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THE WARREN COURT AND CONGRESS: A CIVIL RIGHTS PARTNERSHIP

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On December 9 and 10, 1952, long lines of men, women and some children stood patiently outside the United States Supreme Court. This was the beginning of the school desegregation arguments. Only a small fraction got in to hear the proceedings. But when the decision was handed down on May 17, 1954, it had a profound effect on the lives of most of those present. Millions who were not there were also destined to be caught up in mountainous waves of change caused by the words of the opinion read by a new Chief Justice. The Honorable Earl Warren, who had been confirmed by the United States Senate on March 1, 1954, speaking for a unanimous court, said that "in the field of public education the doctrine of 'separate but equal' has no place."[1]

The significance of the words of the opinion is found in the fact that this was a complete reversal of an evil concept of law that had fastened itself on the country in the time of political uncertainties that followed the Civil War. During that period of the Nation's history, Congress passed measures that ultimately put the Negro in a position to make a legal claim for equal treatment by invoking the thirteenth, fourteenth and fifteenth amendments to the United States Constitution. However, the Supreme Court systematically struck down the clear legislative guidelines that the Congress enacted for implementing the promises of these amendments. Subsequently, the Congress also fell into the mire of scorning or evading constitutional safeguards.

In contrast, from May 17, 1954 to the present there has developed a meaningful partnership between the Supreme Court and Congress in the field of civil rights, with the Supreme Court setting the direction for the course of that partnership.

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[1] Brown v. Board of Education, 347 U.S. 483, 495 (1954). At the time of the opinion Chief Justice Warren had been serving on the Supreme Court since September 30, 1953, after receiving, first, a recess appointment from President Eisenhower to fill the vacancy caused by the death of Chief Justice Fred Vinson. The President sent the nomination to the Senate on January 11, 1954. As Governor of California, Mr. Warren had appointed Richard Nixon (by then Vice President), Senator William F. Knowland, the Republican leader known as a conservative, and Senator Thomas H. Kuchel, the Republican leader known as a liberal, to serve in the Senate before they began elected terms. All of them warmly praised the Warren appointment.

Before the decision, even liberal members of the House and Senate quailed when asked the question: "Do you believe in social equality?" Like the term "Black Power" used in the racial exchanges today, the words "social equality" could mean anything from being willing to be seen in the company of a Negro on a public street to "joyfully encouraging him to become a son-in-law." Generally, the social equality bomb was thrown at Senators or Congressmen who argued against discrimination based on race. Sometimes, with an ear turned in the direction of their home state or districts where some of the voters might think of the son-in-law version of social equality, the legislators would hasten to explain that they followed the "constitutional guarantee of separate but equal." Others simply avoided getting entangled in civil rights problems. The net result of all this was to leave the field to the vocal and highly abrasive segregation advocates. They gave Congress a low rating among most of the Negroes in the United States.

Seldom did people, other than the late Walter White, who was secretary of the National Association for the Advancement of Colored People (1923 to 1955), and his associates in the organization, think of Congress as a place to seek redress of wrongs. Mr. White, a man with dynamic faith in the legislative branch of American government, always looked forward to the day when Congress would pass effective civil rights legislation. He is credited by many as being responsible for the decline of lynching in the United States. He waged a skillful and continuous campaign for passage of an anti-lynching bill until he died in 1955. Year after year he worked for the introduction and passage of legislation in the Congress. The bill would pass the House and die from filibustering in the Senate. Nevertheless, the debates that accompanied its consideration had the helpful effect of generating strong public opinion against the crime.

In 1937 Mr. White and his associates succeeded in getting the bill, introduced by Representative Joseph Gavagan (D-N.Y.), through the House by a vote of 277 to 119, a breakthrough which was blocked by the Senate. The following is his account of what happened:

> We found that the long struggle to arouse public opinion had penetrated areas and created support where a decade before we would never have dreamed of receiving such support. Southern newspapers like the Richmond Times-Dispatch, the Greensboro Daily News, the Danville Register, and other leading newspapers vigorously and unequivocally urged passage of the bill. Southern church, labor, and student bodies, particularly the women of the Methodist Episcopal Church South, were equally outspoken. But the stronger the Southern and national support became, the more vindictive were the filibustering tactics of senators like Connally of Texas, Smith of South Carolina, Bilbo of Mississippi, Russell

> and George of Georgia, and McKellar of Tennessee, aided openly by Borah and less openly by some of the conservative Republican senators. A seven-week filibuster in 1938 was finally successful when an emergency relief appropriation bill to feed the unemployed was used to displace the anti-lynching bill in the Senate.[2]

Even before the 1954 decision, most Negroes who looked to Washington for aid had their eyes on the occupant of the White House or the Supreme Court. The names of Presidents Roosevelt and Truman and Justices Black, Clark, Frankfurter and Douglas were household words. It is a symbol of the fulfillment of America's promise that the man most responsible for the almost reverent attitude of Negroes toward the Court is now a justice himself, Associate Justice Thurgood Marshall. Very early in his career, colored citizens regarded Mr. Marshall, National NAACP Counsel for many years, as a kind of combination of Attorney General and Chief Justice. Even those white Americans who opposed his efforts to achieve civil rights through the courts, exaggerated his powers. There is further significance in the fact that he was appointed to the Court by a President who was a Senator from Texas when the 1954 decision became news of world wide importance. When Mr. Marshall, serving as chief counsel for the plaintiffs in the school desegregation cases, won, the lions of the Senate and the lesser noise generators in the House made the Capitol echo with their brimstone oratory against Chief Justice Warren and Mr. Marshall. On one occasion, while attacking Court decisions, Senator Richard B. Russell of Georgia suggested that Mr. Marshall seemed to have "mesmeric" powers over the Court.

On March 12, 1956, nineteen Senators and eighty-two Representatives from southern states issued a manifesto declaring that "The unwarranted decision of the Supreme Court in the public school cases is . . . a clear abuse of judicial power."[3] Senator Price Daniel of Texas signed the manifesto, but Senator Lyndon Johnson did not. Eleven years later on August 30, 1967, President Johnson's nomination of Mr. Marshall was overwhelmingly approved by the Senate 69 to 11. It is noteworthy that one of the manifesto signers, Senator J. W. Fulbright (D-Ark.), was among those who voted to approve the Marshall nomination. Another Senator who supported the nomination was William B. Spong whose predecessor, A. Willis Robertson of Virginia, had signed the manifesto. Both of the Texas Senators, Republican John Tower and Democrat Ralph Yarborough, also supported the nominee.[4]

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[2] W. WHITE, A MAN CALLED WHITE, AN AUTOBIOGRAPHY OF WALTER WHITE 173 (1948).

[3] CONG. Q. ALMANAC 416-17 (1956).

[4] 113 CONG. REC. 12718 (daily ed. Aug. 30, 1967).

An indication of Congressional respect for the Court's role in giving leadership comes from Representative Richard Bolling (D.-Mo.) who, as a key member of the House Rules Committee, has played an important part in getting civil rights legislation to the floor. In a recent book he says: "In the 1950's the most substantial impact in domestic affairs was the work of the Supreme Court. . . . It alone behaved in a superior fashion during the period of panic and legislative cowardice provoked by McCarthyism and internal strains brought on by the cold war."[5]

EDUCATION AND VOTING RIGHTS

In a sense the vote for the Marshall nomination was a reliable indication that, on the issue of civil rights for the American Negro, the Warren Court enjoyed the potent political approval of the people and their elected officials. Other examples of the Nation's sentiments began to appear as early as the 84th Congress. Although President Eisenhower was not an advocate of civil rights legislation, his Attorney General, Herbert Brownell, put together a civil rights package that became H.R. 627.[6] In the 84th Congress some conservative Republicans insisted that they could not support the bill. Senator Hugh Scott of Pennsylvania initiated a move in the 1956 Republican Convention to make the bill a part of the party platform. This was done and it helped immeasurably in gaining GOP votes when the bill reached the Senate in 1957.[7] One of the principle objectives of the legislation was to give the Attorney General power to institute civil action to protect the Negro's right to vote. The Department of Justice already had power to seek indictments and prosecute offenders in voting discrimination cases, but it was reluctant to use the powers. In his testimony, Attorney General Herbert Brownell stressed the importance of civil action in voting cases. At one point he said:

> I cannot emphasize too much the importance of providing the Department with these civil-law powers and remedies in voting and also in other civil-rights cases. The civil remedies would be far simpler, more flexible, more reasonable, and more effective than the criminal sanctions could possibly be. Yet at the present time criminal sanctions are the only remedy specifically authorized by Congress.[8]

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[5] R. BOLLING, POWER IN THE HOUSE 193 (1968).

[6] H.R. 627, 85th Cong., 1st Sess. (1956).

[7] In his book, H. SCOTT, COME TO THE PARTY (1968), Senator Scott, who was a Republican member of the House Rules Committee in 1956-57, comments on his effort to have the Republican platform support the civil rights bill and the 1954 school desegregation decision. *Id.* at 148-49.

[8] *Civil Rights Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 84th Cong., 1st Sess. 591 (1957).

Some indication of how much the statute was needed can be gleaned from a statement by Assistant Attorney General Warren Olney, III. He said that the White Citizens Council, an organization formed to resist school desegregation, was operating in Ouachita Parish, La., for the principal purpose of preventing and discouraging Negroes from voting. This organization was said to have eliminated 3,300 Negro voters from the parish rolls "in violation of the laws of Louisiana, as well as those of the United States."[9]

Eighty-three Southern opponents of the bill had issued a second "manifesto" as soon as it was introduced. Just as they did in 1954, when attacking the Supreme Court, and as some of the rear-guard segregation advocates do now in denouncing civil rights laws passed by Congress, the signers of the second manifesto resorted to sulfuric terms in attacking the bill. The following is an excerpt from their statement:

> WHEREAS, under the guise of pious language the civil rights bill, HR 627, proposes to establish a Commission on Civil Rights, and to provide for an additional Assistant Attorney General, and further purports to strengthen the Civil Rights statutes and protect the right to vote; and
>
> WHEREAS, the truth is that these combined proposals if enacted into law would constitute a flagrant violation of States' rights; would result in further concentration of power in the Federal Government and vest unprecedented powers in the hands of the Attorney General, and would intrude the authority of the Federal Government into matters which under our Constitution are expressly reserved to the States and the people.
>
> Now, therefore, be it resolved that we, the undersigned Members of the United States House of Representatives, conscious of the grave and far-reaching consequence involved in it, hereby pledge our unqualified opposition to this iniquitous legislation....
>
> [W]e invite and urge every member of like mind in the House of Representatives and in the Senate, where the rules of procedure are more flexible, to join with us in the employment of every available legal and parliamentary weapon to defeat this sinister and iniquitous proposal.[10]

Apparently there was not a "like minded" majority in the House. When the bill came to a vote on July 23, 1956, it passed 279 to 126.[11] Senate obstruction prevented passage of the law that year, but its chief sponsors, Representative Emanuel Celler (D-N.Y.) and Representative William McCulloch (R-Ohio) reintroduced it in the 85th

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[9] *Id.* at 1018.

[10] CONG. Q. ALMANAC 462 (1956).

[11] 102 CONG. REC. 13894 (1956).

Congress as H. R. 6127.[12] It passed the House on June 18, 1957, by a vote of 286 to 126. Although the Senate struck out a very vital title known popularly as "Part III",[13] the other parts of the bill specifically mentioned in the foregoing excerpt from the manifesto remained virtually unchanged. The Senate passed the bill 72 to 18 on August 7, 1957, and President Eisenhower signed it into law on September 9, 1957.[14] The law was amended in 1960.[15]

One of the important developments connected with the passage of the 1957 Act was the fact that this was the first time Congress had been able to pass a civil rights bill in over eighty years. A number of cliches that had been used, even by civil rights supporters, were discredited when the bill became law. One standard saying was that civil rights legislation could pass the House but would never get through the Senate without a change in Rule XXII of that body which requires a two thirds vote of Senators "present and voting" to shut off a filibuster. Senator Strom Thurmond staged an all night filibuster but was not successful in preventing passage. Another widely held belief was that legislation which did not get Senate approval before April or May would not have a chance for passage, assuming that it could get around a filibuster, because from June to the end of the session Congress would be so busy with appropriation bills that it would not have time to consider civil rights matters. The 1957 bill, as previously noted, reached the Senate in June and was passed in August.

The Supreme Court took prompt action in overruling challenges to the new law.[16] The Court's posture was a great source of encouragement to members of Congress who wanted to seek more and stronger legislation in this field.

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[12] At the time the bill was introduced in 1956, the Republican support was led by Representative Kenneth B. Keating, who was then the ranking member of the House Judiciary Committee. Mr. Keating was elected to the Senate from New York in 1956. Mr. Culloch then became the ranking Member of the House Judiciary Committee.

[13] The passage of the 1964, 1965, and 1968 Civil Rights Acts has cancelled out this loss.

[14] The Civil Rights Act of 1957, 71 Stat. 634, 637 (1957).

[15] The Civil Rights Act of 1960, 74 Stat. 86 (1960). The 1960 Act authorized federal judges to appoint referees to register Negroes who were denied that right by state officials. This was helpful but slow. Civil rights advocates had insisted that examiners appointed by the executive branch would be more effective and could reach a greater number of people. Congress approved the use of examiners in the 1965 Voting Rights Act. The 1960 law also provided criminal penalties for bombings and threats of bombings as well as penalties for mob action obstructing court orders.

[16] United States v. Raines, 362 U.S. 17 (1960); Hannah v. Larche, 363 U.S. 420 (1960).

Moved by continuing evidence of flagrant denial of the right to vote in the 1964 Presidential elections and acts of violence, such as the killing of NAACP State Executive Medgar Evers in Mississippi, the violence against voting rights' marchers in Selma, and national indignation, Presdent Johnson called for a new voting rights act in 1965. By that time resistance to such legislation in Congress was insignificant. The bill became law August 6, 1965.[17] It provided for registration of Negroes by federal examiners appointed by the executive branch of government.

The State of South Carolina promptly sought to prevent enforcement of the new statute. Alabama, Louisiana and Mississippi refused to obey its provisions and the Department of Justice filed suit to require compliance. These issues reached the U.S. Supreme Court, and on March 7, 1966, Chief Justice Warren, speaking for the Court said:

> After enduring nearly a century of widespread resistance to the 15th Amendment, Congress has marshalled an array of potent weapons against the evil, with the authority in the Attorney General to employ them effectively.... As against the reserved powers of the states, Congress may use any rational means to effectuate the constitutional prohibitions of racial discrimination in voting.[18]

Complimenting the Johnson determination to move ahead with civil rights bills was the general assumption in Congress that, under the Warren leadership, the Court would not evade its responsibility to uphold legislation that met constitutional requirements. Clear evidence of this congressional belief is found in the hearings, debates and the language of the 1965 Voting Rights Section dealing with the poll tax as a requirement for voting in state elections. Faced with a disagreement about the provision, Congress said in effect, "Mr. Attorney General, you can get the power you need in a court decision." On final passage, the bill included the following: (a) a declaration that the requirement of a payment of a poll tax as a condition for voting was an abridgement of the right to vote, (b) directed the Attorney General to institute "forthwith" challenges to poll tax requirements in the federal courts, (c) stipulated the directive to the Attorney General was based on authority given to Congress by the fourteenth and fifteenth amendments to the U.S. Constitution, (d) stipulated that during the pendency of suits filed by the Attorney General against the poll tax no citizen in the affected political area could be denied the right to vote during the first year of his eligibility if he tendered payment of

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[17] Voting Rights Act of 1965, 79 Stat. 437 (1965).
[18] South Carolina v. Katzenbach, 338 U.S. 301, 337 (1966).

the tax for the current year to an examiner at least 45 days prior to an election, and (e) authorized federal examiners, serving in lieu of state registrars to issue receipts for payment of poll taxes and transmit payments to state officials. The Attorney General began his work as suggested by Congress, but the Supreme Court did not seem to need any advice on the matter when it decided the issue.[19]

In *Harper v. Virginia Bd. of Elections*, the Court concluded that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."[20]

The foregoing court decisions and laws dealing with public school desegregation and voting rights establish three important points that should be kept in mind when considering the voluminous and highly emotional arguments that have been devised to attack court decisions and legislation protecting rights of Negroes in the areas of public accommodations, equal employment and fair housing. These points are as follows:

1. Even though rules and laws regulating public schools and voting are clearly in the ambit of state action and, therefore, subject to requirements of the fourteenth amendment to the United States Constitution, opponents of federal protective action fight advances in these fields just as vigorously as they oppose federal protection against discrimination by what they describe as "purely private action with no state connection."

2. The Warren Court has continued to move the nation forward in the area of civil rights despite the increasing intensity of the attacks and the spurious charge that the Court has exceeded its powers.

3. Leadership given by Presidents Kennedy and Johnson, in the executive branch, challenged Congress to act in meeting vital civil rights problems. This, in turn, has given the Court the kind of backing in civil rights matters that encourages forthright decisions affirming the right of Negroes to be first class citizens.

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[19] United States v. Texas, 252 F. Supp. 234 (W.D. Tex. 1966) (abolishing Poll Tax in Texas elections); United States v. Alabama, 254 F. Supp. 537 (S.D. Ala. 1966) (abolishing Poll Tax in Alabama elections).

[20] Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966).

PUBLIC ACCOMMODATIONS AND THE 1964 CIVIL RIGHTS ACT

First it should be noted that while President Kennedy presented to Congress his Civil Rights Bill in June, 1963, the task of enacting what became the Civil Rights Act of 1964 fell on the desk of President Johnson. President Johnson was better equipped to accomplish results than any other chief executive in recent history. He knew all of the strengths and weaknesses of civil rights opponents in the Senate. These opponents have been the main roadblock to civil rights legislation since the turn of the Century. As majority leader in the Senate, he had been a hard driving leader, neither sparing himself nor his followers. He transferred that quality to his White House program and also did not hesitate to prod civil right forces when he thought it was necessary to do so.[21]

In 1964 and 1965 Congress did not have the advantage of reading the Chief Justice's expressions on the "Responsibilities and Duties of the Legal Profession". That speech was not made until April 23, 1966, at the dedication ceremonies of the new law building of the School of Law at the University of Maryland. If that speech had been available many senators and congressmen could have cited it as justification for assuming that the Court would uphold the constitutionality of bills then under consideration. These are the words of the Chief Justice:

> In seeking to meet the problems of these turbulent times, law schools like yours face an exciting challenge. The programs which they offer should provide the opportunity for meeting the social problems which surround us. I am thinking not only of the so-called bread and butter course which may be available. The law is not just a craft. It is a profession. And it is a profession with

[21] The writer of this article cites these two personal experiences. (1) Shortly before passage of the 1964 Act, I shared a Capitol subway ride with a distinguished southern senator who has long been an opponent of civil rights, but who has usually fought fair. "We put up a tough fight", he said, "but we are going to lose because President Johnson is just putting too much pressure on us."
(2) After passage of the 1965 Voting Rights Act the President invited civil rights leaders to a meeting at the White House. He was in good humor. Noting that some advocates of civil rights seemed to be straying to other fields, he said: "In my part of the country it gets very cold on the range. The cattle get weary and lie down. If we do not make them stand on their feet they will freeze to death. So we go around and twist their tails until they stand up. That is known as tailing up," he said. Then pointing to an aide who was present, he said to the group, "I want him to be in charge of tailing up on civil rights." The President was smiling when he said it, but most of those present knew that if they felt a sharp sensation in the dorsal region of the conscience, when not attending to duty, the source of the pain might very well be the White House.

> increasing responsibilities to serve society as a whole. Today's law schools have a significant responsibility, not just to train lawyers but to further the development of our democratic system.... For the law schools to perform their proper function today, they must participate in research in the law as it relates to social conduct. There is a compelling need for creative research projects which will afford an insight to the complexities of modern living. In this way, the law schools can facilitate the growth of the law, which must attune itself to the changes in our social and economic institutions.[22]

In addressing a New York University Law School Convocation on October 4, 1968, the Chief Justice said:

> All government agencies, local, state and national, must employ their total resources in seeking solutions to the problems of racial hatred and discontent.... By remaining a responsive forum of last resort for Negroes and other minority interests, the court can assure that the spirit of the 14th Amendment will become a tangible reality of American life.[23]

The Chief Justice's message to law students in Maryland and New York is really a kind of reaffirmation of the spirit that moved just men to seek abolition of human slavery and an end to all of the badges of servitude that accompanied it in the 19th Century.

Congress passed a civil rights bill on March 14, 1866. Two weeks later it had to override a veto by President Andrew Johnson. Among other things, this bill gave colored citizens the right "to inherit, purchase, lease, sell, hold and convey real and personal property."[24] After the ratification of the fourteenth and fifteenth amendments, Congress, on May 31, 1870, reenacted the 1866 statute with certain additions on voting, personal protection, etc.[25] In response to pleas for further protection, Congress passed another Civil Rights Act on March 1, 1875. This law provided that:

> [A]ll persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances, on land or water, theaters, and other places of public amusement; subject only to conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.[26]

Although the Reconstruction Congress sought to protect the rights of Negroes, the Supreme Court at that time was a stronghold of post civil war opposition to making the freed man a citizen.

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[22] Warren, *Responsibilities of the Legal Profession*, 26 MD. L. REV. 103, 108 (1966).
[23] Washington Evening Star, Oct. 5, 1968.
[24] The Civil Rights Act of 1866, 14 Stat. 27, 27 (1866).
[25] The Civil Rights Act of 1870, 16 Stat. 140 (1870).
[26] The Civil Rights Act of 1875, 18 Stat. 335, 336 (1875).

J. Patrick White, writing on "The Role of the Judiciary in a Democratic Society",[27] points out that the Court held that the fourteenth amendment did not preclude the infringement of a citizen's rights by another individual acting privately.[28] The Court then struck down the Civil Rights Act of 1875 by insisting that the fourteenth amendment, on which the court concluded the statute was based, did not cover situations where there were invasions of rights by individuals as distinguished from state action.[29] Historians and legal scholars have rightly praised the eloquent dissent written by Mr. Justice Harlan in that case. However, within the very language of the majority opinion were words and reasoning that would once again help to open the door of equal treatment in public accommodations. Chief Justice Bradley, writing for the Court, conceded that use of the power of Congress to regulate the commerce would have presented a different problem.[30] In other decisions the Court set forth the reasoning that became the legal basis for the separate but equal doctrine.[31]

Acting on the separate but equal theory, the country set up an incredible network of rules and regulations that built physical and mental walls between American citizens. There were separate waiting rooms in railway stations, separate schools even in John Brown's Kansas, barriers against use of hotels and restaurants, and separate accommodations in some department stores.

In a 1947 publication, Milton R. Konvitz, in discussing the importance of state civil rights laws, said:

> In the absence of such legislation in a state, places of public accommodation have the right to select their patrons and customers; they may exclude whomsoever they please, for any reason whatsoever.... For instance, in Baltimore, where the Negroes constitute 18 per cent of the population, only one large department store accepts Negro trade and allows Negro customers to try on apparel. In other stores two patterns are found: (1) as soon as a Negro enters the store, a floor-walker approaches and says that the store does not cater to Negro trade; and (2) Negroes are permitted to enter and buy articles across the counter, but are not allowed to try on hats, dresses, or gloves. Similar discrimination is practiced in Washington, D.C.[32]

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[27] White, *The Warren Court Under Attack: The Role of the Judiciary in a Democratic Society*, 19 MD. L. REV. 181, 183 (1959).

[28] United States v. Cruikshank, 92 U.S. 542 (1875).

[29] Civil Rights Cases, 109 U.S. 3 (1883).

[30] *Id.*

[31] Plessy v. Ferguson, 163 U.S. 537 (1896); Cumming v. Bd. of Education, 175 U.S. 528 (1899).

[32] M. KONVITZ, THE CONSTITUTION AND CIVIL RIGHTS 115 (1947).

In another exercise of imagination, numerous filling station operators refused to allow colored customers to use rest rooms available for white customers.[33]

In 1954, tickets to a Navy football game at the Sugar Bowl in New Orleans carried this statement: "This ticket is issued for a person of the Caucasian Race and if used by any other is a violation of state law. Such person may be ejected without penalty or refund."[34] The Navy met the problem by selling them to all who wanted to purchase them. This provoked an angry editorial outburst in the South. One paper said:

> Because of the agitation and the Navy's surrender to it, the seeds are sown for what could be an explosive situation at the Sugar Bowl. Probably there will be no serious unpleasantness—we certainly hope not—but by surrendering to NAACP pressure and attempting to flaunt long established customs of Louisiana the Navy has made a mistake.[35]

Although it is not clear that the Navy's action had much practical value in assuring that colored spectators would not be ejected if they used the tickets, the occurrence prompted the Army to move its 1957 game with Tulane University to a location outside the state of Louisiana.[36] This, of course, triggered an uproar among Louisiana Congressmen, especially Representative Hébert, a powerful member of the House Armed Services Committee. A year later he said he had been assured that no "service academy team is automatically barred from a bowl game because of racial segregation issues."[37] This type of backtracking on the part of the federal government is one of the many reasons why most thoughtful civil rights advocates prefer a court decision or a law to an executive order or a statement of policy.

Seldom did one pick up a newspaper during the late 1950's without finding an item saying such things as "Negroes arrested for trying to use public golf course,"[38] or "clergymen arrested for riding in white section of Atlanta street car."[39] Many people assume that the refusal of Negroes to accept Jim Crow arrangements did not begin until the late 1960's. Actually, the *Henderson* case on segregation in dining cars,[40] the *Morgan* case on interstate travel,[41] and

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[33] Hearings on the 1964 Civil Rights Act.
[34] Chattanooga, Tenn. Times, Dec. 25, 1954.
[35] Chattanooga, Tenn. Free News, Dec. 24, 1954.
[36] Washington (D.C.) Post, Sept. 17, 1957.
[37] Washington (D.C.) Star, May 28, 1959.
[38] Carolina Times, Oct. 31, 1959.
[39] Baltimore Afro-American, Jan. 13, 1959.
[40] Henderson v. United States, 339 U.S. 816 (1950).
[41] Morgan v. Virginia, 328 U.S. 373 (1946).

the Delaware bus terminal decision[42] all show that Negroes consistently challenged this type of injustice as they encountered it in their regular pursuits. Also, their acts often escaped public attention because the television camera had not come into wide use by the news media.

After World War II and the emergence of new non-white nations, an international aspect of the separate but equal problem began to arise. Previously, most dark skinned people who came to the United States on official visits were carefully steered around embarassing segregation by the colonial power representatives whose governments controlled the countries from which the visitors came. In the Washington area visitors from India, even after that country gained its freedom, would sometimes escape simply by wearing a turban or a sari. Pandit Nehru, who became a life member of the National Association for the Advancement of Colored People, and his sister, Ambassador Pandit, usually were indignant when they encountered segregation based on race. Inevitably, of course, some American Negroes began wearing robes and turbans to be accorded the better treatment given to the citizens of India. When the African nations began asserting their independence the picture changed. The Black Africans could not and would not pass for some other racial group. In addition, they quite properly demanded that they be given the kind of treatment accorded other foreign visitors. Their indignant protests against discriminatory practices became page one news.

The African problem was brought to the fore in a dramatic way when K. A. Gbedemah, Finance Minister of Ghana, was refused a glass of orange juice at a restaurant carrying the trade name of a nationally known company. He was enroute to Washington from New York on official business and stopped for breakfast in Delaware. Although news accounts contained an implication that President Eisenhower did not fully grasp the seriousness of this insult to a foreign visitor, it was clear that he felt something should be done to make amends. He invited Mr. Gbedemah to breakfast at the White House. The minister cancelled a trip to London in order to accept the invitation. Afterward, he told the press that President Eisenhower had said "little things" like this were happening "all over the place" and one never knew when one of them "was going to blow up".[43]

The fundamental difference between the Eisenhower approach to this problem and the responses of his successors, Presidents Kennedy

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[42] Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).
[43] N.Y. Times, Oct. 11, 1958.

and Johnson, is illustrated by the incident affecting Mr. Gbedemah. The invitation showed President Eisenhower's personal inclination to be fair and this is further supported by some of his appointments and invitations extended for Negro guests to dine at the White House. On the other hand, he often insisted that "you can't change the hearts and minds of men with a lot of laws". His characterization of the incident as one of the "little things" happening "all over the place" also suggests that such things as the Supreme Court's civil rights cases and broad federal civil rights legislation were not high on his list of national priorities.

When President Kennedy took office he sought at once to make his own position clear, but was reluctant to seek legislation that would meet the problem.

The enormous pressures being built among Negroes made action imperative. These pressures were simply an expansion of activities that had gone unnoticed by most of the white people of the country. The parents who demanded admission of their children to formerly all white schools in the South or the travelers who had the courage to take a seat in the so-called white section of a bus in Mississippi were the founders of what is often popularly called "direct action."

Sometimes a careful look at the cases involving young people, who were in court because they had personally challenged segregation, revealed that many of them were children or even grandchildren of persons who had been working against racial discrimination through the years.

In Maryland the Jackson children, whose names are listed in the case that accomplished desegregation of public beaches in that state,[44] raised the issue by going for a swim and outing with their aunt, State NAACP lawyer, Juanita Jackson Mitchell. Their grandmother, Dr. Lillie M. Jackson, state president of the NAACP holds a record for picketing. She was a leader of persons who won desegregation of a theater after picketing for seven years in the 1940's.

NAACP leaders in Oklahoma were among the first to win desegregation of state supported institutions of higher learning.[45] One of the leaders in that state is Mrs. Clara Luper, a school teacher and a mother. She became the NAACP's youth adviser in her state. Her children were among the most active in attacking segregation in places of public accommodation.

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[44] Lonesome v. Maxwell, 123 F. Supp. 193 (D. Md. 1954), *rev'd*, 220 F.2d 386 (4th Cir. 1955), *aff'd*, 350 U.S. 877 (1955).

[45] Sipuel v. Bd. of Regents, 332 U.S. 631 (1948); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

The 1958 Report of the NAACP carried this statement: "The Oklahoma City youth council conducted a city-wide "sit down" protest against segregation in lunchrooms, soda fountains and department stores which resulted in 39 stores opening their full facilities on an integrated basis to thousands of Negro customers."[46] The 1960 Report states: "The Oklahoma City youth council was cited by Parents Magazine as the most outstanding youth group in the nation during 1959-60. The council received a special Parents Magazine gold medallion and a check for $100 for its efforts in opening up more than 100 places of public accommodation to Negro citizens."[47]

In 1960, the use of the Oklahoma City type of pressure for civil rights was used by students in North Carolina. This attracted nation-wide attention and is sometimes, although erroneously, thought to be the first time Negroes employed this technique. In 1961 caravans of "freedom riders" began to test segregation practices on buses and in bus stations while travelling south of Washington. Most of the riders were subjected to brutal physical attacks for sitting in so-called white sections of buses or going into white waiting rooms. John Seigenthaler, who was then an assistant to Attorney General Robert Kennedy, was knocked unconscious during one incident of mob action against the freedom riders.[48] Mass demonstrations of Negroes, led by Dr. Martin Luther King in April 1963, in Birmingham, Ala., were broken up with dogs and fire hoses. As stated earlier in this writing, Medgar Evers, the state Secretary for the NAACP in Mississippi, was shot and killed on June 12, 1963, as he entered his home. He was engaged in leading extensive civil rights campaigns, including stepped up efforts to increase voter registration. Two months before, a white Baltimore postman, William L. Moore, was found dead of bullet wounds on a road in Alabama on April 23. He was walking through the state to protest against segregation.

Numerous voluntary efforts were made to meet the demand for equal access to places of public accommodation. These succeeded at times, but many businessmen were unwilling to act without a law.

The feelings of some who were disposed to end segregation are set forth in a publication by the North Carolina Mayors' Cooperating Committee. The following are excerpts:

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[46] NAACP, THE ANNUAL REPORT OF THE NAACP 32 (1958).

[47] NAACP, THE ANNUAL REPORT OF THE NAACP 32 (1960).

[48] A. SCHLESINGER, JR., A THOUSAND DAYS 936 (1965).

> The president of the Chamber of Commerce, at the request of the Mayor, called a meeting of the executive committee of the Charlotte Chamber of Commerce to discuss what adjustments could be made in opening accommodations—hotels, motels, restaurants, and theaters—to the Negroes. This was in May, 1963.
>
> No one seemed to know how, but all agreed that they would be willing. However, no one was willing to make adjustments alone. There was economic fear. The operators seemed afraid to act alone because they did not want to be criticized individually. Neither did they want to risk letting a competitor have any sort of advantage.
>
> There was subsequently a meeting of 40 hotel and motel men. There was hesitancy on the part of some, but others were ready to go. Concern about the possible loss of white customers and concern about a possible incident seemed to be the delaying factors. Eight decided to desegregate. The others would wait. Within a week the others moved. Adjustment was made, completed and announced. The hotel men agreed to desegregate their dining rooms first. On three successive days the white directors of the Chamber of Commerce and several other leading business, civic, and government leaders went to lunch with Negroes as guests. In groups of two, four, and six, they went by appointment. There was no publicity. *On one occasion when an out-of-town newsman sought to take pictures for national television, the appointment was switched to another restaurant in order that the agreement not to take pictures would remain unbroken.*
>
> Attention was turned, then, to drive in restaurants. Meetings and telephone calls brought an agreement for 18 drive-ins to begin accepting Negroes, two groups each night, for three nights beginning June 24. After that, it was hoped, general desegregation would be announced. *However, something that can never be predicted happened over an intervening week-end. There was a big social affair that involved several restaurant owners. Some of the dining room owners chided some of the drive-in owners about their plans to desegregate. By Monday several of them had changed their minds. When the Negro groups showed up Monday night they were turned away at 11 of the 18 places.*[49]

On June 11, 1963, President Kennedy made a radio-television address to the Nation in which he said:

> The old code of equity law under which we live demands for every wrong a remedy, but in too many communities, in too many parts of the country, wrongs are inflicted on Negro citizens as there are no remedies at law. Unless the Congress acts, their only remedy is the street.
>
> I am, therefore, asking the Congress to enact legislation giving all Americans the right to be served in facilities which are open to the public—hotels, restaurants, theaters, retail stores, and similar establishments.

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[49] NORTH CAROLINA MAYORS COOPERATING COMMITTEE, NORTH CAROLINA AND THE NEGRO 55-58 (1964) (emphasis added).

> This seems to me to be an elementary right. Its denial is an arbitrary indignity that no American in 1963 should have to endure, but many do.
>
> I have recently met with scores of business leaders urging them to take voluntary action to end this discrimination and I have been encouraged by their response, and in the last two weeks over 75 cities have seen progress made in desegregating these kinds of facilities. But many are unwilling to act alone, and for this reason, nationwide legislation is needed if we are to move this problem from the streets to the courts.[50]

Agreeing on a legal basis for a public accommodations statute was a thorny problem. Many able lawyers in the Civil Rights field had given considerable attention to the possibility of getting a public accommodations law passed in Congress or establishing a legal basis for a successful court suit.

In 1949, William R. Ming, a well known civil rights lawyer, had suggested a possible court attack on segregation in places of public accommodation by applying the rationale of the Supreme Court in the restrictive covenant cases. Writing in the *University of Chicago Law Review*, where he also served as a law school faculty member, Mr. Ming said:

> [J]udicial remedies appear available for the victims of racial segregation even in the absence of state statutes. For example, if a Negro presents himself for admission to a privately owned place of public accommodation, such as a hotel, and is denied admission solely on account of his color, it has generally been held by state courts that, in the absence of a statute to the contrary, he is without remedy. But the *Restrictive Covenant Cases* require such a decision to meet the test of the Fourteenth Amendment, and the Supreme Court's analysis of that amendment should compel reversal. The decision of the state court would be "state action" as now defined. Moreover, it is this "state action" which denies the plaintiff damages and the basis of the court's denial of damages is the race and color of the plaintiff. It thus follows that he has been denied equal protection of the laws in violation of the constitutional prohibition.[51]

Jack Greenberg, the director-counsel of the NAACP Legal Defense and Educational Fund, in his book *Race Relations and American Law*, discussed the possible form that such statutes should take. He also noted that there was respectable historical precedent in the English Common Law which bound innkeepers "to receive and lodge all travelers and to entertain them at reasonable prices without any specific or previous contract, in the absence of reasonable grounds for refusal." In considering the American position on

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[50] CONG. Q. ALMANAC 967 (1963).

[51] Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. CHI. L. REV. 203, 234 (1949).

this phase of the common law, Mr. Greenberg mentioned several states which specifically rejected the common law in this area. Tennessee, the author pointed out, expressly abrogated the common law.[52] Prompted by the Greenberg research, this writer checked two earlier cases that have a bearing on the duty of innkeepers under the common law. A 1913 Tennessee case which arose from a boarding house owner's objection to paying a tax imposed on hotel owners, gave a recital of the duty of an innkeeper to serve all.

After stating that the terms "innkeeper and hotel keeper", while synonymous, do not include a boarding house, the court said:

> The innkeeper, said Coleridge, J. in Rex v. Ivens, 7 Car. & P. 213, "is not to select his guest. He has no right to say to one, 'you shall come into my inn,' and to another, 'you shall not', as everyone conducting himself in a proper manner has a right to be received; innkeeper being a kind of public servant, having the privilege of entertaining travelers and supplying them with what they want.[53]

Further American thinking on this subject may be found in a Rhode Island decision as late as 1936. There the court said:

> In Cromwell v. Stephens, 3 Abbott's Practice, (n.s.) 26, the court, at page 36 of that opinion, defines an inn as "a house where all who conduct themselves properly, and who are able and ready to pay for their entertainment are received, if there is accommodation for them, and who, without any stipulated engagement as to duration of their stay, or as to rate of compensation, are, while there, supplied at a reasonable charge with their meals, their lodgings and such services and attention as are necessarily incident to the use of the house as a temporary home." This definition of an inn concisely set out the position of an innkeeper as stated in the early English cases of which Newton v. Trigg, 1 Salk 109 is an example.[54]

While the cases cited did not involve the question of serving a Negro, their statement of the law shows that the argument of segregation advocates about public accommodation laws invading rights of privacy of the owners of establishments open to the public was not sanctioned in the early decisions of the British Courts when dealing with innkeepers. At the time of the decisions in Tennessee and Rhode Island, the courts' extensive description of an innkeeper's duties and obligations would indicate, in those states at least, the private right to be free from control by law in accommodating guests did not have acceptance. As Mr. Greenberg points out, Dela-

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[52] J. GREENBERG, RACE RELATIONS AND AMERICAN LAW 97 (1959).

[53] McClaugherty v. Cline, 128 Tenn. 605, 607, 163 S.W. 801, 801 (1913).

[54] Ford v. Waldorf System, Inc., 57 R.I. 131, 133, 188 A. 633, 635 (1936). In this case, the plaintiff was suing for a breach of implied warranty after swallowing a piece of wood while eating beans in the defendant's restaurant.

ware, Mississippi, Florida and Tennessee found it prudent to reject the innkeeper laws by statute.[55] He concluded that the "innkeeper rule as now observed in some jurisdictions seems to contain exceptions which might be used against Negroes."[56] After listing various inadequacies of the innkeeper laws and other common law approaches, Mr. Greenberg concluded that the best way to get at private action would be through passage of a civil rights law.[57]

To this writer the cases and the statutes passed by states to nullify the common law in this area show that supporters of segregation did not intend to take any chances on giving Negroes a legal right of entry to places of public accommodation by failure to close all loopholes in the statutory or common law. This kind of ingenuity would seem to indicate that results were obtained with sufficient state involvement to warrant an attack under the fourteenth amendment. Unfortunately, it is also my opinion that without the Warren Court that attack would not have succeeded.

Although he was citing the event as a warning to alert segregation advocates, Senator Russell advised the Nation, via the Congressional Record, that "Thurgood Marshall, head of the large legal staff of the national colored peoples association" was devising a new attack on segregation in places of public accommodation.

The Russell warning was based on a widely publicized meeting of sixty-two civil rights lawyers at Howard University in Washington, D.C. The group issued a statement on March 19, 1960, pledging to appeal "every fine" imposed on persons arrested because they sought service in restaurants from which they were barred because of race. The lawyers agreed that use of public force either in the form of arrest by the police or conviction by the courts "is in truth state enforcement of private discrimination and is in violation of the 14th Amendment."[58]

Outside of Congress one of the most active persons seeking passage of the entire 1964 Civil Rights bill was Joseph L. Rauh, Jr. Mr. Rauh, who is engaged in the private practice of law in Washington, D.C., has given extensive volunteer service in drafting civil rights bills. At the outset of the discussions on the constitutional basis for the Public Accommodations title of the bill, he insisted that the title could be based on both the fourteenth amendment and the Commerce Clause. After numerous conferences, organizations comprising the Leadership Conference on Civil Rights accepted the Rauh

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[55] J. GREENBERG, RACE RELATIONS AND AMERICAN LAW 97 (1959).
[56] *Id.* at 98.
[57] *Id.* at 112.
[58] 106 CONG. REC. 6777 (1960).

formula in pushing for passage of the bill in Congress. They refused to take a position that public accommodations legislation had to be based on a single part of the Constitution.[59]

In Congress there was a considerable amount of opinion favoring a public accommodations statute based on the fourteenth amendment. Senator John Sherman Cooper of Kentucky, highly respected by his colleagues for his views on constitutional law, was a leading proponent of the fourteenth amendment approach. The Kennedy Administration and many legal scholars thought that the statute had to rely upon the Commerce Clause to avoid a legal collision with the Supreme Court's earlier rejection of the fourteenth amendment base in the *Civil Rights Cases.*

It is another indication of the respect for the fairness and courage of the Warren Court that many congressmen and senators believed the Court could be relied upon to uphold a carefully drawn statute based on the fourteenth amendment. Their view was expressed by Senator Cooper when he said:

> I believe that title II should be based on the 14th amendment, and that a constitutional right is involved where access to places open to the general public is in issue. I believe this right would be made explicit by the Supreme Court.[60]

During the arguments about the constitutional basis for a public accommodations law, a collateral and wholly political problem was created by opponents of the bill. They insisted that basing the bill on the fourteenth amendment would make it broad enough to cover "even the elderly widow, living on Social Security and meager rents from her boarders, who might be compelled to take a guest in her home against her wishes." Eventually, this fictitious lady became known as "Mrs. Murphy." Supporters of the Commerce Clause approach got around this argument by exempting owner occupied units with five or fewer rooms for rent. Many supporters of the public accommodations measure immediately attacked this limitation as a plan to gut the bill. In the end, the "Mrs. Murphy" provision was kept in the bill.[61]

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[59] *Civil Rights Hearing Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. at 1870 and 2172 (1964).

[60] 110 CONG. REC. 13447 (1964).

[61] A similar provision was included in the 1968 fair housing legislation. The Supreme Court's decision in Jones v. Mayer, 392 U.S. 409 (1968), makes it clear that the 1866 statute would not permit a Mrs. Murphy exemption to be valid under that law. Whether the decision also nullifies the Mrs. Murphy provision in the 1968 law has not been determined at this time.

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