executive and Civil Rights* (1961).

during World War II with respect to employment created by Federal contract. The Leadership Conference called for more forceful administration of the principle in this area and its extension to other fields.

Experience with Executive orders requiring nondiscrimination in federally connected employment had revealed weaknesses. It was asserted by civil rights groups that employers were being required to take action to afford equal opportunity only when there were specific complaints, that Federal agencies were frequently in the position of investigating themselves, and that the President's Committee would not be effective until it was made clear that sanctions would be imposed against agencies and contractors which refused to comply.

President Kennedy combined the functions of the two Committees and considerably strengthened them when, in 1961, he created the President's Committee on Equal Employment Opportunity, with Vice President Lyndon B. Johnson as Chairman.[26] In issuing the merger order, the President said: [27]

> I have dedicated my Administration to the cause of equal opportunity in employment by the government or its contractors. The Vice President, the Secretary of Labor and the other members of this committee share my dedication. I have no doubt that the vigorous enforcement of this order will mean the end of such discrimination.

The President emphasized the necessity of using affirmative action to achieve the objectives of this policy and specifically indicated that such efforts should be made by all departments and independent agencies of the government, not simply by

[26] Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961).
[27] White House Release, Mar. 6, 1961.

the Committee staff.[28] The first Government-wide survey of employment was conducted; it exposed areas of Government employment where corrective action was needed.[29] Unlike its predecessors, the Committee has authority to investigate complaints, issue recommendations and orders, and require reconsideration of final decisions by department and agency heads.

The order requires inclusion of a nondiscrimination clause in all Government contracts and the submission of compliance reports by contractors and subcontractors at regular intervals to the contracting agency. The Committee has authority to order a contracting agency to terminate its contract with a noncomplying contractor or to refrain from entering into a contract with a potential contractor who has a record of noncompliance. The nondiscrimination clause also authorizes the Committee to declare a noncomplying contractor ineligible for further Government contracts. The Committee may also require that a prospective contractor or subcontractor submit compliance reports covering any previous contracts covered by the order. The Committee may hold hearings on and investigate the practices and policies of labor unions involved in Government work. Reports on the cooperation of labor unions and recommendations for securing their cooperation are made periodically to the President.

During the first year of the new Committee's operation, it received 1,299 complaints in government employment and 770 complaints in contract employment as compared to 1,053 and 1,042, respectively, during the entire life (six and seven and one-half years, respectively) of the two previous Committees. As Chairman Johnson explained, the increased volume of complaints "resulted not because there has been

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[28] *Ibid.*

[29] President's Committee on Equal Employment Opportunity, *The American Dream—Equal Opportunity: Report on the Community Leaders' Conference* 11 (1962).

more discrimination but because people think they have a better chance to get results, and I think there is justification for that conclusion." [30]

The Committee also has secured the voluntary cooperation of major Government contractors in programs which go beyond the minimum requirements of the order. In the first two years of the new administration some 85 contractors employing 4.3 million workers signed "Plans for Progress" [31] which pledge equal opportunity for all qualified persons regardless of race, color, religion, or national origin.

In the area of Federal employment, the Civil Service Commission has taken the Federal recruitment program directly to Negro colleges and universities. The President's Committee, in cooperation with the Civil Service Commission, has convened regional meetings of Federal agencies to encourage equal opportunity in employment. As a result, there has been a substantial increase in employment of Negroes in the middle and upper grades of the Federal service.[32]

Twenty-one States, at this writing, have enforceable fair employment practice laws. New York took the lead in 1945 and the number of such States had increased to eight by 1950.[33] In 1955, three States—Michigan, Minnesota, and

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[30] *Id.* at 13. On Nov. 19, 1962, Vice President Johnson noted that employment of Negroes by the Federal Government had increased by three times the anticipated number in the last year; 4,481 Negroes had been promoted to middle-level white collar jobs and 343 to top executive posts. N.Y. Times, Nov. 20, 1962, p. 35.

[31] *The American Dream, op. cit. supra* note 29, at 12; N.Y. Times, Nov. 20, 1962, p. 35.

[32] In Nov. 1962, it was reported that Negroes held 28,986 jobs in classified service at grades GS–5 through GS–11 (salary levels $4,565 to $8,045) an increase of 18.3 percent over the previous year. The total number of jobs in this category had increased by only 4 percent. In grades GS–12 through GS–18 ($9,475 to $22,000) the number of Negroes increased by 343 to 1,380, a rate of increase of 33.1 percent compared with an increase in the total number of such jobs of 7.8 percent.

[33] Conn., Mass., N.J., N.M., N.Y., Oreg., R.I., and Wash.

Pennsylvania—enacted fair employment practice laws; four years later California and Ohio joined the ranks. In 1957, Wisconsin and Colorado, both of which had limited legislation in the area, rewrote their laws to conform to legislation enacted in other States. When Alaska became a State in 1959, it possessed a fair employment practice law which it had enacted in 1953. In 1960, Delaware's legislation brought the total to 17. In 1961, Kansas [84] adopted a fully enforceable fair employment practices law; Illinois joined all the industrial States of the North and West which have such laws; Missouri became the first former slave-holding State to enact a fair employment practices statute; and Idaho declared discrimination in private employment to be a criminal offense.[85] On November 30, 1961, the Michigan Supreme Court held that State's Fair Employment Practices Act constitutional in the first "full scale constitutional attack" on a State law banning discrimination in private employment. The court said: [86]

> By prohibiting racial, religious, or ancestral discrimination in relation to employment, the statute seeks to extend and make more specific rights which have at least been hinted at in the more general words of the Declaration of Independence and the Fourteenth Amendment to the Constitution of the United States. It is an effort to transpose into law that cherished portion of the American dream which is referred to in the pregnant phrase "equality of opportunity."

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[84] On Nov. 27, 1961, a Federal district court issued a permanent injunction restraining the Kansas State Employment Service from using any application form containing racial specifications, from accepting racially discriminatory job requisitions, and from denying the use of its facilities to Negro residents of Kansas. *Pryor* v. *Poirier,* Civ. No. W-2219, D. Kan., Nov. 27, 1961; 6 *Race Rel. L. Rep.* 1098 (1961).

[85] 1 *1961 Report of the U.S. Commission on Civil Rights, Voting* 208–10 (1961) (hereinafter cited as *1961 Voting Report*).

[86] *Highland Park* v. *FEPC,* 111 N.W. 2d 797 (Mich. 1961).

The State laws declare discrimination on racial, religious, or ethnic grounds to be illegal in both public and private employment. They also authorize a State agency to eliminate, by persuasion and mediation, any proven discrimination. The agency may hold public hearings and, on the basis of findings, issue cease and desist orders which are enforceable by court decree. Only Indiana, not counted among the 21 States with enforceable fair employment practice laws, has a law without enforcement provisions. State commissions have been particularly active in opposing discrimination in referrals handled by employment agencies, including the federally supported State employment services. In many States this legislation has opened up white collar and professional job opportunities to Negroes for the first time.

The Right To Travel

The power of Congress "to regulate commerce . . . among the several states," [87] and the authority of the Interstate Commerce Commission to prohibit "undue or unreasonable prejudice or disadvantage" [88] have been important tools in the struggle for equal rights. They have been construed to outlaw discriminatory State legislation which operates as a burden on commerce, and to strike down discriminatory practices by interstate carriers acting in accordance with local law or custom. The sweeping antidiscrimination rules promulgated by the Interstate Commerce Commission in 1961 were partly a response to new protests, but they were built upon a foundation laid during the previous two decades. In the years before the separate-but-equal doctrine was invalidated, it was the commerce power upon which the courts relied to eliminate discriminatory practices.

The year 1941 saw the first of a series of judicial and administrative decisions that were to end segregation in inter-

[87] U.S. Const. art. I, par. 8.

[88] Interstate Commerce Act, 54 Stat. 902, 49 U.S.C. sec. 3(1) (1958).

state and intrastate transportation. A Negro Congressman, Arthur Mitchell of Illinois, bought a first-class ticket on a railroad from Chicago, Ill., to Hot Springs, Ark. While traveling in Arkansas he was forced to move to a second-class car because the train did not carry a Negro first-class car. He complained to the Interstate Commerce Commission, but it ruled against him. The Supreme Court disagreed.[39]

Speaking for a unanimous Court, Chief Justice Hughes ruled: [40]

> The question whether this was a discrimination forbidden by the Interstate Commerce Act is not a question of segregation but one of equality of treatment. The denial to appellant of equality of accommodations because of his race would be an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment . . . and in view of the nature of the right and of our constitutional policy it cannot be maintained that the discrimination as it was alleged was not essentially unjust. In that aspect it could not be deemed to lie outside the purview of the sweeping prohibitions of the Interstate Commerce Act.

Although the Court did not reach the separate-but-equal question, it tied the proscribed "undue or unreasonable prejudice or disadvantage" which Congress had written into the Interstate Commerce Act to the denial of equal protection prohibited by the 14th amendment. Future cases showed how effective the tie was.

In 1946, the Supreme Court decided a transportation case which turned on a broader principle. A Virginia criminal statute required all bus companies to separate white and Negro passengers. When a Negro woman traveling from

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[39] *Mitchell* v. *United States,* 313 U.S. 80 (1941).
[40] *Id.* at 94.

Virginia to Baltimore, Md., refused to move to the back of the bus, she was arrested, tried, and convicted of violation of the Virginia law. Pointing out that "even where Congress has not acted, state legislation . . . is invalid which materially affects interstate commerce," [41] the Supreme Court found that the Virginia statute placed an undue burden on interstate commerce since "seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel." [42]

Reaffirming its 1941 ruling under the Interstate Commerce Act, the Supreme Court decided in 1950 that where "a dining car is available to passengers holding tickets entitling them to use it . . . denial of dining service to any such passenger . . . subjects him to a prohibited disadvantage." [43] It is interesting to note that the Court cited a higher education case [44] decided the same day which determined that segregated seating arrangements at a State university violated the equal protection clause of the 14th amendment: [45]

> We need not multiply instances in which these rules [of the railroad carrier] sanction unreasonable discrimination. The curtains, partitions and signs emphasize the artificiality of a difference in treatment which serves only to call attention to a racial classification of passengers holding identical tickets and using the same public dining facility. Cf. McLaurin v. Oklahoma State Regents, 339 U.S. 637, 70

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[41] *Morgan* v. *Virginia,* 328 U.S. 373, 378–79 (1946).

[42] *Id.* at 386.

[43] *Henderson* v. *United States,* 339 U.S. 816, 824 (1950). Ten years later, the Court applied this rule to restaurants operated as an integral part of bus service for interstate passengers. *Boynton* v. *Virginia,* 364 U.S. 454 (1960).

[44] *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637 (1950). See p. 146, *infra.*

[45] *Henderson* v. *United States, supra* note 43, at 825.

S. Ct. 851. They violate sec. 3(1) [making it unlawful for a railroad in interstate commerce "to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: . . ."]

In 1955, the Interstate Commerce Commission, relying specifically on the *School Segregation Cases,* which struck down the separate-but-equal doctrine as it applied to public education,[46] ruled that segregation of passengers on railroads or in terminals subjects them to an undue prejudice or disadvantage in violation of the Interstate Commerce Act.[47] One year later the Supreme Court relied on the education cases to affirm a district court ruling that State and local laws requiring segregation on local intrastate buses operating in Montgomery, Ala., violated the 14th amendment.[48]

In May 1961, members of the Congress on Racial Equality (CORE) instituted "freedom rides" to protest the remaining forms of discrimination against interstate passengers.[49] Late that month, Attorney General Robert F. Kennedy petitioned the Interstate Commerce Commission to adopt more stringent regulations against segregation in waiting rooms, rest rooms, and eating places in interstate bus terminals.[50] Secretary of State Dean Rusk supported the Justice Department's proposal.[51]

On September 22, 1961, the Interstate Commerce Commission prescribed new rules prohibiting discrimination in

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[46] See pp. 147–48, *infra.*

[47] *NAACP* v. *St. Louis-S.F. Ry. Co.,* 297 I.C.C. 335 (1955), 1 *Race Rel. L. Rep.* 263 (1956).

[48] *Gayle* v. *Browder,* 352 U.S. 903 (1956), *affirming Browder* v. *Gayle,* 142 F. Supp. 707 (M.D. Ala., 1956). See note 202, *infra.*

[49] See pp. 179–81, *infra.*

[50] Dept. of Justice Release, May 29, 1961.

[51] N.Y. Times, June 2, 1961, p. 21.

seating on interstate buses [52] and requiring each bus to display a sign stating: [53]

> Seating aboard this vehicle is without regard to race, color, creed, or national origin, by order of the Interstate Commerce Commission.

The signs were posted until January 1, 1963. From that time on, a similar notice has been required on all bus tickets,[54] no interstate bus may use a segregated terminal,[55] and a sign containing the antidiscrimination regulations must be conspicuously displayed in each interstate bus terminal.[56]

When the new rules went into effect on November 1, 1961, open defiance was reported in Georgia, Louisiana, and Mississippi. The Department of Justice responded by filing a series of suits in Louisiana and Mississippi to enforce the new regulation.[57]

By 1962, the law had become so clear that the Supreme Court was able to announce: [58]

> We have settled beyond question that no State may require segregation of interstate or intrastate transportation facilities. . . . The question is no longer open; it is foreclosed as a litigable issue.

In 1962, the Attorney General reported that virtually every airport as well as bus and railroad stations throughout the South had been desegregated.[59]

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[52] 49 C.F.R. 180a. 1 (1961).
[53] 49 C.F.R. 180a. 2 (1961).
[54] 49 C.F.R. 180a. 3 (1961).
[55] 49 C.F.R. 180a. 4 (1961).
[56] 49 C.F.R. 180a. 5 (1961).
[57] Dixon, "Civil Rights in Transportation and the I.C.C.," 31 *Geo. Wash. L. Rev.* 198, 232–40 (1962).
[58] *Bailey* v. *Patterson,* 369 U.S. 31 (1962). A few weeks later the Court made it clear that this principle also applied to airport facilities. *Turner* v. *Memphis,* 369 U.S. 350 (1962).
[59] Address by Attorney General Robert F. Kennedy, National Newspaper Publishers Association, Baltimore, Md., June 22, 1962.

Progress in Housing

For several decades, the primary legal device for regulating residential patterns was the racial and religious restrictive covenant. The covenant was a private contract, entered into by property owners in a neighborhood or community, which barred specific racial, religious, and ethnic groups from residing in an area. Such contracts were binding on all future property owners during the term of the covenant. If a property owner violated the agreement and sold to one of the prohibited classes of people, the other property owners could bring suit to keep the new owner from occupying the house. In some States, they could also have the sale set aside and the title restored to the last proper owner.

In 1948, the Supreme Court declared such restrictive covenants to be unenforceable in the courts. While recognizing that these "restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed . . . by the Fourteenth Amendment," the Court held that: [60]

> [I]n granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand."

In a companion case, the Supreme Court held that judicial enforcement of such restrictive covenants in the District of Columbia would violate section 1 of the Civil Rights Act of 1866, which provides: "All citizens of the United States shall have the same right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." [61] The Court went on to say that, even in the absence of the statute, it "is not consistent with the public policy of the United States to permit Federal courts in the nation's capital to

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[60] *Shelley* v. *Kraemer*, 334 U.S. 1, 13, 20 (1948).

[61] *Hurd* v. *Hodge*, 334 U.S. 24, 30–31, 34 (1948). See also U.S. Department of Justice, *Prejudice and Property: An Historic Brief Against Racial Covenants* (1948).

exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws." [62]

The Federal Housing Administration (FHA), which until 1948 had actually encouraged racial restrictive covenants and homogeneous neighborhoods, began to reexamine its policies.[63] In December of 1949 it revised its Underwriting Manual to read: ". . . homogeneity or heterogeneity of neighborhoods as to race, creed, color, or nationality is not a consideration in establishing eligibility" for mortgage insurance.[64] FHA announced that it would not insure mortgages on homes on which such restrictive covenants were filed after February 15, 1950.[65]

President Eisenhower's message to Congress on January 25, 1954, recognized the need for further Executive action: [66]

> We shall take steps to insure that families of minority groups displaced by urban redevelopment [urban renewal] operations have a fair opportunity to acquire adequate housing; we shall prevent the dislocation of such families through the misuse of slum clearance programs; and we shall encourage adequate mortgage financing for the construction of new housing for such families on good, well located sites.

On July 16, 1954, FHA announced a policy of "active steps to encourage the development of demonstration open-occu-

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[62] *Hurd* v. *Hodge, supra* note 61, at 35.

[63] See pp. 96–97, *supra.*

[64] Federal Housing Administration, *FHA Manual,* sec. 70303 (1962).

[65] *1959 Report of the U.S. Commission on Civil Rights* 464 (1959) (hereinafter cited as *1959 Report*).

[66] 100 *Cong. Rec.* 738–739 (1954). The Solicitor General of the United States appeared to argue before the Supreme Court in 1948 that the enforcement of racial restrictive housing covenants was in violation of the 14th amendment. *Shelley* v. *Kraemer, supra* note 60.

pancy projects in suitable key areas." [67] Congress, recognizing the existence of inequalities in home financing, created the Voluntary Home Mortgage Credit Program (VHMCP), a joint government-industry program to assist minority group members to obtain home mortgage financing.[68]

In a series of decisions in State and Federal courts, segregation in federally-aided public housing projects was held to violate the 5th and 14th amendments.[69] Following these decisions, segregation in Federal public housing projects markedly declined in the cities of the North and West. In 1960, the Federal Urban Renewal Administrator announced that municipalities would have to establish committees on minority housing in order to receive Federal loans and grants.[70] On June 1, 1961, the Federal Home Loan Bank Board adopted a resolution opposing racial discrimination in mortgage lending by the 1,873 savings and loan associations that it supervises.[71]

Beginning in the late 1950's Federal assistance to housing became the major focus of the demand that the Federal Government not permit its money to be spent for discriminatory purposes. After the 1948 decision of the Supreme Court in *Shelley* v. *Kraemer,* the Federal Government had shifted its policy from one of actually encouraging discrimination to "neutrality." But as pointed out by the National Committee

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[67] *Message from FHA Commissioner To Be Read by Insuring Office Directors at NAHB Local Meetings Relating to Providing Homes Available to Minorities, No. 118130, June 16, 1954.*

[68] Voluntary Home Mortgage Credit Program, *Operating Policy Statement No. 1* (1954). VHMCP is now known as the National Voluntary Mortgage Credit Extension Committee.

[69] See, *e.g., Detroit Housing Commission* v. *Lewis,* 226 F. 2d 180 (6th Cir. 1955); *Banks* v. *Housing Authority,* 260 P. 2d 668 (Cal. Dist. Ct. App. 1953), *cert. denied,* 347 U.S. 974 (1954).

[70] 4 *1961 Report of the U.S. Commission on Civil Rights, Housing* 85 (1961) (hereinafter cited as *1961 Housing Report*). Such committees were to have as their primary function the responsibility of working for full opportunity in housing for all groups.

[71] *Id.* at 36.

Against Discrimination in Housing, an organization of civil rights groups with a special interest in open occupancy housing, Federal assistance in the form of loans, grants, insurance, and mortgage guarantees still went to builders and mortgage lenders who discriminated against Negro applicants. Housing was the one commodity "in the American market . . . not freely available on equal terms to everyone who can afford to pay." [72]

On November 20, 1962, the President issued an Executive order prohibiting discrimination in federally assisted housing.[73] He directed Federal agencies to "take every proper and legal action to prevent discrimination" in (1) the sale or lease of housing owned or operated by the Government; (2) housing constructed or sold through loans or grants made, insured, or guaranteed by the Government; and (3) housing made available through Federal urban renewal or slum clearance programs.[74] The order took effect immediately and all subsequent applications for Federal assistance under these programs must be processed in accordance with the order and its implementing regulations.[75]

Although informal means of correcting violations are encouraged, each department and agency is authorized to move against offenders by canceling Federal aid contracts, withholding further aid until compliance is secured, or declaring any FHA- or VA-approved lending institution ineligible to participate in the loan guarantee programs.[76] Federal agen-

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[72] *1959 Report* 554.

[73] Exec. Order No. 11063, 27 Fed. Reg. 11527 (1962). The issuance of such an order was recommended by the U.S. Commission on Civil Rights in 1959 and 1961.

[74] White House Release, Nov. 20, 1962; Exec. Order No. 11063, sec. 101.

[75] Housing and Home Finance Agency, *Questions and Answers on the President's Order on Equal Opportunity in Housing*, Nov. 21, 1962, p. 2.

[76] Exec. Order No. 11063, sec. 302.

cies will be assisted in their enforcement of the order by the President's Committee on Equal Opportunity in Housing. Committee members include the heads of certain departments and agencies,[77] such public members as the President may appoint, and a member of the President's Executive Staff, who will serve as Chairman and Executive Director.[78]

The Committee will recommend procedures and policies for the implementation of the order, coordinate the activities of the various agencies affected, and encourage educational programs by private groups to "eliminate the basic causes of discrimination" in housing assisted by the Federal Government.[79] The Committee will report to the President on the progress of its work at least once each year.

The order was not as sweeping in its scope as some had expected.[80] Its principal impact will be on new house construction—in particular those large suburban subdivisions and multi-family rental units which are built with Federal assistance. But the order does not cover existing housing or housing financed through conventional means. In regard to federally assisted housing not covered by the order, the President directed Federal agencies to "use their good offices and to take other appropriate action permitted by law, including the institution of appropriate litigation, if required, to promote the abandonment of discriminatory practices." [81]

The prime significance of the order was that it committed the Federal Government to use its resources to establish housing available to everyone. As HHFA Administrator Robert C. Weaver declared, the order had made "clear the policy of

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[77] Secretaries of Defense, Treasury, and Agriculture; the Attorney General; the HHFA Administrator; the Veterans' Affairs Administrator; and the Chairman of the Federal Home Loan Bank Board.

[78] Exec. Order No. 11063, sec. 401.

[79] Exec. Order No. 11063, sec. 502.

[80] *Cf., e.g.,* "The Challenge of Open Occupancy," *House and Home,* Nov. 1962, p. 91.

[81] Exec. Order No. 11063, sec. 102.

our government in an area which has suffered from fear and uncertainty as well as from prejudices." [82]

Nineteen States and 55 cities have barred discrimination in some areas of the housing market. In the past 5 years alone, 3 cities, 11 States, and the Virgin Islands have adopted fair housing laws which apply to privately financed as well as governmentally aided housing. These are New York City, Pittsburgh, Toledo, Colorado, Massachusetts, Connecticut, Oregon, California, Pennsylvania, New York State, New Jersey, Minnesota, New Hampshire, and Alaska. Many of these laws established agencies composed of distinguished citizens to conciliate and mediate complaints, to hold public hearings, and to issue orders enforceable in the courts.[83]

At the same time, hundreds of volunteer fair housing groups have been organized in many sections of the country. Some have as their objective the creation of housing opportunities in formerly segregated communities and others seek to maintain the stability of areas which have become integrated.

Education and the Law

While advances were being made during the 1940's in voting, employment, and transportation, the field of public education was emerging as the battleground for a full-scale assault upon segregation and the doctrine of "separate but equal."

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[82] Statement by Robert C. Weaver, HHFA Administrator, Nov. 20, 1962.

[83] See U.S. Housing and Home Finance Agency, *State Statutes, and Local Ordinances and Resolutions Prohibiting Discrimination in Housing and Urban Renewal Operations* (1961); National Association of Intergroup Relations Officials, *Federal, State, and Local Action Affecting Race and Housing* 26 (1962). The Washington law was held unconstitutional in *O'Meara* v. *Washington State Board Against Discrimination,* 365 P. 2d 1 (Wash. 1961), *cert. denied,* 369 U.S. 839 (1962). *But see, Massachusetts Commission Against Discrimination* v. *Colangelo,* 182 N.E. 2d 595 (Mass. 1962), sustaining the constitutionality of the Massachusetts law.

The erosion of segregated education began in the thirties when the increasing number of Negro students seeking higher education were faced with the fact that there were virtually no Negro graduate and professional schools in the South. Under the leadership of Nathan R. Margold of the Garland Fund and Charles H. Houston, counsel for the NAACP, a systematic effort was begun to break down the barriers of segregation in higher education. The effort first bore fruit when the Supreme Court held that, where a State operated a law school for white students within the State, provision for legal education of Negroes out-of-State was not equality.[84] In 1948, the Court extended this ruling to require that equal education for Negroes within the State had to be offered at the same time that it was provided for any other group.[85] One question remained: How would the equality of a separate graduate or professional school for Negroes be measured? In 1950, the Court answered this question.

Heman Marion Sweatt had applied for admission to the University of Texas Law School. Although he was otherwise fully qualified, the application was denied because he was a Negro. Meanwhile the State opened a law school at Texas State University for Negroes. Sweatt refused to apply for admission. The Texas courts, finding that the new school offered opportunities for the study of law that were equal to those offered at the University of Texas, denied him relief. The Supreme Court disagreed.[86] When the Court compared the facilities of the two law schools it found the University of Texas Law School to be clearly superior. The gap between the two appeared even wider when the Court assessed those qualities "which are incapable of objective measure-

[84] *Missouri ex rel Gaines* v. *Canada,* 305 U.S. 337 (1938); *cf.* ch. 5, note 26, *supra.*

[85] *Sipuel* v. *Board of Regents,* 332 U.S. 631 (1948). See pp. 110–11, *supra.*

[86] *Sweatt* v. *Painter,* 339 U.S. 629 (1950).

ment but which make for greatness in a law school." [87] It found that the reputation of the faculty, the position and influence of the alumni, and the standing in the community of the University of Texas so far exceeded the Texas State University for Negroes that "one who had a free choice" could not help but choose the former.[88] Accordingly, the Court ruled that "The Equal Protection Clause of the Fourteenth Amendment requires that petitioner be admitted to the University of Texas Law School." [89]

On the same day, the Supreme Court decided the case of a University of Oklahoma graduate student who was required, in accordance with State law, to occupy separate classroom seats and library and cafeteria tables. The Court found that these "restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." It concluded: [90]

> State imposed restrictions which produce such inequalities cannot be sustained. . . . [U]nder these circumstances the Fourteenth Amendment precludes differences in treatment by the state based on race.

While the Supreme Court had nominally preserved the doctrine of "separate but equal," the pattern of school segregation had been broken at the level of higher education. It was clear that, in graduate education at least, no separate school would be adjudged equal.

Encouraged by these decisions, Negro parents began to challenge in Federal courts the notion that separate elementary and secondary schools could provide equal education.

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[87] *Id.* at 634.
[88] *Ibid.*
[89] *Id.* at 636.
[90] *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637 (1950).

In 1952, Thurgood Marshall, Houston's successor as counsel for the NAACP Legal Defense and Educational Fund, brought to the Supreme Court five cases involving a challenge to segregated public education.

Arguments were first held in 1952 and the court ordered that the cases be reargued on specific points during the following year.[91] The cases were reargued in 1953. After five more months of consideration, an opinion was handed down May 17, 1954, on the four State cases.[92] Speaking for a unanimous Court, Chief Justice Earl Warren said in the *Brown* opinion: [93]

> [I]n the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated . . . are . . . deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

A decision that segregation under the auspices of the Federal Government violates the due process clause of the fifth amendment followed the same day in *Bolling* v. *Sharpe,*[94] a case involving public schools in the District of Columbia. Again speaking for a unanimous Court, the Chief Justice declared: [95]

> Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reason-

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[91] 345 U.S. 972 (1953).

[92] *Brown* v. *Board of Education,* 347 U.S. 483 (1954) (now known as the *School Segregation Cases,* they carried the title of the case arising in Topeka, Kans., *Brown* v. *Board of Education*).

[93] 347 U.S. at 495.

[94] 347 U.S. 497 (1954).

[95] *Id.* at 499–500.

ably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.

Although the Court's decision dealt specifically with public schools its rationale struck a blow at all segregation laws. The principle that "Our Constitution is color-blind, and neither knows nor tolerates classes among our citizens," first enunciated in dissent by Justice Harlan,[96] had finally become the view of a unanimous Court, three of whose members were southerners.

Having announced its decision, the Court ordered that the cases be reargued again on the question of the appropriate relief to be granted. It recognized that granting such relief "presents problems of considerable complexity." [97] Not only the plaintiffs, but all Negro children similarly segregated in public schools, had been found to be deprived of their constitutional rights. The full impact of the decision was a matter of conjecture but there was no question that it affected the discriminatory practices of the District of Columbia and the 21 States which required or permitted racial segregation in the schools.[98] It took another year before a decision was reached on what could be done.

Without waiting for the Court's implementing decree which was to come in the spring of 1955, 154 school districts in six States and the District of Columbia commenced the desegregation of their school systems in the fall of 1954.[99]

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[96] See p. 69, *supra.*

[97] *Brown* v. *Board of Education, supra* note 93, at 499–500.

[98] Compulsion of State law: Ala., Ark., Del., Fla., Ga., Ky., La., Md., Miss., Mo., N.C., Okla., S.C., Tenn., Texas, Va., and W. Va. Permission of State law: Ariz., Kan., N.M., and Wyo. See *1959 Report* 158.

[99] *1959 Report* 296.

In addition to Washington, D.C., these school districts included the cities of Baltimore, Md., Wilmington, Del., St. Louis and Kansas City, Mo.[100] The first steps toward compliance with the new law of the land were accomplished peacefully and without incident.

The executive branch began to reexamine its practice of permitting segregated education at schools supported by the Federal Government even prior to the May 17, 1954, decision. On January 12, 1954, the Secretary of Defense ordered "all school facilities located on military installations" conducted on a segregated basis to "cease operating on a segregated basis, as soon as practicable, and under no circumstances later than September 1, 1955." [101] The order was carried out without incident, although some school districts in the South which had operated the on-base schools for the Federal Government canceled their agreements as a result of the order.[102]

In December 1954, the town council of the United States Atomic Energy Commission town of Oak Ridge, Tenn., passed a resolution requesting abandonment of segregation in its public schools. Although the schools were supported entirely from Federal funds, they were operated under contract by the Anderson County Board of Education. Strong opposition developed, but the schools were desegregated in September 1955.[103] On May 31, 1955, the Supreme Court handed down the decree implementing the *Brown* decision. The decree reaffirmed the "fundamental principle that racial

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[100] For an account of the desegregation programs of these cities see *1959 Report* at 173–85; *Conference in Nashville, Tenn., Before the U.S. Commission on Civil Rights, Education* 54–85, 136–51 (1959); *Conference in Gatlinburg, Tenn., Before the U.S. Commission on Civil Rights, Education* 8–20 (1960).

[101] Memorandum from C. E. Wilson, Secretary of Defense, to the Secretaries of the Army, Navy, and Air Force, Jan. 12, 1954.

[102] *Conference in Gatlinburg, Tenn., Before the U.S. Commission on Civil Rights, Education* 112 (1960).

[103] Redd, "Educational Desegregation in Tennessee," 24 *J. Negro Ed.* 333, 338 (1955); So. School News, Feb. 1955, p. 1.

discrimination in public education is unconstitutional" [104] and declared that "all provisions of Federal, State, or local law requiring or permitting such discrimination must yield to this principle." [105] The Court did not, however, order the immediate admission of the Negro children to the schools from which they had been barred. The cases were sent back to the courts from which they had come with the requirement that the school authorities "make a prompt and reasonable start toward full compliance" with the May 17, 1954 ruling.[106] Recognizing that there would be many problems in reorganizing the schools serving over 10 million children, the Court said: "Full implementation of these constitutional principles may require solution of varied local school problems." [107] It placed the primary responsibility for "elucidating, assessing, and solving these problems" on local school authorities and gave the Federal district courts the duty of deciding "whether the action of the school authorities constitutes good faith implementation of the governing constitutional principles." [108] Lower courts were told that, once a start had been made in good faith, they might allow additional time for the solution of problems related to administration.[109] But the transition to a racially nondiscriminatory school system was to be accomplished "with all deliberate speed." [110]

Newspapers in all parts of the Nation remarked on the Supreme Court's wisdom in adopting a moderate course.[111] Some, however, expressed concern that the decree might make it possible for "some States to get away with segregation

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[104] 349 U.S. 294, 298 (1955).
[105] *Ibid.*
[106] *Id.* at 300.
[107] *Id.* at 299.
[108] *Ibid.*
[109] *Id.* at 300–01.
[110] *Id.* at 300.
[111] *1959 Report* 104 n. 31.

for untold years." [112] It was predicted that the phrase "with all deliberate speed" would cause "uncertainty and turmoil for a long time"; [113] that "complete racial integration may yet be many court cases away." [114]

The Supreme Court's decisions had been welcomed by responsible citizens and organizations in many parts of the South. Important support came from the Southern Regional Council. Composed of 80 southerners, both white and Negro, drawn from the major religious faiths, and all 13 States of the region, the Council in 1951 had formally committed itself to the aim of a desegregated society.[115] Support for its program of encouraging frank, critical, and realistic discussion of the racial problem came from national foundations, church denominations, trade unions, and business firms.[116] The Race Relations Law Reporter, published since 1956 at the Vanderbilt University School of Law, has reported developments in all areas where the question of race or color has legal consequences.

Spurred by this climate of acceptance, some 297 border-State and southern school districts admitted Negro pupils to previously all-white schools in the fall of 1955.[117] In 1956, 248 additional school districts implemented desegregation plans.[118] At the close of the school year 1956–57, a total of 699 had taken steps to bring the operation of their schools into compliance with the declared law of the land. Although this number was slightly less than one-fourth of all

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[112] Charleston (W. Va.) Gazette, June 2, 1955.

[113] Albuquerque (N.M.) Journal, June 1, 1955.

[114] The (Portland) Oregonian, June 1, 1955.

[115] Southern Regional Council, *Fact Sheet.*

[116] *Ibid.*

[117] *1959 Report* 296. It should be noted that a school district is statistically desegregated when it is no longer completely segregated: *i.e.*, if one Negro student attends school with white children, the whole district is regarded as desegregated.

[118] *1959 Report* 296.

biracial districts in the 17 Southern States which required segregation in public schools in May 1954, it is significant that only 9 of the 699 acted under compulsion of court order.[119] This was the highwater mark for desegregation programs begun without the compulsion of a Federal court order.

Voluntary desegregation occurred, with few exceptions,[120] only in the border States of Delaware, Maryland, West Virginia, Kentucky, Missouri, and Oklahoma. In these States, legislative programs to prevent, delay, or minimize desegregation never developed. Farther south, the reaction was different. When the 1954 decision was handed down, there was little immediate response. In 1955, however, when it appeared that implementation was to be gradual and that neither Congress nor the Executive would provide specific support to implement the decision, many States proclaimed outright defiance. This included the adoption of resolutions which purportedly nullified the Court's decision and "interposed" the States' authority between the Federal Government and the people; called for the impeachment of Supreme Court Justices; and provided for the closing of schools if that became the only alternative to desegregation. Held in readiness as the next line of defense were earlier plans to permit school districts to exercise local option and to limit desegregation to token numbers through pupil placement and State tuition grants. North Carolina and Texas alone of the group of 11 former Confederate States enacted no interposition resolutions, issued no call for the impeachment of Supreme Court Justices, and made no petition to Congress to declare the 14th

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[119] *Ibid.*

[120] A few school districts in Arkansas and Texas desegregated during the period 1954–56 before State resistance took form. One district in Tennessee, the federally owned town of Oak Ridge, desegregated in September 1955.

amendment unconstitutional.[121] Nineteen Senators and 82 Representatives from these 11 States, in a "Declaration of Constitutional Principles" introduced in the House and the Senate on March 12, 1956, decried "the Supreme Court's encroachment on rights reserved to the States and to the people," and commended "the motives of those States which have declared the intention to resist forced integration by any lawful means." [122] This document became known as the "Southern Manifesto." [123]

Elected officials were not the only source of resistance to change during this period. Private groups formed throughout the South to engage in direct obstruction of court-ordered desegregation. The most enduring of these was the White Citizens' Council.[124]

For several years, each annual school opening was marked by violent attempts to block the opening of white schools to Negroes. Local segregationists were aided in their agitations by outsiders. Such was the experience of Hoxie, Ark.,[125] in 1955, Clay and Sturgis, Ky.,[126] Clinton, Tenn.,[127] and Mansfield, Tex.,[128] in 1956, and Nashville, Tenn.,[129] and Little Rock, Ark., in 1957.[130] All except Mansfield have since proceeded with their desegregation programs quietly and without further disorder.

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[121] *1959 Report* 233–34. See *1959 Report* 237–42; 2 *1961 Report of the U.S. Commission on Civil Rights, Education* 65–77 (1961) (hereinafter cited as *1961 Education Report*).

[122] 104 *Cong. Rec.* 4515 (1956); So. School News, Apr. 1956, p. 1.

[123] So. School News, Apr. 1956, p. 1.

[124] See Brady, *Black Monday* (1955).

[125] *1959 Report* 195.

[126] *Id.* at 212–13.

[127] *Id.* at 219–21.

[128] *Id.* at 203–04.

[129] *Id.* at 221–22.

[130] *Id.* at 196.

As opposition to the *School Segregation Cases* crystallized, there arose the question of how far the executive branch of the Federal Government would go to enforce school segregation orders of the courts. When the Hoxie, Ark., school board's July 1955 attempt to desegregate its schools was obstructed by a group of individuals, the school board went to court to have such conspiratorial action enjoined. The Attorney General intervened as a friend of the court.[131] In 1956, the Attorney General intervened in criminal contempt proceedings brought against certain private individuals for the violation of an injunction by violent interference with the orderly desegregation of public schools in Clinton, Tenn.[132]

The following year, obstruction to the enforcement of a school desegregation court order came not from a group of individuals, but from a sovereign State. The Arkansas General Assembly enacted a number of laws to block desegregation of a Little Rock high school in accordance with a Federal court order. When the school opened in September 1957 the Governor ordered the Arkansas National Guard to prevent Negroes from entering the school.[133] The Attorney General filed a petition against the Governor, at the court's request, and he was enjoined from further acts to prevent compliance with the court's order.[134] The Governor then

[131] Brief of the United States as amicus curiae, *Brewer* v. *Hoxie School District No. 46,* 238 F. 2d 91 (8th Cir. 1956). The Attorney General's first appearance in a school desegregation case was in the *School Segregation Cases.*

[132] *Kasper* v. *Brittain,* 245 F. 2d 92 (6th Cir. 1957), *cert. denied,* 355 U.S. 834 (1957); *United States* v. *Bullock* and *United States* v. *Kasper,* Civ. No. 1555, E.D. Tenn., July 23, 1957, 2 *Race Rel. L. Rep.* 795 (1957), *aff'd.,* 265 F. 2d 683 (6th Cir. 1959), *cert. denied,* 360 U.S. 909, 932 (1959).

[133] 2 *Race Rel. L. Rep.* 937–38 (1957). The Governor's proclamation stated that troops were dispatched "to accomplish the mission of maintaining or restoring law and order and to preserve the peace, health, safety, and security of the citizens . . . ."

[134] *United States* v. *Faubus,* Civ. No. 3113, E.D. Ark., Sept. 20, 1957, 2 *Race Rel. L. Rep.* 958 (1957).

withdrew the National Guard. When civil disorder followed, President Eisenhower directed Federal troops to remove any obstruction to compliance with the court order. The court's decree was enforced. The court of appeals sustained the Government's position to appear in these cases "to prevent its orders and judgments from being frustrated and to represent the public interest in the due administration of justice." [135] The Supreme Court, once more with the Attorney General appearing to advise the Court, declared: [136]

> The constitutional rights of children not to be discriminated against in school admission on grounds of race or color . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation, whether attempted "ingeniously or ingenuously."

State-supported resistance to desegregation did not end with the *Little Rock* case. In New Orleans in 1960 and at the University of Mississippi in 1962, angry mobs were encouraged by the defiant words and acts of their Governors and legislators to attempt to thwart desegregation. They did not succeed.

It soon became clear that the closing of schools would not provide an escape from the law of the land. In the next stage of the *Little Rock* suit, the court of appeals made this explicit when it barred the leasing of public property to a private school system which was formed to operate public schools closed by the Governor.[137] In 1959, the Supreme Court of Virginia decided, after action had been brought by white parents seeking the reopening of public schools in Norfolk, that the State school closing laws violated the Virginia

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[135] *Faubus* v. *United States*, 254 F. 2d 797, 805 (8th Cir. 1958).
[136] *Cooper* v. *Aaron*, 358 U.S. 1, 17 (1958).
[137] *Aaron* v. *Cooper*, 261 F. 2d 97 (8th Cir. 1958).

constitution.[138] In 1962, Prince Edward County, Virginia, stood as a lone monument to the device of school closing.

Although three States—Mississippi, Alabama, and South Carolina—still have successfully resisted all attempts to desegregate their public schools, the pattern in most areas is at least token compliance.

The chief means for limiting desegregation has been the pupil placement or assignment law, which, by 1961, all the Deep South States had placed on their statute books. These laws were used by school boards to assign all Negro pupils to Negro schools and to require Negro pupils to apply for transfer to another school to escape segregation. Elaborate screening and testing of applicants for transfer and the necessity to exhaust administrative remedies provided for by these laws limited the number of actual transfers severely.[139]

By 1962, the minimal desegregation resulting from the administration of pupil placement and other plans led the courts to a closer scrutiny of school board policies and practices. A statement of the Court of Appeals for the Fifth Circuit in 1962 characterizes the increasing judicial intolerance of such dilatory and discriminatory administrative procedures: [140]

> This court condemns . . . the Pupil Placement Act, when, with a fanfare of trumpets, it is hailed as the instrument for carrying out a desegregation plan while all the time the entire public knows that in fact it is being used to maintain segregation by allowing a little token integration.

By June 1960, 749 southern school districts had been desegregated among 2,850 school districts reporting biracial

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[138] *Harrison* v. *Day,* 106 S.E. 2d 636 (Va. 1959).

[139] *1959 Report* 240; *1961 Education Report* 76–77.

[140] *Bush* v. *Orleans Parish School Board,* 308 F. 2d 491 (5th Cir. 1962).

student bodies.[141] By June 1961, the number rose to 783.[142] By May 1962, among Southern and Border States and the District of Columbia, 912 of 3,047 school districts with biracial enrollments—nearly a third—had desegregated their schools.[143] However, only 7.6 percent of the 3,240,439 Negro students in these school districts attended desegregated schools.[144]

In the fall of 1961, public schools were desegregated for the first time and without disorder in Atlanta, Ga., Dallas, Tex., and Memphis, Tenn. On October 6, 1961, President Kennedy hailed the peaceful school transition in these communities: "The way in which our citizens are meeting their responsibility under the law in Memphis, New Orleans and elsewhere reflects credit on the United States throughout the world." [145] At the time the President spoke, New Orleans was starting its second year of school desegregation in peace. A year-long boycott had been broken and attendance was rising at the six desegregated schools. In Little Rock, desegregation was extended to four junior high schools without incident.[146]

As slow progress was being made in the South, civil rights groups were beginning to attack the problem of school segregation in the North. In January 1961, a Federal district court found that the school board of New Rochelle, N.Y., had deprived Negro school children of their constitutional rights not to be segregated because of race in the public schools. In the 18 months that followed that decision, 43 cities in 14 Northern and Western States became the targets of action against northern style segregation.

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[141] So. School News, June 1960, p. 1.
[142] So. School News, June 1961, p. 1.
[143] So. School News, May 1962, p. 1.
[144] *Ibid.*
[145] N.Y. Times, Oct. 7, 1961, p. 21.
[146] So. School News, Oct. 1961, p. 6.

The educational systems of the North and West do not use racially based laws to segregate school children. But in many cases, it has been charged that all-Negro and all-white schools are the results of policies which create or perpetuate patterns of segregation.

At the same time, it has been urged that even where school segregation is solely the product of residential patterns, school boards should act affirmatively to establish integrated schools. In response, school authorities in New York City[147] and Detroit[148] have relaxed their neighborhood school policies to accomplish this result. The ultimate legal question of whether school boards have a duty to adopt policies which foster integrated education has yet to be decided. In the meantime, Negro communities continue to press the attack against policies which result in segregated, and in many cases, grossly inferior education.

In the sphere of higher education, impressive progress has been made. West Virginia adopted desegregation policies for all State institutions in 1954. Delaware continued a similar policy adopted in 1950. By 1962, State universities in all States excepting South Carolina had admitted qualified Negro applicants as students either voluntarily or by order of a Federal court. The large majority of publicly supported institutions of higher learning in the formerly segregated States had taken steps to comply with the law of the land.

But in January 1961, attention was focused on another aspect of the continuing problem of segregated colleges and universities. The Federal Government is deeply involved financially in the higher education of its citizens. Financial assistance is provided many public and private colleges and universities through college dormitory construction programs, national defense fellowships, nationally sponsored institutes

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[147] *Conference in Washington, D.C., Before the U.S. Commission on Civil Rights, Education* 128–29 (1962).

[148] *Id.* at 133–34.

and agricultural research and extension programs. Much of this assistance was going to colleges and universities which discriminated in their admission policies because of race or color.[149]

The Department of Health, Education, and Welfare undertook a reexamination of its policies. In February 1962, the United States Commissioner of Education announced that language and counseling institutes held under the National Defense Education Act would not again be located at colleges and universities which do not accept Negro teachers as enrollees. After the institutes were held during the summer of 1962, the Department found that 11 colleges in the South had Negroes attending the institutes for the first time and that for four of these it was the first breach of the segregation barrier at the university. All the universities reported that they had experienced no difficulty with desegregation. The National Science Foundation announced that it would follow the same nondiscrimination policy at similar institutes during the 1963 school year. These steps, small in themselves, provide a precedent for further executive action to assure that Federal assistance to education will not be used to perpetuate discrimination.

The Federal Government also began to reexamine its support to segregated elementary and secondary schools. Secretary of Health, Education, and Welfare Abraham A. Ribicoff announced that as of September 1963, the Federal Government would regard segregated schools as "unsuitable" for children whose parents live and work on Federal installations. Where school districts persisted in their practices of segregation, Mr. Ribicoff said, schools would be operated on Federal property for these dependents on a nondiscriminatory basis. To further implement this ruling, the Attorney General initi-

[149] U.S. Commission on Civil Rights, *Equal Protection of the Laws in Public Higher Education* 182–238 (1960).

ated litigation to end racial segregation in the schools of Prince George County, Va., which are attended by children of Federal personnel. This marked the first time the Federal Government had initiated a desegregation case; its authority stemmed from the fact that Prince George County uses Federal school funds to provide education for children of personnel stationed or working at the Fort Lee Military Base.[150] Attorney General Robert F. Kennedy said: [151]

> [T]he purpose . . . of the suit is to seek an end to unconstitutional school segregation in an area where such segregation directly affects the armed forces. It makes no sense that we should ask military personnel to make sacrifices and serve away from home and at the same time see their children treated as inferiors by local requirements that they attend segregated schools.

In the eight years following the Supreme Court's decision in the *Brown* case, progress has been painfully slow. Thousands of Negro children had lost their constitutional right to a nonsegregated education. But the efforts of the advocates of violence and closed schools failed. The courage and integrity of southern judges such as—William A. Bootle, Walter E. Hoffman, Frank A. Hooper, William E. Miller, Richard T. Rives, Robert L. Taylor, Elbert R. Tuttle, J. Waites Waring, John Minor Wisdom, J. Skelly Wright—all men who risked ostracism to carry out their oaths of office—were vindicated. The dedicated efforts of citizens' groups in Dallas, Atlanta, New Orleans and elsewhere has borne fruit.

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[150] *United States* v. *School Board of Prince George County,* Civ. No. 3536, E.D., Va., Sept. 17, 1962; So. School News, Oct. 1962, p. 2. "In the 17 Southern and border states there are 242 impacted school districts which accommodate children connected with 369 military bases or other federal installations." *Ibid.*

[151] Dept. of Justice Release, Sept. 17, 1962.

It has been said that the courts must take the cases which the waves wash to them. The point to the metaphor is that the judiciary has much less initiative than the executive and the legislature in framing public policy. Private groups and individuals have helped to develop the cases discussed throughout this report and to prosecute them through successive appeals to the highest court of the land. At the same time, the actions of the executive and the legislature at State and national levels have been largely a response to the efforts of groups and individuals to secure governmental protection of civil rights. The number of such groups is large and growing. Some are created on a temporary basis to deal with specific situations such as the desegregation of the public schools of New Orleans and Atlanta. Some have been at work in the civil rights field for decades and, like the NAACP, are responsible for impressive changes in public policy. Other organizations created for purposes not directly related to civil rights have taken constructive civil rights positions.

It was the NAACP, the Nation's largest civil rights organization with nearly 400,000 members in 46 States and the District of Columbia, and the NAACP Legal Defense and Educational Fund which arranged for counsel in all the *School Segregation Cases.* The association has 1,500 chapters.[152] It seeks to end racial segregation and other forms of discrimination in all public aspects of American life. This objective includes equal justice under law; protection of the right to vote; personal security against mob violence and police brutality; the end of segregation in public education, transportation, housing, health and recreational facilities, libraries and museums, and in such public accommodations as hotels, theaters, restaurants, and taverns.[153]

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[152] Hughes, *Fight for Freedom: The Story of the NAACP* 12 (1962).
[153] *Id.* at 12–13.

The NAACP works along four main lines. It uses the State and Federal courts to secure justice and level Jim Crow barriers. It works for enactment of laws at national, state, and local levels to protect civil rights and ban racial discrimination. It carries on an educational program to create a climate of opinion in favor of equal rights. It engages in selective buying campaigns, picketing, and direct action programs.[154]

Since 1941, attorneys working with the association and the Legal Defense Fund have successfully argued 43 of the 47 cases in which they have appeared before the Supreme Court. Among these decisions have been those declaring segregation unconstitutional not only in public, elementary, and secondary schools, but also in public colleges and universities, public parks and playgrounds, interstate travel vehicles, and intrastate buses. NAACP attorneys have also participated in cases which judicially invalidated court enforcement of racially restrictive covenants, discrimination in the selection of jurors, and denials of the right to vote.[155]

Another of the older civil rights organizations, but one with a different orientation, is the National Urban League. Founded in 1910, the League has become a professional community service agency with a nationwide network of local affiliates in 62 industrial cities strategically located in 29 States and the District of Columbia.[156] The goals and objectives of the Urban League are to eliminate all forms of segregation and discrimination based on race or color in American life, and to secure for every Negro citizen equal opportunity to develop his fullest potential and to share equally the rewards and responsibilities of American citizenship. The League seeks to advance the economic and social well-being

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[154] *Id.* at 174, 185–94.

[155] *Id.* at 122–29.

[156] National Urban League, *National Urban League Fact Sheet* 1 (1962).

of Negro citizens in four major areas. These are job development and employment, education and youth incentives, health and welfare, and housing. Urban League services reach an urban Negro population which represents 70 percent of all Negro citizens who live in cities throughout the Nation.[157]

Illustrative of the League's work is its Washington, D.C., agreement with the Merchants and Manufacturers Association under which association members have promised to offer more skilled jobs to qualified Negroes. The League, in turn, is making a census of the city's Negro unemployed so it can refer trained and educated people to employers who need them. This follows in the tradition of the decade-old International Harvester agreement under which the company gives Negro job applicants equal opportunity with whites. As a result of that agreement, the number of Negro employees in the company's Louisville plant has risen from only a handful of laborers to roughly 15 percent of the work force. This is about the percentage of Negroes in the population of Louisville, a yardstick the League has often approved.[158]

In Oakland, Calif., the League has received a $39,000 foundation grant to expand its program of "career clinics" for Negro youth. The program is typical of others conducted in many public high schools. In Columbus, Ohio, for example, the League has established five career clubs in junior high schools. Negro and white students listen to lectures and attend seminars led by scientists and technicians from nearby colleges and industrial laboratories.[159]

The League is aided by many universities including Akron, Harvard, Johns Hopkins, MIT, Ohio State, Omaha, and UCLA. Among participating companies are General Motors, Hughes Aircraft, Nation-Wide Insurance, North American Aviation, Ohio Edison, Harshaw Chemical, and

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[157] *Id.* at 1, 3.

[158] *The National Observer,* June 17, 1962.

[159] *Ibid.*

Goodyear Tire & Rubber. As a result of Urban League prodding, industrial recruiters now bid for Negro graduates on college campuses. Each new crop of Negro college seniors—especially those in science, engineering, and business administration—receives an abundance of job offers. Businessmen appear at the League's New York headquarters in increasing numbers seeking advice and assistance in finding qualified Negro job applicants. "It used to be," says executive director Whitney M. Young, Jr., "that we had to beg to get in to talk to some of these big companies. Now we find many of them are knocking down our doors and begging us to help them." [160]

The Urban League's campaign has shown results. There already has been what League workers call "a major breakthrough" in banking. Until five years ago, Negroes could expect to be hired by banks only as porters or scrubwomen. Now banks in New York, Washington, D.C., Detroit, St. Louis, Kansas City, Milwaukee, Seattle, and several other cities employ Negroes in skilled and even managerial positions.[161] Airlines have hired a few Negro hostesses, and the League expects to place more as time goes on—especially as Negroes increasingly travel as airline passengers. Urban League spokesmen say few large companies have a nondiscrimination record equaling the Bell Telephone system, which hired its first Negro operator in 1946 and now has some 15,000 Negroes in nonmenial jobs.[162]

The Southern Regional Council, successor to the Commission on Interracial Cooperation, consists of a board of some 80 southerners drawn from the major religious faiths, both races, and the 13 States of the region. The Council is nonprofit, nonpolitical, and nondenominational. In 1951, it

[160] *Ibid.*
[161] *Ibid.*
[162] *Ibid.*

formally committed itself to working for a desegregated society. It did so because it believed segregation to conflict with moral values, democratic principles, and the best interests of the country.[163]

The Council presently provides consulting services to private and official agencies, carries on research and publishes reports of findings, publishes the monthly magazine *New South,* works with newspapers, radio, and television, and serves as a clearing house for other agencies concerned with southern problems. Its financial support comes from many different individuals and organizations. Among the latter are national foundations, many church denominations, and various trade unions and business firms.[164]

One of the most significant contributions to the dissemination of information on the progress and process of desegregation in education has been made by the Southern Education Reporting Service (S.E.R.S.). Within four months of the *Brown* decision, the S.E.R.S. published the first edition of the Southern School News in Nashville, Tenn. Its purpose was "to tell the story, factually, and objectively, of what happens in education as a result of the Supreme Court's May 17 opinion." [165]

Another type of organization has been concerned primarily with insuring a peaceful response to school desegregation. As residents of southern communities witnessed the open conflict of Little Rock and the closing of schools in Prince Edward County, Virginia, they seemed to face two sets of questions: Would desegregation orders be complied with in an orderly manner, or would they be allowed to provoke disorder and violence? Would the schools be desegregated, or would public education be abandoned? Confronted with these alternatives, parents, clergy, teachers, and businessmen banded

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[163] Southern Regional Council, *op. cit. supra* note 115.

[164] *Ibid.*

[165] So. School News, Sept. 3, 1954, p. 1.

together in organizations created for the purpose of promoting law and order and keeping the schools open.

In response to the closing of schools, a group of Arkansas citizens organized the Women's Emergency Committee. When an effort was made to purge Little Rock teachers, an organization called STOP (Stop This Outrageous Purge) was formed. This group had an important influence on the reversal of the school board's decision to summarily dismiss 44 faculty members regarded as sympathetic to desegregation. Fortified by these and other citizens groups, the Little Rock School Board in August 1959, decided to reopen the high schools.[166]

HOPE—Help Our Public Education, Inc.—was formed in Atlanta, Ga., in December 1958. Mrs. Mary Reese Green of Atlanta, a member of the executive committee of HOPE, described its activities at a Conference before the United States Commission on Civil Rights in 1961: [167]

> During the fall of 1958, formal and informal groups were meeting in the Atlanta metropolitan area to discuss this situation. Columns and editorials appeared in the newspapers saying something must be done to change Georgia laws; manifestos were published by ministers, university professors, and physicians calling for continued public education, and a few scattered PTAs had programs about the crisis. However, it was still true that in most places and for most people the problem was not even considered a polite topic of conversation. In retrospect, some people consider that the major contribution of HOPE was the extent to which it helped change this situation during its first year of operation.

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[166] *Conference in Gatlinburg, Tenn., Before the U.S. Commission on Civil Rights, Education* 78–80 (1960).

[167] *Conference in Williamsburg, Va., Before the U.S. Commission on Civil Rights, Education* 42–43 (1961).

In November of 1958 two women started a telephone chain inviting people to a public meeting, and over 500 parents came and heard a local legislator speak for open public schools. It soon became apparent that a formal organization was needed to coordinate and spearhead open school activities.

First, an attempt was made to get prominent Atlanta citizens to head such an organization. That failed, but a group of 18 parents went ahead. HOPE, Inc., was granted a State charter in December 1958. Its policy has been to work for the continuance of free public education in Georgia. HOPE does not discuss segregation or desegregation.

Less than 3 months after being granted its charter, HOPE held its first large public meeting at a local theater. This meeting established HOPE as the rallying point for open-school advocates throughout Georgia.

Following this rally, a series of informative teas were held in over 100 homes in Atlanta. These were covered on the society pages of local papers, thus reaching many readers that might otherwise have been missed.

HOPE held its next public meeting in November of 1959, at which members of the Little Rock School Board and Chamber of Commerce were the speakers. This was followed by another large public meeting at which the representatives, Atlanta representatives, in the State legislature were the speakers. By this time all four of these men were speaking openly for open public schools, whereas the year before only one of them had been willing to take this stand.

> Almost from its beginning, HOPE was in touch with open-school groups in Virginia and Arkansas. Their experiences and help prevented many mistakes and made HOPE's job much easier. Within Georgia other organizations who were interested in preserving public education now had one group to work with which could coordinate open-school activities.

As the Georgia legislature convened in January 1961, Atlanta was under court order to desegregate its schools in the fall. HOPE launched "Operation Last Chance," a campaign aimed at repeal of Georgia's massive resistance laws during that legislative session. Its goal was accomplished. HOPE also helped prepare the people of Atlanta for the partial desegregation there which occurred in September 1961.[168]

A group of New Orleans residents patterned their open-schools movement after HOPE. Under the leadership of Mrs. N. H. Sand, Save Our Schools (SOS), formed in 1960, faced the New Orleans education crisis that same year as crowds of screaming women and rioting teen-agers demonstrated against the integration of two schools. SOS members appeared before legislative committees and testified against massive resistance legislation, attempted to educate the people of New Orleans as to the nature of the choice which confronted them, and actually drove pupils through jeering crowds to and from school in an effort to break the white boycott of Frantz and McDonough schools.[169]

In the belief that "any program for the peaceful desegregation of a city's schools must seek to reach and influence the total population—not just parents—or whites—or Negroes—but the total population," the long established and highly respected Dallas Citizens Council, composed of heads of

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[168] *Id.* at 44–45.

[169] Louisiana State Advisory Committee to the U.S. Commission on Civil Rights, *The New Orleans School Crisis* 6–7, 40–42 (1961).

industry and private corporations, undertook early in 1960 to prepare the community for school desegregation. Working with such groups as the Dallas Bar Association, the County Medical Society, and the Greater Dallas Council of Churches, the Citizens Council (not to be confused with the segregationist White Citizens Councils) made and distributed a documentary film entitled "Dallas at the Crossroads." Mr. Sam R. Bloom, a member of the Council, explained the purpose of the film: [170]

> We believed that the women who rioted in Little Rock and New Orleans had seen themselves as crusaders for a cause, not as lawbreakers or as hurting their children. We believed that carefully selected newsclips of actual riot scenes would make this difference clear.

The Council also prepared a pocket-sized booklet bearing the title of the film. Payroll inserts were prepared and distributed to tens of thousands of employees, and thousands of posters were placed on display. They showed happy children and carried the legend, "Keep Dallas safe for them—avoid violence." [171]

The major religious organizations spoke out soon after the Supreme Court's 1954 decision. On May 19, 1954, the General Board of the National Council of Churches of Christ in the United States of America hailed the decision as offering the "promise of further steps for translating into reality Christian and democratic ideals," but recognized that its implementation would "test the good will and discipline of people in many communities." [172] In June, the Southern Baptist Convention took issue with prevailing political

[170] *Conference in Washington, D.C., Before the U.S. Commission on Civil Rights, Education* 145 (1962).

[171] *Ibid.*

[172] Campbell and Pettigrew, *Christians in Racial Crisis* 157 (1959).

opinion in the South and recommended that its members recognize that the Court's opinion was "in harmony with the constitutional guarantee of equal freedom to all citizens, and with the Christian principles of equal justice and love for all men." It also urged positive thought on the problems of adjustment and called upon church leaders to prevent increased antagonisms during "this crisis in our national history." [173] The convention has continued to make similar statements and suggestions for its constituents.

The General Assembly of the Presbyterian Church in the United States (Southern) was as unequivocal as the Southern Baptist Convention on the matter of desegregation. Its recommendations of 1954 were: "That the General Assembly affirm that enforced segregation of the races is discrimination which is out of harmony with Christian theology and ethics and that the church, in its relationship to cultural patterns, should lead rather than follow." Four years later the assembly declared that, "The Christian conscience cannot rest content with any legal or compulsive arrangement that brands any people as inferior; which denies them the full right of citizenship on the ground of race, color, or social status; or which prevents them from developing to the fullest possible extent the potentialities with which they, as individuals, have been endowed by the Creator." It went on to declare that the decision in the *School Segregation Cases* "must be recognized as the law of the land, and obeyed as such unless it is changed by legal and constitutional methods. . . ." [174] James McBride Dabbs, an active Presbyterian elder in South Carolina, wrote in the *Christian Century* that the White Citizens Councils which had sprung up to fight for segregation have been forcing "men of sensitive conscience" into openly backing desegregation.[175]

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[173] *Id.* at 137–38.

[174] *Id.* at 160–62.

[175] Root, *Progress Against Prejudice: The Church Confronts the Race Problem* 25 (1957).

There were other declarations about segregation in the South in the wake of the *Brown* decision. J. Claude Evans, editor of the *South Carolina Methodist Advocate,* spoke out against segregation in the columns of his paper. Methodist Bishop William T. Watkins of Memphis warned that "the church that says it's a follower of Jesus Christ must not allow the state to get ahead of it in this march for Christianity." Women church leaders of 15 Southern States declared, in a resolution, that the school decision gave them "an opportunity of translating into reality Christian and democratic ideals." They said they felt "impelled to promote a Christian society in which segregation is no longer a burden upon the human spirit." The executive committee of the Georgia Council of Churches urged Christians to oppose "every racial discrimination." [176]

Roman Catholic prelates also spoke out. In April of 1954, the Archbishop of San Antonio, Tex., announced that "henceforth no Catholic child may be refused admittance to any school maintained by the Archdiocese merely for reasons of color, race, or poverty." In August, the Bishop of Raleigh, N.C., made a similar announcement and extended the ban on segregation to Catholic hospitals and hospital staffs. A month later, while urging "every reasonable effort" to desegregate the Catholic schools in the diocese of Little Rock, Bishop Fletcher also took the opportunity to remind "some Catholics that persons of every race, creed and nation should be made to feel at home in every Catholic church." [177]

Although parochial schools had been desegregated quietly as early as 1947 in St. Louis,[178] desegregation of Catholic schools in other parts of the Nation was far from an accomplished fact. In 1956, Archbishop Rummel of New Orleans

[176] *Id.* at 26–28, 31.

[177] Birmingham Council on Human Relations, *Religious Bodies and the Supreme Court Decision* 31 (1957).

[178] Staff Reports to U.S. Commission on Civil Rights, *Civil Rights U.S.A., Public Schools: Cities in the North and West 1962* at 256.

asked for a spirit of conciliation and calm in working out a solution to the problem. Declaring that "racial segregation is morally wrong and sinful," the Archbishop emphasized that the Church's toleration of segregation was never intended to be a permanent arrangement.[179] Nevertheless, it was not until March 1962, that the Archbishop announced that, effective with the 1962–63 school year, archdiocese schools covering several parishes, would be desegregated.[180] Public reaction was swift; much of it was unfavorable. The three leading critics of the Archbishop's statement—Leander Perez, prominent segregationist leader; Jackson G. Ricau, executive secretary of the Citizens' Council for Southern Louisiana; and Mrs. B. J. Gaillot, Jr., who contended that the Bible supported segregation—were later excommunicated by Archbishop Rummel for their part in a meeting to protest the desegregation order. Despite the disturbances, there was no apparent decline in registration.[181] In Buras, a parochial school, which admitted Negroes in September, opens daily to empty classrooms.[182]

In Atlanta, Marietta, and Athens, Ga., Negro children entered six previously segregated Catholic elementary and high schools without incident.[183] Other church schools and colleges also began operating on a desegregated basis.

In 1962, a Negro was elected to the post of moderator of the New York synod of the United Presbyterian Church.[184] A Negro woman currently serves as first vice president of the International Convention of Christian Churches (Disciples of Christ).[185] In September 1962, Southwest Virginia Epis-

[179] *Religious Bodies, op. cit. supra* note 177, at 32–35.
[180] So. School News, April 1962, pp. 1, 6.
[181] So. School News, May 1962, p. 2.
[182] N.Y. Times, Oct. 7, 1962, p. 63.
[183] *Id.* at 5.
[184] N.Y. Times, June 21, 1962, p. 27.
[185] Dallas (Tex.) Morning News, July 13, 1962, p. 5.

copal clergy and laymen voted to end racial segregation at church-operated camps.[186] In November, the House of Bishops of the Protestant Episcopal Church, meeting in Columbia, S.C., adopted a resolution calling for "willing obedience to laws which grant equal access to our public schools to all students, the right to vote to all citizens, and justice in economic and housing opportunities." [187]

Church groups have spoken out increasingly against segregated public facilities and have either refused to hold church-affiliated functions at such places [188] or insisted that all participants be accommodated without discrimination.[189] The impact of church leadership on the attitudes of their members was seen vividly in Albany, Ga., in August 1962, when a minister who had sharply criticized the arrest of Negroes who tried to integrate his church was given a vote of confidence by his Board of Deacons.[190]

The increase in church discussion of the problems of discrimination led to the convening of a National Conference on Religion and Race in January 1963 in an effort "to bring the joint moral forces of the churches and synagogues to bear on the problem of racial segregation." [191]

Another segment of the community often looked to for leadership is the legal profession. Although individual lawyers have long championed the cause of civil rights, the organized bar has steered a middle course.[192]

State and local bar associations vary in their practice as to the admission of Negro applicants. Until the mid-1950's,

[186] Richmond (Va.) Times-Dispatch, Sept. 28, 1962, p. 8.

[187] N.Y. Times, Nov. 2, 1962, p. 13.

[188] Washington (D.C.) Post, Sept. 11, 1962, p. B2.

[189] Charleston (S.C.) News and Courier, Oct. 31, 1962, p. 6B.

[190] Atlanta (Ga.) Constitution, Aug. 27, 1962, p. 1.

[191] N.Y. Times, June 22, 1962, p. 10.

[192] While the American Bar Association and at least 19 State and 12 local bar associations have Bill of Rights committees, only 3 State and 7 local associations entitle them "Civil Rights Committee." American Bar Association, *Section and Committee Directory* 4–5 (1961).

the American Bar Association required nomination by one of its State Committees on Admission as a condition of membership.[193] This resulted in the partial exclusion of Negro lawyers from the Association. During this period, a number of predominantly Negro State and local bar associations and the National Bar Association, were organized to provide Negro attorneys with a forum.[194] The American Bar Association now admits applicants on the recommendation of one sponsor, and, in effect, is open to all.[195]

It would be difficult to list the achievements of isolated groups of lawyers in the civil rights area. Occasionally, the local bar has served as a catalyst to improve the civil rights climate, as for example in Little Rock, Ark., in 1958. After the Supreme Court ordered the Little Rock school board to desegregate as planned, Governor Faubus closed the four Little Rock high schools and ordered a special election to determine whether the schools should open desegregated or remain closed and the State turn money over to private schools in the form of tuition grants. Some sixty Little Rock lawyers sponsored a paid advertisement in which they declared that "existing public school facilities of this District cannot be legally operated with any public funds as segregated private schools." They continued: [196]

> A limited integrated school system pursuant to Court orders is distasteful to many in our group, but the alternative of no public school system is even more distasteful.

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[193] Letter from the Executive Director, American Bar Association, to the U.S. Commission on Civil Rights, Dec. 18, 1962.

[194] Myrdal, *An American Dilemma* 816 (1944).

[195] American Bar Association, *The Constitution and By-Laws of American Bar Association*: Constitution, art. II, sec. 1; *By-Laws*, art. I, sec. 1 (1962).

[196] See (Little Rock) Arkansas Gazette, Sept. 22, 1958, p. 3A, and (Little Rock) Arkansas Democrat, Sept. 22, 1958, p. 18.

They concluded: "We urge our fellow citizens in the Little Rock School District to face frankly the hard alternatives and to join with us in an effort to preserve free, public education in our city." [197]

Four years later, after the final decision had been rendered in the case of *Meredith* v. *Fair,* the president of the American Bar Association gave support to the executive branch: "The paramount issue was whether or not the judgment of the courts was to be upheld. The executive branch had a clear duty to see that the courts were sustained." [198]

But as Assistant Attorney General Burke Marshall pointed out in referring to the aftermath of *Meredith:*

> [U]ntil after the violence when the present President of the American Bar Association made an eloquent statement . . . the people of the nation, were not helped much by the legal profession of this country, and particularly of the South where lawyers could have done great service through their influence and potential effect on public opinion simply by speaking out in favor of obedience to the law.[199]

Viewed against the broad background of rapidly growing private support for the elimination of segregation, direct nonviolent action movements assumed major importance. In 1955, a group of Montgomery, Ala., Negroes under the leadership of the Reverend Martin Luther King protested segregated seating on city bus lines. When Mrs. Rosa Parks was arrested for refusing to move to the rear of a bus, the group instituted a boycott. For 12 months makeshift car-

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[197] *Ibid.*

[198] Statement to the Press issued Oct. 1, 1962, by Sylvester C. Smith, Jr., president of the American Bar Association.

[199] Address by Burke Marshall, Assistant Attorney General, Civil Rights Division, Dept. of Justice, to Yale Law School Association of Washington, D.C., Nov. 20, 1962, p. 15.

pools substituted for public transportation. Many persons walked several miles to and from their jobs.[200] The bus company at first scoffed at the Negro protest. But as the economic effects of the boycott began to be felt, the company sought a settlement. When negotiations broke down, legal action was brought to end bus segregation. On June 5, 1956, a Federal district court ruled that segregation on local public transportation violated the due process and equal protection clauses of the 14th amendment.[201] Later that year, the Supreme Court, citing the *School Segregation Cases,* affirmed the judgment.[202] The boycott was ended.

The success in Montgomery gave new stimulus to organizations committed to nonviolent action. The Congress of Racial Equality and the Southern Christian Leadership Conference intensified their efforts. Created in 1943, the Congress on Racial Equality (CORE), from its early beginnings, utilized the nonviolent protest to achieve its goals. The Southern Christian Leadership Conference (SCLC), a direct outgrowth of the Montgomery bus boycott, was formed to serve as a coordinating agency for those employing the technique and philosophy of nonviolent protest. At its organizational meeting in Atlanta in 1957, the Reverend Martin Luther King was elected as its president. The NAACP, itself a participant in direct action, the Southern Regional Council, religious groups, and various labor and civic organizations gave support and aid to those involved in direct action.

Then on February 1, 1960, four students from the Negro Agricultural and Technical College of Greensboro, North Carolina, entered a variety store, made several purchases, sat down at the lunch counter, ordered coffee, and were refused

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[200] King, *Stride Toward Freedom: The Montgomery Story* 43 (1958).
[201] *Browder* v. *Gayle,* 142 F. Supp. 707 (M.D. Ala. 1956).
[202] *Gayle* v. *Browder,* 352 U.S. 903 (1956).

service because they were Negroes. They remained in their seats until the store closed.

In the spring and summer of 1960, young people, both white and Negro, participated in similar protests against segregation and discrimination wherever it was to be found.[203] They sat in white libraries, waded at white beaches, and slept in the lobbies of white hotels. Many were arrested for trespassing, disturbing the peace, and disobeying police officers who ordered them off the premises.[204] As a result of the sit-ins, literally hundreds of lunch counters began to serve Negroes for the first time and other facilities were opened to them.[205]

Thus began a sweeping protest movement against entrenched practices of segregation. In summing up the movement, Reverend King said that legislation and court orders tend to declare rights but can never thoroughly deliver them. "Only when people themselves begin to act are rights on paper given life blood. . . . Nonviolent resistance also makes it possible for the individual to struggle to secure moral ends through moral means." [206] By 1962, the sit-in movement had achieved considerable success. As a result of the sit-ins and negotiations undertaken because of them, department store lunch counters and other facilities had been desegregated in more than 100 cities in 14 States in various parts of the Nation.

The sit-in movement did not escape Executive attention. On March 16, 1960, President Eisenhower commented that he was "deeply sympathetic with efforts of any group to enjoy

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[203] In April 1960 the leaders of the student protest movement met and established the Student Non-Violent Coordinating Committee.

[204] McMillan, "Sit-Downs, The South's New Time Bomb," *Look*, July 5, 1960, pp. 21–25.

[205] Southern Regional Council, *The Student Protest Movement: A Recapitulation* 14–15 (1961). Another aftermath was an increase in the number of law suits filed in Federal courts to desegregate publicly owned facilities.

[206] *The Progressive*, Dec. 1962, p. 4.

the rights . . . of equality that they are guaranteed by the Constitution" and that "if a person is expressing such an aspiration as this in a perfectly legal way," the President did not see any reason why he should not do so.[207] On June 1, Attorney General William P. Rogers met with representatives of several national variety stores and secured their promises to have their local managers confer with public officials and citizens' committees to work out means of desegregating their lunch counters. On August 10, the Attorney General announced that the national chains had made good on their promises by desegregating lunch counters in 69 southern communities.[208]

The judiciary was soon to become involved in the sit-ins. For while some of the sit-in demonstrators voluntarily went to jail,[209] many appealed their convictions on the ground that the ejections, arrests, and convictions by local government officials constituted enforcement of the private proprietor's discrimination and therefore constituted State action in violation of the 14th amendment. Three cases involving 16 students reached the Supreme Court from Louisiana in the fall of 1961. On December 11, 1961, without reaching the broader constitutional questions, the Court reversed the convictions because of lack of evidence that the sit-ins disturbed the peace either by outwardly boisterous conduct or by passive conduct likely to cause a public disturbance.[210]

In November 1962, the Supreme Court heard arguments in six cases in which the arrest of sit-in demonstrators was

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[207] *Public Papers of the Presidents, Dwight D. Eisenhower, 1960–61* at 294.

[208] American Jewish Congress, *News Letter,* Aug. 11, 1960, p. 3.

[209] At least 70,000 Negroes and white persons participated in some way in over 100 cities in the South and border States and an estimated 3,600 were arrested. *The Student Protest Movement, op. cit. supra* note 205, at 3.

[210] *Garner* v. *Louisiana,* 368 U.S. 157 (1961).

attacked as unconstitutional.[211] The Solicitor General of the United States, appearing as a friend of the Court, maintained that four of the criminal convictions were based on unconstitutional State laws, and the fifth on a pervasive State policy of segregation, and that the sixth should be reversed because the agent who evicted the defendants also served as the arresting officer.[212] The Court's decision is awaited at this writing.

One of the most dramatic attacks on segregation and discrimination was undertaken in May 1961 by the Congress of Racial Equality. A group of CORE-sponsored "freedom riders" toured the South to test segregation laws and practices in interstate transportation and terminal facilities. The "freedom riders" encountered no difficulties until they arrived in Alabama and Mississippi. In Montgomery, Ala., 20 persons were injured on May 20, 1961, by mob action. When local police failed to restore order, 400 Federal marshals were brought in to maintain order. President Kennedy said the situation was "the source of the deepest concern to me as it must be to the vast majority of the citizens of Alabama and all Americans." [213] On May 21, after initially resisting Federal authority, Governor Patterson called out the National Guard and order was quickly restored. The Department of Justice secured a temporary restraining order from the Federal district court prohibiting any further attempt by force to stop "freedom riders" from continuing their test of bus segregation.[214] On June 2, Montgomery city officials, together with several private individuals and organizations, were enjoined by the court from interfering with travel of passengers in interstate commerce. The city officials were

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[211] See 31 *U.S.L. Week* 3144–45 (U.S. Oct. 30, 1962).

[212] 31 *U.S.L. Week* 3162–63 (U.S. Nov. 13, 1962).

[213] N.Y. Times, May 21, p. 1; May 22, p. 1; Atlanta (Ga.) Constitution, May 22, p. 8; Dept. of Justice Release, May 20, 1961.

[214] Dept. of Justice Release, May 22, 1962.

also enjoined from refusing to provide protection for such travelers.[215]

When the "freedom riders" rode into Mississippi, the Governor called out the National Guard to escort them into Jackson. On May 24, 1961, the first contingent was arrested for refusing to obey a police officer's command to move from segregated terminal waiting room facilities.[216] In the following months, more than 300 "freedom riders" were arrested and convicted. On July 10, the Department of Justice intervened before a three-judge Federal court to halt the arrest of the riders in Mississippi. The Attorney General charged that local authorities had gone "beyond the scope of their lawful power" in making the arrests.[217] On November 17, the court ruled that the arrests must be challenged in State courts.[218] An application to the Supreme Court for an injunction to stay State criminal prosecutions was denied.[219] President Kennedy, in reply to a question at his

[215] *United States* v. *U.S. Klans, Knights of Ku Klux Klan,* 194 F. Supp. 897 (M.D. Ala. 1961). When the court also restrained groups and individuals from sponsoring "freedom rides" into Alabama, the Department of Justice filed a brief in opposition saying that no previous cases could be discovered "in which the exercise of lawful, peaceful, constitutionally protected activity has been proscribed because such activity was expected to arouse unlawful violence by others." N.Y. Times, June 9, 1961, p. 23. Three days after the brief was filed the district court refused to prolong its temporary restraining order. N.Y. Times, June 13, 1961, p. 1. On June 20, a group of "freedom riders" returned to Montgomery and encountered only a sullen crowd. N.Y. Times, June 21, 1961, p. 17.

[216] N.Y. Times, May 25, 1961, p. 1.

[217] (Jackson, Miss.) Clarion-Ledger, July 11, 1961, p. 1; N.Y. Times, July 19, 1961, p. 11.

[218] *Bailey* v. *Patterson,* 199 F. Supp. 595 (S.D. Miss. 1961).

[219] *Bailey* v. *Patterson,* 368 U.S. 346 (1961). One of the issues was whether the complainants had "standing" in the court to challenge the arrests since they, themselves, had not been arrested.

July 19 news conference, upheld the right of American citizens to move in interstate commerce "for whatever reasons they travel." [220]

By the summer of 1962, the leaders of the direct action movements could see results in the form of Government response to their demands and favorable changes in business attitudes and policies.

Places of Public Accommodation

The "sit-in" movement and the "freedom riders" brought the issues of discrimination and segregation in places of public accommodation back to the forefront as prime civil rights issues. In 1875, Congress had enacted legislation to ban these practices, but the Supreme Court ruled in 1883 that the Constitution does not permit Congress to prohibit private persons from denying equal access to privately owned and operated places of public accommodation.[221] The Constitution does, however, guarantee equal access to places of public accommodation that are publicly owned and operated.[222] In the 1940's and 1950's, the Supreme Court found that discrimination in privately owned terminal facilities in interstate commerce imposes an undue burden on that commerce and is a violation of the Constitution.[223] In 1961, the Court expanded its interpretation of publicly-owned-and-operated when it held that a privately owned restaurant in a State-

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[220] N.Y. Times, July 20, 1961, p. 1. See pp. 137–38 for a discussion of the I.C.C. order and Supreme Court decision that followed.

[221] *The Civil Rights Cases,* 109 U.S. 3 (1883).

[222] See *Holmes* v. *City of Atlanta,* 350 U.S. 879 (1955), *reversing* 223 F. 2d 93 (5th Cir. 1955); *City of Baltimore* v. *Dawson,* 350 U.S. 877 (1955), *affirming* 220 F. 2d 386 (4th Cir. 1955).

[223] See pp. 134–37, *supra.* See also, *Boynton* v. *Virginia,* 364 U.S. 454 (1960).

owned parking garage in Wilmington, Del., could not refuse service on the basis of race or color.[224]

In 1947, President Truman's Committee on Civil Rights recommended the "enactment by the states of laws guaranteeing equal access to places of public accommodation, broadly defined, for persons of all races, colors, creeds, and national origins." [225] At that time, 18 States had such laws. All had been enacted in the 19th century in response to the decision in *The Civil Rights Cases* that held that the Federal Government did not have the authority to legislate in this field.[226] The 56-year legislative lull was broken in 1953 when Oregon enacted a statute prohibiting discrimination in privately owned and operated places of public accommodation. This breakthrough was followed by Montana and New Mexico in 1955, Vermont in 1957, Maine in 1959, and Idaho, New Hampshire, North Dakota, and Wyoming in 1961. Alaska was admitted to the Union in 1959 with such a law on its books, bringing the total at the end of 1962 to 28 States.[227] In addition, several cities in States without such

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[224] *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961). This decision was handed down on April 17, 1961; on June 2, 1961, Wilmington enacted an ordinance prohibiting all persons licensed to sell food for consumption on the premises from refusing to serve any person because of race, color, or religion. Ordinance 61–013, *6 Race Rel. L. Rep.* 885 (1961). A similar case came before the Supreme Court from Louisville, Ky., on May 24, 1954, and the Court had vacated the judgment of a lower court holding that the 14th amendment was not applicable to a privately operated enterprise conducted on leased public property, and remanded the case "for consideration in light of the Segregation Cases decided May 17, 1954." *Muir* v. *Louisville Park Theatrical Ass'n,* 347 U.S. 971 (1954), *vacating* 202 F. 2d 275 (6th Cir. 1953), *affirming* 102 F. Supp. 525 (D.C.W.D. Ky., 1951).

[225] President's Committee on Civil Rights, *To Secure These Rights* 170 (1947).

[226] See pp. 66–67, *supra.*

[227] Konvitz and Leskes, *A Century of Civil Rights* 157 (1961); 1 *1961 Report of the U.S. Commission on Civil Rights, Voting 208–10* (1961) (hereinafter cited as *1961 Voting Report*).

laws have enacted antidiscrimination ordinances concerning public accommodations.[228]

The interest in equal access to places of public accommodations has greatly increased in recent years. On May 17, 1960, the Department of Justice filed suit to assure that a public beach constructed with funds from the Federal Government would be available to all the public without discrimination because of race or color.[229] On September 13, 1961, the Department of State publicly urged the Maryland legislature to pass a bill, then pending before it, to prohibit discrimination in restaurants, hotels and other places of public accommodation in the State.[230] More significantly, President Kennedy spoke out on this issue. In March 1961, the Civil War Centennial Commission, responding to an appeal from the President, elected not to use segregated facilities in Charleston, S.C.[231] On September 25, 1961, the President issued a personal plea for an end to discrimination "in restaurants and other places of public service." [232]

In 1962, the executive branch of the Government for the first time attacked discrimination and segregation in hospital facilities constructed or maintained with the aid of Federal funds. The Department of Justice asked the Federal district

[228] Wilmington, Del.; Baltimore and Montgomery County, Md.; St. Louis and Kansas City, Mo.; and El Paso, Tex., have such laws. Also, Washington, D.C., has such a law. The Supreme Court has sustained the District of Columbia ordinance, *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100 (1953), and upheld a Michigan statute against a charge that it operated as an undue burden on commerce when applied to an excursion boat operating in Canadian waters. *Bob-Lo Excursion Co.* v. *Michigan*, 333 U.S. 28 (1948). The Court said that the Michigan Civil Rights Act "contains nothing out of harmony, much less inconsistent with our federal policy in the regulation of commerce between the two countries . . . ." *Id.* at 37.

[229] Dept. of Justice Release, May 17, 1960.

[230] N.Y. Times, Sept. 14, 1961, p. 1. The bill, however, failed passage.

[231] N.Y. Times, Mar. 26, 1961, p. 1.

[232] Washington (D.C.) Post, Sept. 26, 1961, p. 4A.

court in Greensboro, N.C., to declare unconstitutional the separate-but-equal provision of the Hill-Burton Act—the law which provides Federal funds for hospital construction. The Department made the request as it moved to intervene in a private suit brought to challenge the constitutionality of the separate-but-equal provision of the Hill-Burton Act.[233] Attorney General Kennedy said the Department of Justice had specific responsibility under law to take part in the action. A judicial procedure statute calls for the Government to intervene in any suit in which the constitutionality of a Federal law is questioned, but in which the Government is not already a party.[234] This was the first time the Government had intervened to challenge the constitutionality of a Federal statute.

Administration of Justice

When Negroes intensified their efforts to secure their constitutional rights after the Supreme Court's decision in the *School Segregation Cases,* violence and racial tension often followed. A survey published by the Southern Regional Council, the American Friends Service Committee, and the National Council of Churches of Christ documented 530 cases of violence, reprisal and intimidation of Negroes between

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[233] *Simkins* v. *Moses H. Cone Memorial Hospital,* Civ. No. C–57–G–62, M.D.N.C., Dec. 5, 1962. The district court, while finding that hospitals are pursuing discriminatory practices, dismissed the suit on the ground that the hospitals were not instrumentalities of the State and therefore not subject to the prohibitions of either the 5th or 14th amendments. The court specifically declined to reach the question of the Hill-Burton separate-but-equal clause. On Dec. 19, 1962, the Moses H. Cone Memorial Hospital announced that it would accept Negroes on its staff and an invitation to Negro doctors and dentists to apply for staff privileges was issued by the hospital. Greensboro (N.C.) Record, Dec. 19, 1962, p. 1.

[234] Dept. of Justice Release, May 8, 1962; see 28 U.S.C. sec. 2403 (1958).

1955 and 1959.[235] A 1961 study concluded that police brutality was still a serious problem in many parts of the United States, that Negroes were the victims with disproportionate frequency, and that while official tolerance of private violence was diminishing, it also remained a problem.[236]

At the same time, there have been important signs of progress. Personal violence directed against the Negro in the form of lynching once took 100 lives per year. It is now virtually extinct. In the 1940's, racial tensions erupted in Detroit, Los Angeles, New York, and other cities, causing deaths, injuries and property damage. Mob action of this kind has been infrequent in the past decade and, when it has occurred, effective State and local law enforcement has controlled the situation. In those few cases where local officials have refused or neglected to control mob violence, the Federal Government has acted with dispatch to abate violence.[237] The Ku Klux Klan, which for many years served as an instrument of personal violence against the Negro, has been effectively controlled, and in many places driven out of existence by government action. In the one State where the Ku Klux Klan still poses a threat, local law enforcement officials and juries are convicting Klansmen and sentencing them to long prison terms when they engage in violent conduct.[238]

The courts have remained alert to discrimination against Negroes and other minorities at the hands of agencies of justice. Since 1948, the Supreme Court in six decisions has

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[235] Southeastern Office, American Friends Service Committee; Dept. of Racial and Cultural Relations, National Council of the Churches of Christ in the United States of America; Southern Regional Council, *Intimidation Reprisal and Violence in the South's Racial Crisis* 1 (1959).

[236] 5 *1961 Report of the U.S. Commission on Civil Rights, Justice* 109 (1961) (hereinafter cited as *1961 Justice Report*).

[237] See generally *1961 Justice Report;* Franklin, *From Slavery to Freedom: A History of American Negroes* (1956).

[238] Birmingham (Ala.) News, Sept. 18, 1961, p. 12; Sept. 15, 1961, p. 3.

reversed convictions on the grounds that Negroes were discriminated against in the selection of grand and petit juries.[239] In 1954, the Court denied the contention of the State of Texas that the constitutional protection against systematic exclusion from juries did not extend to Americans of Mexican descent.[240] In these decisions, the Court shifted to the States the burden of showing that Negroes or other minorities have not been systematically excluded from jury service.[241]

Despite this judicial vigilance there are still many counties in Southern and Border States where Negroes have never sat on a grand jury and only rarely serve on petit juries.[242] Frequently, this is due to the discriminatory application of some qualification which is valid on its face. For example, in Mississippi a juror must be a registered voter. Therefore, denials of the opportunity to register are inextricably linked to jury discrimination.[243] As the United States Court of Appeals for the Fifth Circuit observed in 1959: [244]

> . . . we have long known that there are counties . . . in which Negroes constitute the majority of the residents but take no part in government either as voters or as jurors. Familiarity with such a condition thus prevents shock, but it all the more increases our concern over its existence.

The Negro appears to suffer with disproportionate frequency from acts of violence by law enforcement officials. An analysis of such allegations submitted to the Department

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[239] *Brunson* v. *North Carolina,* 333 U.S. 851 (1948) (five cases); *Cassell* v. *Texas,* 339 U.S. 282 (1950); *Shepherd* v. *Florida,* 341 U.S. 50 (1951); *Avery* v. *Georgia,* 345 U.S. 559 (1953); *Reece* v. *Georgia,* 350 U.S. 85 (1955); *Eubanks* v. *Louisiana,* 356 U.S. 584 (1958).

[240] *Hernandez* v. *Texas,* 347 U.S. 475 (1954).

[241] *Ibid; United States ex rel. Goldsby* v. *Harpole,* 263 F. 2d 71 at 77–78 (5th Cir. 1959), *cert. denied,* 361 U.S. 838 (1959).

[242] *1961 Voting Report* 179.

[243] *1961 Justice Report* 99.

[244] *United States ex rel. Goldsby* v. *Harpole, supra* note 241, at 78–79.

of Justice between 1958 and 1960 indicated that, although Negroes comprised only about 10 percent of the United States population, they were subjected to 35 percent of the alleged incidents of brutality.[245] Until 1961, relief from such abuse was made difficult by a Supreme Court requirement that the complainant show that the police officer had a specific intent to deprive him of a constitutional right.[246] In an important 1961 decision, the Supreme Court ruled that this doctrine of specific intent applied only to the criminal Civil Rights Acts and not to civil statutes; the civil statute "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." [247] This decision suggests that it will now be less difficult to maintain an action for damages against an offending police officer.[248]

Additional help against police violence has come from the Federal Bureau of Investigation (FBI), which has conducted a series of 553 special civil rights schools for State and local officials. The FBI National Academy also offers 12-week training programs for career officers, which include instruction in this area.[249] Similar courses have been established in many large cities, including Chicago, Dallas, Detroit, Los Angeles, New York, and Philadelphia.[250]

Thus while serious problems of police mistreatment and private violence remain, new resources are being employed to deal with them. The developing law, more vigorous action by Federal, state and local officials, and community training programs all afford promise of significant gains in the administration of justice.

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[245] *1961 Justice Report* 26; see Greenberg, *Race Relations and American Law* 316–23 (1959).

[246] *Screws* v. *United States,* 325 U.S. 91 at 103 (1945).

[247] *Monroe* v. *Pape,* 365 U.S. 167, 187 (1961).

[248] See *Hardwick* v. *Hurley,* 289 F. 2d 529 (7th Cir. 1961).

[249] Dept. of Justice, *The Role of the FBI in Protecting Civil Rights* 6 (1962).

[250] *1961 Justice Report* 86, 241.

In 1952, the Department of Justice prepared a brief history of the protection of constitutional rights of individuals during the period from 1932 to 1952.[251] On the right to vote, this report stated: [252]

> In 1932, the question as to the right of Negroes to vote involved twelve Southern States—Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia. In these states, Negroes were so effectively disfranchised, regardless of the Fourteenth and Fifteenth Amendments to the Constitution, that considerably fewer than a hundred thousand were able to vote in general election[s] and virtually none was permitted to vote in the primary election[s].

By 1953, however, important progress had been made. The successful campaign by Negroes in the courts to eliminate the "white primary" was the first important step.[253] A second was voluntary State action abolishing the poll tax as a prerequisite for voting. Louisiana did it in 1934; Florida in 1937; Georgia in 1945; South Carolina in 1951; and Tennes-

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[251] Dept. of Justice, *Protection of the Rights of Individuals* (1952).

[252] *Id.* at 4.

[253] If any further doubt remained about the right of any or all citizens to participate in primaries, it was dispelled by the Supreme Court in the case of *Terry* v. *Adams,* 345 U.S. 461 (1953). In this case, a Democratic club in Texas, which barred Negroes from membership, claimed to be a voluntary, private club having no connection with State elective machinery. It merely recommended candidates for the regular party primary, and its expenses were met by assessing the candidates themselves. Speaking for the Court, Justice Black said that this "club" could not exclude persons because of their race or color, and retain its position as a part of the election machinery. The white primary, as a device to deny Negroes their right to vote, was finally laid to rest.

see in 1953. Today, only five Southern States—Alabama, Arkansas, Mississippi, Texas, and Virginia—still require payment of poll tax as a prerequisite for voting.[254]

By 1947, the number of registered Negroes in the 12 Southern States had risen from 100,000 in 1932 to 645,000; by 1952, this number exceeded 1 million; [255] today, it exceeds 1.3 million.

This new political strength has been reflected in the fact that Negroes now hold more elective offices than at any time since 1877. In 1945, 27 Negroes sat in the legislatures of 13 States. In 1947, there were Negro judges in Cleveland, Chicago, Los Angeles, Washington, and several other cities. The number of Negro judges had increased to seven in New York City. In many other cities, Negroes served as members of boards of education and city councils, members of the prosecuting attorneys' staffs, policemen, tax commissioners, and corporation counsels. In 1953, a Negro educator was elected to the school board of Atlanta, Ga. During the fifties, Negroes were elected to the city councils of several southern cities, including Durham, N.C., and Nashville, Tenn. In

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[254] See note 271, *infra,* for discussion of proposed anti-poll tax constitutional amendment.

[255] *Protection of the Rights of Individuals, op. cit. supra* note 251, at 5. Two Supreme Court decisions in the sixties on gerrymandering and malapportionment should further protect and expand the right to vote. In *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960), the Supreme Court held that a statute redefining the city limits of Tuskegee, Ala., and altering the shape of the city from a square to a 28-sided figure thereby allegedly removing from the city all but four or five Negro voters but not excluding a single white voter was unconstitutional because it violated the 15th amendment which forbids a State from passing any law depriving a citizen of his vote because of his race. In a concurring opinion, Justice Whittaker expressed the view that the decision should be rested, not on the 15th amendment, but rather on the equal protection clause of the 14th amendment. In *Baker* v. *Carr,* 369 U.S. 186 (1962), the Supreme Court held that Federal district courts have jurisdiction of suits alleging a gross disproportion of representation to voting population.

1953, a Negro was elected to the presidency of New York City's Borough of Manhattan. In 1960, Otis M. Smith was elected Auditor General for the State of Michigan and became the first Negro elected to a statewide office in the North. Two years later, he was elected to a full term on the Michigan State Supreme Court after serving on the court by appointment.

In the 1962 elections, Gerald Lamb was elected treasurer for the State of Connecticut and Massachusetts voters elected Edward T. Brooke as their attorney general. Leroy Johnson of Atlanta became the first Negro elected to the Georgia State Senate since Reconstruction days. Mrs. Charles E. White, a Negro member of the Houston, Tex., School Board, was reelected over five opponents. In the national elections, Negroes won five seats in the United States House of Representatives. This was one more than in the preceding Congress and more than they had won in any national election since 1874, when the South sent seven Negroes to the House and one to the Senate. The newest House member, Augustus F. Hawkins of California, joined Adam Clayton Powell of New York; Charles C. Diggs, Jr., of Michigan; William L. Dawson of Illinois; and Robert N. C. Nix of Pennsylvania.[256]

Appointment of Negroes to Federal positions of responsibility also reflected both a growing participation in the electorate and the Federal Government's affirmative policy of equal employment opportunities. In 1946, President Truman appointed William H. Hastie as Governor of the Virgin Islands and three years later nominated him to the United States Court of Appeals for the Third Circuit. Upon Judge Hastie's confirmation by the Senate, he became the highest-ranking Negro Federal judge in American history.

President Eisenhower appointed J. Ernest Wilkins as Assistant Secretary of Labor and he became the first Negro

[256] 20 *Cong. Q.* 2152 (weekly ed. Nov. 9, 1962). Representatives Dawson and Powell are chairmen of two standing House committees.

subcabinet officer. Other Federal appointments between 1953 and 1960 included Scovel Richardson as chairman of the U.S. Board of Parole; Charles Mahoney as the first full delegate to the United Nations; E. Frederic Morrow as administrative officer on the White House staff; Clifton R. Wharton as Minister to Rumania; and Messrs. J. Ernest Wilkins and George M. Johnson successively, as members of the United States Commission on Civil Rights.

President Kennedy has continued and increased the appointment of Negroes to high Federal positions. Robert C. Weaver's appointment as Administrator of the Housing and Home Finance Agency marked the first selection of a Negro to head a Federal agency. Frank Reeves was appointed to the White House staff. Clifton R. Wharton became Ambassador to Norway. Dean Spottswood W. Robinson, III of Howard University Law School became a member of the United States Commission on Civil Rights. Thurgood Marshall was appointed court of appeals judge and James B. Parsons and Wade H. McCree, the first district court judges within the continental United States. Merle McCurdy and Cecil F. Poole became the first Negroes to be named United States Attorneys. Assistant United States attorneys were appointed in such southern and border cities as Baltimore, Houston, Memphis, and St. Louis. John B. Duncan was made a member of the District of Columbia Board of Commissioners; Carl T. Rowan was named Deputy Assistant Secretary of State; and Andrew T. Hatcher, Associate White House Press Secretary. On September 26, 1962, A. Leon Higginbotham was confirmed for a seven-year term as a member of the Federal Trade Commission and became the first Negro to serve as a Commissioner on a Federal regulatory agency.

Despite this progress, disfranchisement based upon race or color continued to be a problem.[257] However, the increasing

[257] See *1961 Voting Report* 135.

political strength of Negroes has helped make it possible to fashion new legal instruments with which to fight discrimination.

Congress and the New Laws

The Civil Rights Act of 1957 was the first positive congressional expression of an expanding Federal role in civil rights since 1875. Congress had repealed provisions of earlier civil rights statutes but had done nothing to replace them. President Truman submitted proposals for legislation to implement the recommendations of his Civil Rights Committee. With support for civil rights mounting, the House of Representatives passed bills several times during the period between 1953 and 1957, but no civil rights bill came to a vote in the Senate.

The filibuster, the committee system of transacting legislative business, and the seniority rule which tends to favor southern members of Congress with committee chairmanships, are regarded by many as active impediments to civil rights legislation. The diverse character of interests in the two national parties, representing within each party a broad spectrum of opinion and interest with respect to any given issue, has not helped to focus political attention upon the need for civil rights legislation. However, by 1957 there was a definite and discernible tide which was to sweep away the traditional impediments to civil rights legislation and overcome political inertia in this neglected field.

The migration of Negroes from the South and their increased participation in the electoral process made civil rights a political issue in more areas of the Nation. The Supreme Court's 1954 decision in the *School Segregation Cases* and the role of the United States in world affairs brought many congressmen to an increased sensitivity to civil rights issues. Thus, when President Eisenhower presented a four-point program for civil rights in 1957, he was speaking to a more responsive audience. The administration's major proposal,

popularly known as Part III, was that the Attorney General be empowered to go into Federal courts to seek injunctive relief on behalf of persons whose constitutional rights had been violated. With the strong support of civil rights groups, the House passed the Eisenhower proposals largely intact. But, in the Senate, the fight was long and acrimonious. Ultimately, Part III was struck from the bill, but a new law containing several significant provisions was enacted.

The purpose of the new law was "to provide means of further securing and protecting the civil rights of persons within the jurisdiction of the United States." [258] It authorized the Federal Government to bring civil suits in its own name to obtain injunctive relief where any person is denied or threatened in his right to vote; prior to this time, this remedy was available only to private persons, many of whom were unable to bear the expense of protracted and complex litigation.[259] It gave the Federal district courts jurisdiction of such civil proceedings without requiring that State remedies first be exhausted. It also elevated the Civil Rights Section of the Department of Justice to the status of a Division by providing for the appointment of an additional Assistant Attorney General.

The Civil Rights Act of 1957 also created the United States Commission on Civil Rights and authorized it to investigate allegations of denials of the right to vote; to study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution; and to appraise the laws and policies of the Federal Government with respect to equal protection.[260]

During its first two-year term, the Commission on Civil Rights held hearings in Montgomery, Ala.; New York City,

[258] Civil Rights Act of 1957, 71 Stat. 634.

[259] Act of Apr. 20, 1871, ch. 22, sec. 1, 17 Stat. 13, 42 U.S.C. sec. 1983 (1958).

[260] Civil Rights Act of 1957, sec. 104(a), 71 Stat. 634, 42 U.S.C. sec. 1975c (1958).

N.Y.; Nashville, Tenn.; Atlanta, Ga.; and Chicago, Ill.[261] It attempted to go to Shreveport, La., to take testimony on voting complaints as it had done in Montgomery, Ala., but was stopped by court order.[262]

Under its new authority, the Department of Justice instituted suits in Macon County, Alabama; Terrell County, Georgia; and Washington Parish, Louisiana.[263] In the Georgia case, the Government charged that certain voting registrars, through wrongful acts and in violation of the Georgia registration laws, had failed to register qualified Negro voters solely because of their race or color. The Federal district court, however, ruled that the enforcement provision of the act, as written, might be used against *private* persons who were depriving citizens of their right to vote. This, the court said, was unconstitutional and lay beyond congressional power.[264]

But the Supreme Court, observing that the defendants were not private persons but State officials, reversed the decision.[265] The Court went on to uphold Federal participation in the suit, saying: [266]

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[261] In 1959 and 1961, Congress renewed the Commission for additional two-year terms. Act of Sept. 28, 1959, 73 Stat. 724; Act of Sept. 21, 1961, 75 Stat. 559.

[262] *Larche* v. *Hannah,* 177 F. Supp. 816 (W.D. La. 1959). The order, which invalidated certain of the Commission's Rules of Procedure, was reversed in 1960. *Hannah* v. *Larche,* 363 U.S. 420 (1960). Later that year, the Commission resumed its Louisiana hearings in New Orleans.

[263] *United States* v. *Alabama,* 171 F. Supp. 720 (M.D. Ala. 1959), *aff'd.,* 267 F. 2d 808 (5th Cir. 1959), *vacated,* 362 U.S. 602 (1960); *United States* v. *Raines,* 172 F. Supp. 552 (M.D. Ga. 1959), *rev'd.,* 362 U.S. 17 (1960); *United States* v. *McElveen,* 177 F. Supp. 355 (E.D. La. 1959), 180 F. Supp. 10 (E.D. La. 1959), *aff'd sub nomine, United States* v. *Thomas,* 362 U.S. 58 (1960).

[264] *United States* v. *Raines,* 172 F. Supp. 552 at 562 (M.D. Ga. 1959).

[265] *United States* v. *Raines,* 362 U.S. 17 (1960).

[266] *Id.* at 27.

> It is urged that it is beyond the power of Congress to authorize the United States to bring this action in support of private constitutional rights. But there is the highest public interest in the due observance of all the constitutional guarantees, including those that bear the most directly on private rights, and we think it perfectly competent for Congress to authorize the United States to be the guardian of that public interest in a suit for injunctive relief.

The Louisiana case was resolved by the determination of the Georgia case. The Alabama case was not so simply disposed of. Registrars in Macon County, Alabama, successfully avoided Federal action under the 1957 act by resigning two months before the commencement of the suit. The District judge refused to allow the suit to be maintained against the State, ruling that it was not a "person" subject to the act.[267] The act was unclear and it was beginning to appear as if the lower court might be sustained.

This situation, together with the persistent refusal by some local officials to let Federal investigators examine registration and voting records, led the Commission on Civil Rights to recommend that the act be strengthened. The Commission suggested that an affirmative duty be placed on registrars to act and that records be preserved for a five-year period and subjected to Federal inspection. Its most significant recommendation, predicated on a finding that judicial procedures were too unwieldy to deal with wholesale denials of the right to vote, was for appointment of Federal officers to register Negro applicants where local officials engaged in discriminatory practices against them.

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[267] *United States* v. *Alabama,* 171 F. Supp. 720 (M.D. Ala. 1959).

In 1959, a new effort was made by the Leadership Conference on Civil Rights and its allies to obtain the passage of civil rights legislation. Part III was again in issue, but the major issue involved the Commission's recommendation for Federal registrars.[268] After long and occasionally heated debate during which parts of the proposals were defeated or tabled, the Civil Rights Act of 1960 became law.[269] The act reflected in some measure the recommendations of the Commission. It took care of the problem of resigning registrars by amending the 1957 law to provide that discriminatory acts of registrars "shall also be deemed that of the State and the State may be joined as a party defendant." If a registrar resigns a "proceeding may be instituted against the State." The act further required that voting records be preserved for 22 months following any general, special, or primary election. It permitted the Attorney General to gain access to them for "inspection, reproduction, and copying" before filing suit in order to determine whether proceedings were warranted.[270]

While the act did not exactly follow the Civil Rights Commission's recommendation for establishment of a system of Federal registration officials, it included a provision for appointment of judicial voting referees. If a district court, in a proceeding instituted under the 1957 act, finds a "pattern or practice" of voting deprivation, it can appoint one or more Federal voting referees to receive applications from prospective voters who allege that they have been denied an opportunity to register or otherwise qualify to vote. If the referee agrees with the prospective voter, he reports his findings to the court, which then may issue a decree ordering that the

[268] See *1960 Cong. Q. Almanac* 185–207.
[269] Civil Rights Act of 1960, 74 Stat. 86.
[270] *Ibid.*

qualified voter be permitted to vote. Refusal to honor the decree is punishable as contempt of court.[271]

Enforcement of the two Civil Rights Acts proceeded with new vigor. Late in 1960, the Justice Department acted on reports of severe economic coercion of Negroes who had attempted to vote in Haywood County, Tennessee. The complaints charged that 80 defendants, including named merchants, landowners, banks, and local officials, intimidated, threatened, and coerced Negro citizens to keep them from voting in Federal elections. The alleged methods of intimidation included evictions of sharecroppers and tenant farmers, firings of employees, denials of loans by the banks and credit by the merchants, and direct threats. In May 1962, a Federal court decree permanently enjoined the defendants from interfering with voting by Negroes.[272] A similar suit in Fayette County, Tennessee, was similarly resolved on July 26, 1962.[273]

A suit was brought by the Attorney General on January 19, 1961, on behalf of a Louisiana Negro cotton farmer who could not get his cotton ginned, could not sell his soybean crop, and could not buy butane gas to run his farm because he had testified at a Civil Rights Commission hearing on vot-

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[271] Civil Rights Act of 1960, 74 Stat. 86, 43 U.S.C. sec. 1974 (Supp. III 1962). The act also strengthened the measures available to the Federal Government for dealing with obstructions of Federal court orders and bombings and burnings of schools and churches. *Ibid.*

In 1962 Congress proposed a constitutional amendment to abolish the poll tax, a requirement now existing in only five Southern States. If ratified by 38 states within 7 years, it will become the 24th amendment to the Constitution, and another device which has obstructed realization of full voting rights will have passed into oblivion. *1962 U.S. Code Cong. & Ad. News* 2727–35.

[272] *United States* v. *Beaty,* Civ. Nos. 4065 and 4121, W.D. Tenn., 7 *Race Rel. L. Rep.* 484 (1962). See also 288 Fed. 2d 653 (6th Cir. 1961) and 6 *Race Rel. L. Rep.* 202 (1961).

[273] *United States* v. *Atkeison,* Civ. No. 4131, W.D. Tenn., 7 *Race Rel. L. Rep.* 487 (1962).

ing denials in Louisiana. The defendants stipulated on February 3, 1961, that they would do business with the farmer. [274]

On December 28, 1961, the Department of Justice filed a suit to prohibit the use of a Louisiana voting "test" which required prospective voters to "interpret" the State constitution to the satisfaction of the registrars who administered it.[275] On June 16, 1962, the Department filed a suit in the Federal district court in Jackson, Miss., asking that the court order school officials in Greene County, Mississippi, to renew the contract of a Negro school teacher who was dropped from employment after she tried unsuccessfully to register to vote and then gave testimony about those efforts in a civil rights suit.[276]

On July 24, 1962, 26 Negroes from East Carroll Parish in northeast Louisiana were registered as voters by Federal Judge Edwin F. Hunter, Jr., in the first proceeding of its kind under the 1960 Civil Rights Act.[277] On August 28, 1962, the Department of Justice filed a complaint in the United States district court in Jackson, Miss. It asked the Court to declare unconstitutional two sections of the Mississippi State constitution which require interpretation tests and "good moral character" requirements and made a similar request concerning seven State laws which set up other devices to discriminate against prospective Negro voters.[278]

In all, 33 cases have been brought by the Attorney General: 11 in Mississippi, 9 in Louisiana, 6 in Alabama, 4 in Tennessee, and 3 in Georgia.

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[274] *United States* v. *Deal,* Civ. No. 8132, W.D. La. 1961, 6 *Race Rel. L. Rep.* 474 (1961–62).

[275] *United States* v. *Louisiana,* Civ. No. 2548, E.D. La. No decision was rendered in this case at the time of this writing.

[276] *United States* v. *Board of Education of Greene County,* Civ. No. 1729; S.D. Miss. 1962, 7 *Race Rel. L. Rep.* 770 (1962).

[277] New Orleans Times-Picayune, Jul. 25, 1962, p. 11. See *United States* v. *Manning,* 206 F. Supp. 623 (W.D. La. 1962).

[278] *United States* v. *Mississippi,* Civ. No. 3312, S.D. Miss.

The 1957 and 1960 Civil Rights Acts afford evidence of the capacity of Congress to act to protect constitutional rights. The energy and imagination with which the executive branch has enforced the new laws, backed by the fresh efforts of private civil rights organizations, promise to make significant inroads upon the remaining areas of resistance to full Negro suffrage.

A Summing Up

Looking back on the period from 1948 to 1962, most observers would conclude that the most momentous event was the Supreme Court's decision in *Brown* v. *Board of Education* that segregated public education violates the law of the land. The decision was the combination of years of effort by Negro litigants to give the 14th amendment an interpretation consonant with its history and the history of our Republic.

From this decision has flowed a series of court decisions making it clear that segregation is a dead letter in every area of public activity. Implementation of school desegregation has been slow, especially when impeded by the full range of power of some southern State governments. But the events of the eight years following the decision has made certain things clear: Violence will not be tolerated as a means of thwarting court-ordered desegregation; closed schools are not an answer; and, as time passes, the courts will demand something more than token compliance.

The climate created by the Supreme Court decision has in turn revitalized the efforts of civil rights groups in other areas. Political action and increased participation by Negroes in the electoral processes have brought a response from Congress in the form of voting legislation. Political action and various kinds of community efforts have brought a response from the executive branch which has resulted in progress in employment, transportation, and housing.

The Task Ahead

705-043—63——14

ALEXIS de Tocqueville, a young French nobleman of 30, heralded in 1835 the development of "two great nations in the world, which started from different points, but seem to tend towards the same end. . . . the Russians and the Americans." [1] "The conquests of the American are . . . gained by the plowshare; those of the Russian by the sword. The Anglo-American relies upon personal interest to accomplish his ends and gives free scope to the unguided strength and common sense of the people; the Russian centers all the authority of society in a single arm. The principal instrument of the former is freedom; of the latter, servitude." [2]

Turning his discerning gaze to the domestic problems of the United States, a country which he had visited in 1831–32, Tocqueville recognized the paradox of a free society's dependence upon a system of slave labor. The presence of millions of enslaved Negroes was the "most formidable of all the ills that threaten the future of the Union," and confronted Americans with a problem which appeared to defy solution.[3]

He defined the alternatives available to the slave-holding States with simplicity. They might emancipate the Negroes and treat them with some degree of civility, or perpetuate their serfdom for as long as possible. Emancipation, he saw, would solve few problems in the immediate future. The evidence suggested that freedom for the Negro intensified rather than alleviated the prejudice on the part of the whites: [4]

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[1] Tocqueville, 1 *Democracy in America* 434 (1945).
[2] *Ibid.*
[3] *Id.* at 356.
[4] *Id.* at 360.

> Thus it is in the United States that the prejudice which repels the Negroes seems to increase in proportion as they are emancipated, and inequality is sanctioned by the manners while it is effaced from the laws of the country.

Slavery might recede, Tocqueville said, "but the prejudice to which it has given birth is immovable." [5]

But although emancipation would not automatically solve the problems resulting from slavery, efforts to perpetuate slavery would create the danger of racial conflict "likely to terminate, and that shortly, in the most horrible of civil wars and perhaps in the extirpation of one or the other of the two races." [6]

Tocqueville was correct in his assessment. Slavery precipitated civil war, but it was a war fought between North and South, not between Negro and white. He also was correct in his judgment that emancipation was not a panacea—its immediate effect was to intensify prejudice, and to bring the Negro a freedom more fictional than real. To the end of the 19th century and well into the 20th, the legally-free Negro citizen was denied the franchise, excluded from public office, assigned to inferior and separate schools, herded into ghettos, directed to the back of the bus, treated unequally in the courts of justice, and segregated in his illness, his worship, and even in his death.

Up to this point in time and history, Tocqueville's predictions were confirmed. His view that whites and Negroes could exist together on the American continent only as masters and slaves or as armed combatants seemed confirmed by failure of the United States to pass its first major post-Emancipation test—the reconciliation of the two races in the Reconstruction era. By the time that emancipation had been

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[5] *Id.* at 359.
[6] *Id.* at 379.

achieved, the venom of racism had so infected the body politic that the Government had become incapable of enforcing the new civil rights legislation. Moreover, the gap in Federal enforcement had only in rare instances been filled by the States. This was the long, dark night for civil rights in America, a period in which the American people refused to commit themselves to the principle of equal protection under the law.

Yet if Tocqueville was accurate in predicting that slavery would precipitate armed conflict, he was wrong in his judgment that the only alternative to slavery was the "extirpation" of either race. Not only have both white and Negro survived; they have shown a remarkable capacity to work together for their common benefit. A significant factor in creating this capacity has been the Negro's demonstrated ability to rise from slavery and become an educated contributor to himself and the community.

The first decades of the 20th century saw profound social and economic changes that were to have a significant impact on the struggle for equal rights. The migration of the Negro from farm to city, and from South to North presented him with new opportunities but it also confronted him with new problems. In an atmosphere of indifference or even hostility, the Negro assumed a greater part of the burden in the struggle for equal rights. He formed his own private organizations to champion the cause of civil rights; he sought higher education and entered the professions; he used the political process as a tool for the achievement of economic and social gains; and he fought for his country on foreign shores. Yet the presence of qualified Negroes in ever increasing numbers often only heightened the unwillingness of many Americans to grant the Negro that equality to which the law said he was entitled, and which the Negro increasingly asserted he deserved.

Important gains were wrought out of the crucibles of depression and world war with government support for private

initiative, but they did little more than set the stage for more insistent demands by a minority group which had been called upon for equal sacrifice, but had continued to receive unequal rewards.

Another major factor in the reawakening of Americans to an interest in civil rights has been the Nation's profound involvement in international affairs and the realization that America's prestige in a world torn between ideologies often rests heavily on its performance in living up to its avowed principles of democracy. This new external pressure has brought about a searching reconsideration of the meaning of the Declaration of Independence and the Bill of Rights.

America's new position of world leadership has encouraged action by private groups and government at all levels. It has similarly heightened the interest of the American business community in the condition of the Negro. The interest has been expressed in several divergent ways. One involves the potential of the Negro as buyer to generate a substantial increase in consumption of goods and services.

The business community is also conscious of the studies which show that slum sections of the city yield only about six percent of its total tax receipts but absorb about 45 percent of the total cost of municipal services. And the businessman is growing increasingly aware that refusal to hire qualified Negroes for positions of responsibility is a waste of manpower resources and talent.

As the century following emancipation draws to a close, more forces are working for the realization of civil rights for all Americans than ever before in history. Government is active in every branch and at every level, if not in every region. Voluntary associations in the field have multiplied at such a rate that it is difficult to catalog them. In this swirl of social change, a new pattern is emerging. While it does not reveal solutions to the problems it poses, it offers an increasingly clear portrait of the differing character of civil

rights problems which must be met in different regions of the country.

In the South, the problem may be characterized generally as resistance to the established law of the land and to social change. The irresistible force is moving the object which was thought to be immovable; progress is slow and often painful, but it is steady and it appears to be inevitable. In the North, the issue is not one of resistance to law. It is here that segregation and discrimination are usually *de facto* rather than *de jure,* and it is here that the last battle for equal rights may be fought in America. The "gentlemen's agreement" that bars the minority citizen from housing outside the ghetto; the employment practices that often hold him in a menial status, regardless of his capabilities; and the overburdened neighborhood schools, which deprive him of an adequate education, despite his ambitions—these are the subtler forms of denial and the more difficult to eliminate.

Beyond these factors, which are largely ones of public attitude, there is the increasing problem of physical change. The minority person has been anxious to flee the confines of rural life for the promise of the city. In the rural areas, change often comes slowly and customs may linger beyond their validity. The city, by contrast, provides a climate for the generation and acceptance of new ideas. Yet contemporary history has demonstrated that the growing city becomes a significant menace to minority rights when its physical facilities, public services, and private opportunities fall behind the demands generated by the population.

As a city dweller, the Negro seemingly should gain from efforts to replace dilapidated housing and neighborhoods, to achieve efficient transportation systems, and to make the city a center of community and culture. Instead such projects have often exacerbated the problems of minority residents. The fixing of highway routes and selection of

sites for large-scale housing projects, parks, and civic centers historically follow the path of least resistance. This path frequently leads across the depressed neighborhood of the minority person. When old housing is eliminated without providing adequate replacement units for its residents, the result is more overcrowding of the remaining minority neighborhoods. And there, because of the custom of assigning pupils to the schools in the neighborhoods in which they live, the minority child receives an inferior education in a crowded and segregated school.

Thus one paradox gives rise to another. The Negro suffers from the denial of his rights in the rural area because it refuses to change. He suffers from denials in the city because it must change. In the South, he has struggled to get into the neighborhood school. In the North, he is fighting to get out of it. While he seeks and has largely found identification with the mainstream of American life, he has suffered more than others from its occupational and technological dislocations.

As a Nation, we have solved Tocqueville's paradox of a free society's dependence upon a system of slavery. In doing so, we have been presented with new paradoxes for which we have not yet evolved solutions. We have come a far journey from a distant era in the 100 years since the Emancipation Proclamation. At the beginning of it, there was slavery. At the end, there is citizenship. Citizenship, however, is a fragile word with an ambivalent meaning. The condition of citizenship is not yet full-blown or fully realized for the American Negro. There is still more ground to cover.

The final chapter in the struggle for equality has yet to be written.

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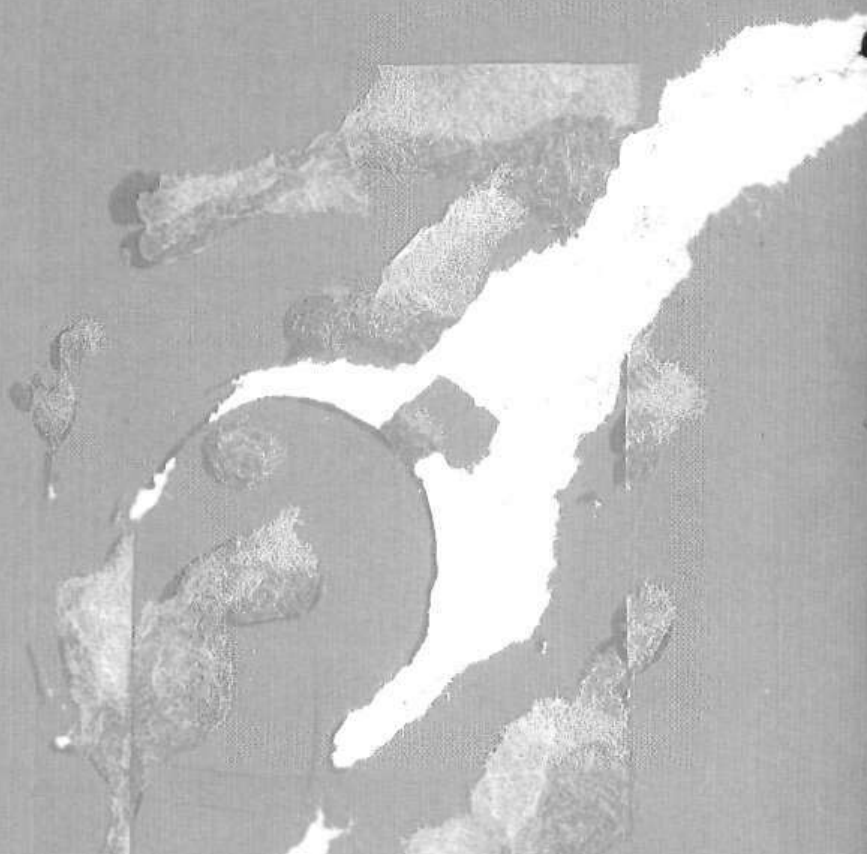

In *giving* freedom to the *sl*[illegible], we *assu*[illegible]edom [illegible]—honorable alike in what we give, an[illegible] we [illegible] nobly save, or meanly lose, the last best, h[illegible] Other means may succeed; this could not fail. The way is plain, peaceful, generous, just—a way which, if followed, the world will forever applaud, and God must forever bless. [Emphasis in original.]

From President Lincoln's Second Annual Message
to the Congress, December 1, 1862

A Report to the President by

the United States Commission on Civil Rights