Fortunately for all concerned, the long standing friendship between Chairman Emanuel Celler of the House Judiciary Committee and the ranking Republican, Representative William McCulloch, enabled the House to resolve the problem by basing the bill on both the fourteenth amendment and the Commerce Clause. A similar good fellowship between Assistant Majority Leader Hubert Humphrey and Assistant Minority Leader Thomas H. Kuchel obtained potent legal support in the Senate for the dual reliance on the Commerce Clause and the amendment.

Early in 1964, Senators Humphrey and Kuchel sent a joint letter to Harrison Tweed, Esq. and Bernard G. Segal, Esq. The letter invited the views of Messrs. Tweed and Segal as co-chairmen of the Lawyers' Committee for Civil Rights Under Law to submit the official views of the committee or give their opinion "in conjunction with other individual leaders of the bar who have had occasion seriously to consider questions of constitutionality." Senator Humphrey inserted the reply in the Congressional Record. He noted that it was signed by three former Attorney Generals of the United States, four former presidents of the American Bar Association, four law school deans (Harvard, Yale, Vanderbilt and Minnesota), and members of both major political parties. The total number, including Messrs. Tweed and Segal, was twenty-two. The letter reply contained a well documented legal memorandum supporting the view that:

> With respect to Title II, the Congressional Authority for its enactment is expressly stated in the bill to rest on the commerce clause of the Constitution and the 14th Amendment. The reliance upon both of these powers to accomplish the stated purpose of Title II is sound. Discriminatory practices, though free from any State compulsion, support or encouragement, may so burden the channels of interstate commerce as to justify legally congressional regulation under the commerce clause. On the other hand, conduct having an insufficient bearing on interstate commerce to warrant action under the commerce clause may be regulated by Congress where the conduct is so attributable to the State as to come within the concept of State action under the 14th Amendment.[62]

Unlike some who persist in trying to find justification for a separate society based on race, most of the members of Congress in the House and Senate were personally convinced that action in this field was urgent. The factual reports on experiences of colored citizens when they sought public accommodations had a profound effect on Senators and Representatives. The following is an example. It is an excerpt from a speech by Senator Bartlett of Alaska:

---

[62] 110 CONG. REC. 7052 (1964).

> I voted for cloture only when the time came when I believed everything which needed to be said about the bill had been said.... I am a member of the Commerce Committee. For several weeks the Commerce Committee held hearings upon a separate public accommodations bill.... At that time I became persuaded and was left with no doubt whatever that such a Federal act is not only justified but necessary.
>
> I have one memory that abides with me out of many, one that impressed itself particularly upon me during the Commerce Committee hearings. That was when Mr. Roy Wilkins, a Negro—intelligent, well dressed, and known personally by many Senators—came before the committee and described the agonies and embarrassments his wife and he suffered while seeking to make a transcontinental automobile trip.
>
> That sort of thing should not be permitted to happen to anyone in this country. I made up my mind then and there I should do my part to prevent its happening in the future.[63]

In addition to staging a filibuster that lasted seventy-four days, from February 26 to June 17, the opponents of civil rights legislation filled the pages of the *Record* with legal arguments against the bill. One of the more imaginative of these writings dealt with the possibility that a civil rights statute which had the effect of requiring white people to serve colored people in places of public accommodation would be involuntary servitude forbidden by the thirteenth amendment.

Senator Sam Ervin presented "Freedom of Choice in Personal Service Occupations: 13th Amendment Limitations of Anti-Discrimination Legislation" which was published in the Winter, 1964, issue of the *Cornell Law Quarterly*. He also offered "Maybe It's Time to Look at the Anti-Slavery Amendment," an article published in the *U.S. News and World Report* on May 11, 1964. Both of these articles were written by Alfred Avins.[64] Although the legal reasoning included in the articles took up approximately ten printed pages of the *Congressional Record*, there is no indication that they were persuasive enough to cause Senators to vote against the public accommodation law to save white people from involuntary servitude in barber shops, hotels or restaurants serving colored patrons. Senator Ervin offered an amendment to "prevent anyone from having to tender any service to anyone he does not wish to under the public accommodations section, in line with the thirteenth amendment abolishing slavery." The amendment was beaten 68 to 21.[65]

The views of the lawyers who supported the Public Accommodation Law were vindicated shortly after the Act's passage when

[63] 110 CONG. REC. 14325 (1964).
[64] 110 CONG. REC. 13474 (1964).
[65] 110 CONG. REC. 13489 (1964).

the Supreme Court struck down challenges to the Act. Justice Clark, speaking for the Court in one case observed that "there is language in the *Civil Rights Cases* which indicates that the Court did not fully consider whether the 1875 Act could be sustained as an exercise of the commerce power."[66] Justice Douglas, in concurring, asserted his belief that it is better to rely in public accommodation on "the legislative power contained in Section 5 of the Fourteenth Amendment which states: 'The Congress shall have power to enforce, by appropriate legislation, the provision of this article' . . . a power which the Court concedes was exercised at least in part in this Act." The Douglas opinion gave a strong judicial hint that Senator Cooper was right in looking to the Warren Court for a bold departure from strained constructions of the past. This is particularly true when one reads the Justice's view that:

> A decision based on the Fourteenth Amendment would have a more settling effect, making unnecessary litigation on whether a particular restaurant or inn is within the commerce definitions of the Act or whether a particular customer is an interstate traveler. Under my construction, the Act would apply to all customers in all enumerated places of public accommodation. And that construction would put an end to all obstructionist strategies and finally close one door on a bitter chapter in American History.[67]

OTHER IMPORTANT TITLES OF THE 1964 ACT

To the credit of Congress it should be said that sometimes its potential is greatly underestimated. This was true when the effort to pass the 1964 Civil Rights Act began. Most of the disorder and embarrassing displays of brutal repression by local authorities that appeared on television screens centered on disputes about the use of public accommodations. For some this was such an overriding problem that they did not wish to risk defeat of the bill by adding an amendment setting up an equal employment opportunity agency to seek eradication of racial discrimination against minorities in the job field. Civil rights supporters, strongly backed by Speaker John McCormack, Chairman Celler, Representative McCulloch and other house civil rights minded congressmen, succeeded in getting the amendment included by the House Judiciary Committee and subsequently successfully fought off attempts to delete that amendment on the floor.

To the surprise of those who sought to kill Title VII's equal employment provisions by stirring up opposition among labor unions,[68]

---

[66] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 251 (1964).
[67] *Id.* at 280 (Douglas, J., concurring).
[68] 110 CONG. REC. 486 (1964).

the legislative forces of the AFL-CIO, led by Andrew J. Biemiller and Jack Conway, gave all out support. Without their efforts, Title VII might well have been lost.

Title VI, requiring non-discrimination in federally assisted programs, also came under heavy attack when southern Democrats, aided by some northern members of that party who were wary of "bussing" and "racial balance as a means of achieving desegregation in northern schools" sought to weaken or delete Title VI. When the bill passed with Titles VI and VII included there was some speculation by "expert observers" that these two titles would be used for "bargaining purposes" in the Senate and would be dropped at an appropriate time in order to get a strong public accommodations title. At the outset of the Senate consideration of the bill, Senators Humphrey and Kuchel made it clear that they intended to seek passage of the entire measure. By agreement, various senators served as captains to protect specific titles of the bill. Title VI was accepted by Senators Pastore of Rhode Island and Cotton of New Hampshire. Title VII was accepted by Senators Clark of Pennsylvania and Case of New Jersey.[69] Although they had other titles to defend, the regular civil rights stalwarts such as Democrats Hart, Morse and Douglas also made a vigorous fight to uphold these titles. Republicans Keating, Javits and Scott, whose entire service in Congress is a record of supporting civil rights and Supreme Court decisions in this area of the law, also accepted the task of defending these titles along with their other assignments on the bill. The full list of the captains and their assignments follows:

> Senator Hart and Senator Keating on title I—voting rights; Senator Magnuson and Senator Hruska on title II—public accommodations; Senator Morse and Senator Javits on title III—public facilities and Attorney General's powers; Senator Douglas and Senator Cooper on title IV—school desegregation; Senator Long of Missouri and Senator Scott on title V—Civil Rights Commission; Senator Pastore and Senator Cotton on title VI—federally assisted programs; Senator Clark and Senator Case on title VII—equal employment opportunity; and Senator Dodd for the Democrats on titles VIII through XI—voting surveys, appeal of remands, community relations service, and miscellaneous items.[70]

It should also be noted that members of the House and Senate, for the most part, assumed that there would be no constitutional problems on Title VII. Here they were fully justified in view of the Court's long record of supporting the employment objectives and congressional power to act in the field of labor relations.[71]

---

[69] 110 CONG. REC. 6528 (1964).

[70] *Id.*

[71] *See* NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1, 43 (1937); New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 561 (1938);

Title VI, of course, was generally regarded as an aid to speeding up compliance with school desegregation decisions. In addition, it had the support of some conservatives in Congress who adhere to the principle that federal standards of non-discrimination should apply when federal funds are spent.[72]

Title IV of the 1964 Act, giving the U.S. Office of Education and the Attorney General duties to assist in school desegregation, is further evidence of an intention of the majority in both Houses to keep in step with Supreme Court decisions in civil rights matters. However, the unrelenting effort of some of the opponents of civil rights is evidenced by restrictive language written into this title. For example, the Title requires that the Attorney General must certify that aggrieved individuals are "unable to initiate and maintain legal proceedings" before he can act. Also, the Title asserts that it does not authorize courts or officials to issue orders to achieve racial balances in schools by transporting children from one school to another. Although this type of legal hair splitting reflects on the credibility of those who support it, there is much evidence to the effect that civil rights opponents regarded its passage as a severe setback for their cause. Senator Thurmond, for example, offered an amendment to delete the entire Title. His amendment was defeated by a resounding 74 to 15 vote on June 16, 1964.[73]

OPEN HOUSING

President Johnson moved beyond the Court and President Kennedy when he sent his 1966 Civil Rights Message to Congress. After outlining the national effort to improve housing for the American people at all levels, he said:

> The historic Housing Act of 1949 proclaimed a national goal for the first time: "a decent home and suitable living environment for every American family."

Railway Mail Assoc. v. Corsi, 326 U.S. 88 (1945); Steele v. Louisville and Nashville R. R. Co., 323 U.S. 192 (1944). For those who assume that picketing and other forms of public demonstrations by Negroes are new developments, it would be enlightening to read the Court's opinion in the New Negro Alliance case. During the 1930's, Negroes started so called "Buy where you can work movements" in a number of large cities. Usually, those engaged in the movements would picket stores or other businesses located in Negro neighborhoods but employing whites only. The defense of the owners was to get an injunction halting the picketing. In the New Negro Alliance case, the District Court enjoined the picketing, but the Supreme Court reversed with a holding that the matter was a labor dispute within the meaning of § 113 of the Norris-LaGuardia Act.

[72] 110 CONG. REC. 13418 (1964).

[73] 110 CONG. REC. 13926 (1964).

> The great boom in housing construction since the Second World War is, in large part, attributable to Congressional action to carry out this objective.
>
> Yet not enough has been done to guarantee that all Americans shall benefit from the expanding housing market Congress has made possible.
>
> Executive Order No. 11063, signed by President Kennedy on November 20, 1962, prohibited housing discrimination where Federal Housing Administration and Veterans Administration insurance programs are involved. That Executive Order clearly expressed the commitment of the executive branch to the battle against housing discrimination.
>
> But that Order, and all the amendments that could validly be added to it, are inevitably restricted to those elements of the housing problem which are under direct executive authority.
>
> Our responsibility is to deal with discrimination directly, at the point of sale or refusal, as well as indirectly through financing. Our need is to reach discrimination practiced by financial institutions operating outside the FHA and VA insurance programs, and not otherwise regulated by the government.
>
> Our task is to end discrimination in all housing, old and new—not simply in the new housing covered by the Executive Order. I propose legislation that is constitutional in design, comprehensive in scope and firm in enforcement. It will cover the sale, rental and financing of all dwelling units. It will prohibit discrimination, on either racial or religious grounds, by owners, brokers and lending corporations in their housing commitments.[74]

As usual, the opponents of civil rights rushed to musty pages of ancient law to defend the right of a man "to do as he pleases with his own property." While everyone would want to honor bona fide requests and stipulations of individual property owners to transfer property to friends, relatives or descendants, this is not the crux of the fair housing problem. The municipal ordinance passed to prevent Negroes from living in certain neighborhoods, the enforcement of restrictive covenants by requiring Negroes to sell property after they had made good faith purchases and the innumerable conspiracies to keep them out of neighborhoods by refusing to make loans or to provide necessary services all amount to restraints on the alienation of property. This is analogous to problems facing would-be purchasers of lands owned by the aristocracy or nobility of one kind or another in the thirteenth and sixteenth centuries in England.

The Statute De Donis, which gave birth to the fee tail estate, must have caused a great deal of mental anguish for the lawyers of that day before they perfected devices to convert the fee tail

---

[74] CONG. Q. ALMANAC 1254-55 (1966).

into the fee simple and, thereby, increase the chance of making valid transfers of title. The English Statute of Uses must have been as troublesome as our restrictive covenants until lawyers perfected the Rule Against Perpetuities.

Tiffany points out that after the Statute of Quia Emptores became the law of England it was well settled that complete limitation on the alienation of real property was "void as inconsistent with the fee." The United States Supreme Court in *Potter v. Couch*[75] invalidated a clause in a will which provided that "no creditors or assignees or purchasers shall be entitled to any part" of the devises. Speaking of this clause the Court said: "But the right of alienation is an inherent and inseparable quality of an estate in fee simple. In a devise of land in fee simple, therefore, a condition against all alienation is void because repugnant to the estates devised."[76] In commenting on this decision, Tiffany says:

> The real basis of the rule prohibiting a provision of the character mentioned which, by divesting, or giving power to divest the estate created in case of its voluntary transfer, operates to prevent such transfer, is to be found in considerations of public policy adverse to withdrawal of property from commerce, and the check upon its improvement and development which must result therefrom.[77]

Apparently, it did not occur to some local law makers, real estate brokers and courts that refusal to sell property to Negroes, and even making them abandon it after taking up residence following bona fide purchase, was also a "withdrawal of property from commerce."

When property goes on the open market for sale to the public, in the opinion of this writer, the English objective of removal of restraints on alienation is on the side of those who say "let all buyers have equal opportunity to purchase without regard to race."

Even if one assumes for purpose of argument that the early English law is on the side of those who wish to retain segregation in housing, the degree of governmental involvement in creating segregation in the United States is so great that simple principles of equity would seem to dictate that what the state created to confound the would-be purchaser, the state had a duty to destroy.

In a series of cases it was necessary for the Supreme Court to strike down city ordinances which forbade Negro occupancy of property, except as servants, in many residential areas.[78]

---

[75] 141 U.S. 296 (1891).
[76] *Id.* at 315.
[77] 5 H. TIFFANY, THE LAW OF REAL PROPERTY § 1343 (3d ed. 1939).
[78] Buchanan v. Warley, 245 U.S. 60 (1917); Harmon v. Tyler, 273 U.S. 668 (1927); Richmond v. Deans, 281 U.S. 704 (1930).

Being ever resourceful, however, the advocates of housing segregation quickly made use of another device known as the restrictive covenant. The use of this device became widespread when the Supreme Court dismissed a challenge to these private agreements barring Negroes from occupancy solely because of race. The Court said the dismissal was made for "want of a substantial question."[79]

Although the covenants were designed to "protect white property owners," some of those "protected" found that they were really over protected when financial or other circumstances made it desirable for them to sell to Negro buyers. This state of affairs cried out for a legal remedy. There was the possibility that such a remedy might have been found in the Supreme Court's utterance that: "[N]either property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm."[80] Unfortunately, neither the Court nor the general public seemed to classify Negroes as "fellows" who could be harmed by whites using their property right and contract rights to the detriment of their black brothers.

The harsh results of enforcing racial covenants is illustrated by a 1938 Maryland decision ousting a colored purchaser.[81] The purchaser of the covered property was the Reverend E. D. Meade, a well known Negro leader and pastor of a Baptist Church. At the time that he moved into the new home with his wife and baby there was only one other property occupied by colored residents in the immediate area. The opinion of the court describes these as dressmakers who catered largely to white customers. Located in Baltimore City, the home purchased by the Reverend Meade was near an adjoining neighborhood where a large number of Negroes lived. Housing trends in the city at that time also showed that the sheer pressure of need and numbers would soon make it impractical to enforce the covenants in the block where the clergyman's house was situated. W. A. C. Hughes, Jr., a leading civil rights lawyer in Maryland at that time, included the following points in his defense of his client's right to occupy the dwelling: (1) the covenant did not run with the land in this case, (2) the covenant, as an agreement to restrict occupancy to whites only, was a restraint on alienation, (3) the clear indication that Negroes already occupied adjoining areas and soon would move into the covenanted area showed that the reason for executing the covenant in the first place no longer obtained, and (4) enforcement of the covenant would be a violation of the fourteenth amendment.

---

[79] Corrigan v. Buckley, 271 U.S. 323 (1926).
[80] Nebbia v. New York, 291 U.S. 502, 523 (1934) (footnotes omitted).
[81] Meade v. Denistone, 173 Md. 295, 196 A. 330 (1937).

In answering point one, the court said that the agreement barring Negroes had created an easement which could be used to protect white owners objecting to Negro owners and this made it unnecessary to depend on whether or not the covenant ran with the land. On point two the court said: "The rules against restraints on alienation were only intended to make conveyancing free and unrestrained, and had nothing to do with occupancy. It may be an anomalous situation when a colored man may own property which he cannot occupy, but if he buys on notice of such a restriction, the consequences are the same to him as to any other buyer with notice."[82] Addressing itself to point three, the court noted that if the covenanted property became "untenanted and unmarketable" because of the racial restriction on occupancy "equity might relieve the parties of the burden of their agreement." Point four was disposed of by a holding that no state action was involved.

Perhaps the most ironic twist to this case was the court's disposition of point three. This said, in effect, that the racially restrictive covenant provided an impregnable fortress for housing discrimination against colored buyers, but, if the white owner suffered a financial loss because he could not sell or rent to a member of his race, equity might provide a kind of postern gate through which he could pass the fee or the right of occupancy to a Negro.

Some do not remember the cruel, the capricious and the tragic-comic aspects of covenants prior to the Supreme Court's decisions halting their enforcement. In addition to the foregoing facts about the *Meade* case, it would be well to recall the following other illustrations of the unjust happenings surrounding the individuals who sought relief by going to the nation's highest court.

In *Shelley v. Kraemer*,[83] the Court pointed out that the covenant barring Negroes from the area was actually entered into at a time when members of that race were resident owners of dwellings located therein. Under the terms of the covenant the Supreme Court pointed out: "Not only does the restriction seek to proscribe use and occupancy of the affected properties by members of the excluded class, but as construed by the Missouri Courts, the agreement requires that title of any person who uses his property in violation of the restriction shall be divested."[84]

Another illustration of absurdities based on legal principles is found in an Ohio case holding that *a minister of a church* could not occupy the parsonage because he was a Negro while, on the other

---

[82] *Id.* at 307, 196 A. at 335.
[83] Shelly v. Kraemer, 334 U.S. 1 (1948).
[84] *Id.* at 10.

hand, the congregation, which was all Negro, was free to use the church part of the property because the title of ownership was in a religious corporation "which has no race." The Supreme Court reversed the Ohio decision in *Trustees of Monroe Avenue Church v. Perkins.*[85]

The extent of governmental involvement in establishing housing segregation is well documented in many reports and writings. In 1961, the Commission on Civil Rights published a report which said:

> Federal policy in the field of housing reflected and even magnified the attitudes of private industry. The [FHA] Manual recommended the use of restrictive covenants to insure against "inharmonious" racial groups! When HOLC acquired homes in white neighborhoods and offered them for sale, Negroes could not buy them.[86]

One description of the federal government's position is as follows. "It is hardly to the credit of the federal government that upon its entrance onto the housing scene in 1934, the spread of these (restrictive) covenants was accelerated. One commentator has characterized the Federal Housing Administration in its early years as 'a sort of typhoid Mary' for racial covenants."[87]

Perhaps the most impressive demonstration of the skill of real estate interests bent on imposing restrictions is found in the program mentioned by the Civil Rights Commission in describing a Grosse Pointe, Michigan, plan. The Commission report said:

> Organized brokers have, with few exceptions, followed the principle that only a "homogeneous" neighborhood assures economic soundness. Their views in some cases are so vigorously expressed as to discourage property owners who would otherwise be concerned only with the color of a purchaser's money, and not with that of his skin. Moreover, these views sometimes find elaborately systematic expression, as in the well-publicized program in Grosse Pointe, Mich. There, discrimination covered the full ambit of "race, color, religion, and national origin," and it was practiced with mathematical exactitude. Two groups, the Grosse Pointe Brokers Association and the Grosse Pointe Property Owners Association had established and maintained a screening system to winnow out would-be purchasers who were considered "undesirable." As Michigan Corp. and Security Commissioner Lawrence Gubow put it to the Commission:

---

[85] 334 U.S. 813 (1948). *See also* Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. CHI. L. REV. 203, 204 & n. 5 (1949).

[86] UNITED STATES COMMISSION ON CIVIL RIGHTS, REPORT NO. 4, HOUSING 16-17 (1961).

[87] Semer and Sloane, *Equal Opportunity and Individual Property Rights*, 24 Fed. B.J. 51 (1964).

> A passing grade was 50 points. However, those of Polish descent had to score 55 points; southern Europeans, including those of Italian, Greek, Spanish, or Lebanese origin had to score 65 points, and those of the Jewish faith had to score 85 points. Negroes and orientals were excluded entirely.
>
> Similar exclusions are accomplished in other communities, though usually with less refinement than in Grosse Pointe.[88]

Of course most of these policies were changed after the Supreme Court outlawed enforcement of restrictive covenants, but by that time the pattern of housing segregation was nation-wide and firmly entrenched.

The Commission also pointed out that:

> Among the four federal agencies that supervise financial institutions, the Federal Home Loan Bank Board and the Board of Governors of the Federal Reserve System acknowledge—at least implicitly—that racial and religious discrimination in mortgage lending does occur among the institutions they supervise. The Comptroller of the Currency and the Federal Deposit Insurance Corporation disclaim any knowledge of such discrimination.... The Federal Home Loan Bank Board is the only one of these four agencies that had adopted a policy of opposing discrimination.[89]

Representatives of the Civil Rights Commission presented this and other evidence during the hearings on the proposed fair housing statute.

When all else failed, the real estate interests and public officials joined forces in establishing firm working agreements which simply barred would be rentors or purchasers solely because of race. During the long struggle for fairness in the sale and rental of property the value of one legal weapon remained a question mark.

In 1866, after the adoption of the thirteenth amendment, Congress sought to assure protection of the freedman's right to purchase, rent and hold real or personal property.

In the quiet detachment of law libraries and legal seminars scholars could read the debates that led to the approval of this law, they could consider the intention of Congress to remove the badges of slavery and, above all, they could see the plain meaning of English language in the statute. But, unfortunately, the courage that permits free expression in a drawing room is seldom found in legislative bodies and the courts. Both Congress and the pre-Warren Supreme Court adroitly ignored or downgraded this law.

---

[88] U.S. COMMISSION ON CIVIL RIGHTS, REPORT NO. 4, HOUSING 2-3 (1961).
[89] *Id.* at 79.

The battle for passage of the 1968 Housing provision began in 1966 when President Johnson called on civil rights leaders to inform them that he was about to "whip the teacher" and needed their help.[90]

Some members of Congress favored a plan of action that would pass fair housing problems to the Supreme Court. They felt that the political risks in this area were too great. In effect, they were overruled when the President called for passage of a civil rights bill that would include a fair housing title.

Throughout the many discussions in which this writer participated, there seldom, if ever, arose doubt about the constitutionality of a fair housing statute nor of the Supreme Court's eventual approval of such a law.

In the 1966 hearings before the House Judiciary Committee perhaps the most prophetic testimony was presented by Professor Mark DeWolfe Howe of the Harvard Law School. He suggested, and was later vindicated by the Supreme Court in *Jones v. Mayer*,[91] that Congress had the power to base a fair housing law on the thirteenth amendment.[92] The redoubtable Joseph L. Rauh, Jr., testifying this time as counsel for the Leadership Conference on Civil Rights, gently reminded the committee that he had been right in advising that the 1964 Civil Rights bill could rest on the Commerce Clause and the fourteenth amendment. He asserted that a fair housing law could stand on the same legal foundation.[93]

Attorney General Nicholas deB. Katzenbach, also fortified by Court decisions upholding his legal arguments presented to Congress in favor of the 1964 Civil Rights Act, suggested that he did not intend to seek a law prohibiting racial discrimination that would

[90] When the President used that expression the writer of this article was intrigued and asked about the background. The President then told this story. He said that as a boy in Texas he and some of his friends decided that they would give an unpopular but large and muscular male teacher a whipping. All of the would-be teacher whippers gathered at a bridge to make a joint and simultaneous attack on the target. The President said that he was the first to grab the teacher but he added: "When I looked over my shoulder I saw my buddies running over a hill and I was all alone." When the laughter among the listeners ended, the President circled the room with a steady gaze and said: "When we get into this fight, I don't want to look over my shoulder and find some of you fellows running over the hill." The writer regrets that some of those present did "run over the hill" but those of real conviction continued and battled until victory was won in Congress.

[91] 392 U.S. 409 (1968).

[92] *Civil Rights Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 1560-81 (1966).

[93] *Id.* at 1543.

be based solely on the Commerce Clause because he thought it would be "equally justifiable as an implementation of Section V of the 14th Amendment."[94]

Among those appearing against the fair housing legislation was W. B. Hicks, executive secretary of the Liberty Lobby. He was accompanied by Dr. Alfred Avins, who seemed undaunted by the short shrift Congress had given his anti-civil rights arguments in its consideration of the 1964 Civil Rights Bill.

Dr. Avins carried the main burden of the testimony which covered ten pages of the hearing record. One of the more intriguing sections of the Avins' argument, submitted for the record, is as follows:

> [T]he small Negro minority which these laws benefit is precisely the group not in need of them to secure good housing. In short, this legislation is pro bono social climbers and nothing more. Invoking such laws for their benefit is like enforcing minimum wage legislation for Elizabeth Taylor.[95]

Testimony at the 1967 Senate Hearing offers these sharp refutations of Dr. Avins' observations about "social climbers." Dr. Robert C. Weaver, Secretary of the Department of Housing and Urban Development, testified that 1960 figures showed that "Three times as large a proportion of non-white families, 28 per cent, lived in overcrowded homes, as did white ... and this overcrowding was prevalent in all income classes."[96] Two Negro witnesses told of their individual problems. Lt. Carlos Campbell, a Navy flyer assigned to intelligence duty at the Pentagon, told the hearing group that most of the housing in the immediate area was for whites only. A poignant excerpt from his testimony is as follows:

> I have had cause to reexamine my philosophy and recognize the fact that the status afforded me as a naval officer can abruptly fall once I leave the base. It seems incongruous that I could be entrusted with the responsibility of navigating a multi-million dollar airplane, which was the case in Patrol Squadrons 22 and 19 ... or with reviewing and approving millions of dollars worth of construction projects and master plans, as it is the case now with the Naval Air Systems Command.[97]

Gerard A. Ferere, a former naval officer, but at that time teaching French and Spanish at St. Joseph's College in Philadelphia, Pennsylvania, told of his experiences in trying to buy a home. In

---

[94] *Id.* at 1178.
[95] *Id.* at 1618.
[96] *Hearing on the Fair Housing Act of 1967 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 36 (1967).
[97] *Id.* at 194.

one instance he estimated that, in avoiding selling a house to him, the white seller was evidently willing to take a loss of $1,600 by transferring the property to a white person.[98]

If one wished to rely merely on the very ancient and honorable doctrine that public policy is against withdrawal of property from commerce, some compelling evidence was offered by two businessmen on the need for legislation to support that policy.

William J. Levitt, President of Levitt and Sons, Inc., said his company had adopted an open occupancy policy in some areas of the country and it had resulted in a five fold increase in sales volume during a five year period. He gave the sales volume for the fiscal year of 1965-66 as seventy-five million dollars. He candidly admitted that he did not have an open occupancy housing policy in Maryland which did not have an open occupancy law at that time because: "[A]ny home builder who chooses to operate on an open occupancy basis, where it is not customary or required by law, runs the grave risk of losing business to his competitor who chooses to discriminate."[99]

Mr. Levitt was followed later by James W. Rouse, President of the mortgage banking firm of James W. Rouse and Co., Inc. of Baltimore, Maryland. He said:

> The public accommodations law may have been more important for the protection it gave those who wanted to open their facilities to all the market than for the pressures it imposed upon unwilling operators. Such is the case in housing. It is my honest belief that the preponderance of real estate developers and home builders would prefer to operate in a fully open market, but fear the results of going it alone.[100]

Although real estate interests failed to stop the fair housing bill in the House in 1966, they did succeed in causing so much delay that the Senate, with some members busy campaigning for re-election, did not act.

Real estate interests and others who favor segregated housing then moved into the 1966 Congressional campaign for the purpose of defeating those who had supported the bill in the 89th Congress. By and large the anti-fair housing forces did not make many "heads roll" on the housing issue, but in fairness to House members, who had carried the major part of the burden in 1966, supporters of the bill made a tactical decision to seek passage first in the Senate and then in the House during the 90th Congress.

---

[98] *Id.* at 205.

[99] *Civil Rights Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 1534 (1966).

[100] *Id.* at 1582.

Of course there were cautious persons who voiced reservations about wording and implementation, but the general feeling was optimism toward court approval, if the law could be passed, and pessimism toward the possibility of passage. The feeling of confidence in the constitutionality of the law was firmly expressed by the Attorney General during Senate hearings on the bill and its principle sponsors, Senators Walter F. Mondale of Minnesota and Edward M. Brooke of Massachusetts. By this time the opponents of civil rights had unsuccessfully used most of their best arguments against public accommodation legislation and they based most of their appeal on naked racial bigotry.[101]

Mr. Ramsey Clark had succeeded Mr. Katzenbach at the time the 1967 Senate hearings began. Mr. Clark again emphasized the encouragement given by the United States Supreme Court to Congress in this part of his testimony before the Subcommittee on Housing and Urban Affairs of the Committee on Banking and Currency:

> Evidence presented before the subcommittees of both Houses last year clearly established the constitutional basis for this legislation.
>
> It was shown that the housing business is substantially interstate and subject to the commerce clause. Millions of outstanding mortgages are held by lenders who reside in different States from the mortgaged housing. Hardly a home is built which does not contain materials produced in other States. The average family moves its place of residence once every 5 years, and 1 out of 6 moves is

---

101 In one letter to its members, the National Association of Real Estate Boards said: "We are devoting our budget now to production for the free leaflet, 'An Urgent Message to Every Homeowner,' which is being printed in the millions." Letter from NAREB to Board Presidents and Secretaries; Copy on file Washington, D.C. Bureau, NAACP.

In its March 11, 1968, publication "Realtors Headlines", the NAREB said that "the right of every homeowner is being bargained away under the guise of civil rights." 35 REALTORS HEADLINES No. 11, p. 1 (March 11, 1968).

The Louisiana Realtors put a full page ad in the Times-Picayune on March 15, 1968, which proclaimed "the House of Representatives in Washington, D.C., is debating a so-called open housing amendment to the pending civil rights bill. If enacted by the House and signed by President Johnson, this new law will forever destroy the basic American right of allowing property owners to rent or dispose of their property as they see fit. Send a Telegram to Hale Boggs or Eddie Hébert or whomever else is the U.S. Representative from your Congressional District supporting the fight against this dangerous and unconstitutional legislation." The Times-Picayune (New Orleans), March 15, 1968, § 2, at 16. *See* Appendix for example.

It is interesting to note that although Mr. Hébert followed the customary southern pattern of voting against fair housing, Mr. Boggs voted for the bill in spite of the deluge of propaganda in his state.

> across a State line. Production and employment depend on the movement of workers and executives from one State to another. Advertising for new housing often crosses State lines.
>
> The 14th amendment provides a firm constitutional base for legislation eliminating discrimination in housing. Government action of the past has contributed heavily to discriminatory housing practices. Until 1947 the Federal Government fostered discrimination in housing by encouraging and often requiring restrictive racial covenants in deeds where Federal mortgage insurance or guarantees were sought. Until 1948 courts enforced private restrictive racial covenants. Even today many State-licensed real estate agents refuse to show Negroes homes in all-white neighborhoods.
>
> Last May in *Reitman v. Mulkey*, 35 U.S.L. Week 4473, U.S., May 20, 1967, the Supreme Court affirmed the finding of California's highest court that the amendment to the State constitution popularly known as Proposition 14 "involved the State in private racial discriminations to an unconstitutional degree." The right to discriminate, the Supreme Court found, had been "embodied in the State's basic charter."
>
> This particular "State action" has been invalidated by the courts, but the case illustrates both the justification and the need for legislation to enforce the guarantees of the 14th amendment.
>
> Last year the Supreme Court, in *Katzenbach v. Morgan*, 384 U.S. 641, demonstrated how firm a base the 14th amendment is for this bill.
>
> Congress has the constitutional authority and duty to remove whatever it reasonably considers to be a barrier to equal protection of the law, even if the barrier is a product of individual action.
>
> Mr. Justice Cardozo told us 30 years ago that, "property, like liberty, though immune under the Constitution from destruction, is not immune from regulations essential for the common good. What the regulations should be," he said, "every generation must work out for itself."
>
> Our generation must give its answer to the pervasive problem of segregated housing now.
>
> We believe that this bill is the answer, Mr. Chairman.[102]

From the beginning of the fight in 1966, this writer believed that there were sufficient votes in Congress to pass a fair housing law and that such a statute would be upheld by the Supreme Court. This belief was based, in part at least, on faith in President Johnson's ability to "count votes" and his tenacity in working for legislative objectives. On my office wall there is a picture of a meeting with the President and a favorite pet at that time, a dog of uncertain ancestry named Yuki. So far as I was concerned there were two purposes for the meeting. The first was to thank the President for his appointment of Mr. Justice Marshall to the Supreme Court. The second was to exchange ideas on how we would get Senate passage of the fair housing law which had been

---

[102] *Hearings on the Fair Housing Act of 1967 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 6-7 (1967).

passed in a restricted form in the House in 1966, but died in the Senate. The President responded to the first by saying nobody had asked him to appoint Mr. Justice Marshall. He said he had made his own decision to name the Justice because of his outstanding ability and the contribution he could make on the Court. I asked and was given permission to quote President Johnson on this. On the second matter of the Housing legislation, he struck his chair arm with his fist, looked me in the eye and said: "We have got to get that bill through and it must cover all housing." I left the White House with renewed belief that the Johnson skill would again prevail and that the Supreme Court would again affirm the constitutionality of a well drawn civil rights law. During the fight for the 1964 Civil Rights law, the chief problem in the Senate was how to win Senator Everett Dirksen over to a vote for cloture. In 1966 the Senator was important, but the addition of some new faces in the Senate also improved the outlook. These individuals worked and planned like the southern opposition in its most halcyon days.

The 1968 Civil Rights Bill, which includes the fair housing law, passed the Senate by a vote of 71 to 20 on March 11, 1968. Passage of the unchanged Senate bill was accomplished in the House on April 10 by a vote of 250 to 172. These heavy majorities in favor of the bill make it safe to predict that there will be good public acceptance of this legislation and it will accomplish its purpose when effectively enforced.

After passage of the bill there came the pleasant, but not wholly unexpected, announcement of the Supreme Court's decision applying the 1866 statute. Perhaps the most refreshing aspect of the Court's decision was its reliance on the thirteenth amendment. From that point on it would not be necessary to mention that amendment in a semi-apologetic manner when talking about vindicating civil rights.

The Court had read the plain words of the English language and concluded that when slavery was abolished in this country Congress meant to give the freedmen first class citizenship. A hundred years labor by those who really meant to build a united nation, blind to color, had proven not to be in vain.

In this writer's opinion the *Jones*[103] decision will open new doors for legislative advances in the field of civil rights. Particularly, it should be of great assistance in closing any loopholes in existing laws such as the 1964 Public Accommodations Act and the new housing statute.

---

[103] 392 U.S. 409 (1968).

CONCLUSION

Perhaps the best way to conclude an article of this kind is to quote the words of a man who is a living example of the spirit that motivates the Warren Court. He served the country as Secretary of Labor, was appointed to the Supreme Court and voluntarily stepped from the bench to fulfill a responsibility as the American Ambassador to the United Nations. Mr. Justice Goldberg, now speaking as a private citizen, said this to the 55th Annual Meeting of the American Judicature Society:

"It is imperative that we recognize that if the law is really to come to grips with the problems of racial discrimination and poverty, it must make itself felt not at the end of a policeman's nightstick, it must manifest itself in just and equitable provisions for righting of wrongs."[104]

This is the spirit of the Warren Court and the Justices who have participated in the affirmation of the great principles contained in the recent civil rights decisions mentioned herein.

---

[104] 52 JUDICATURE 56 (1968).

AN UN-BIASED LOOK AT "OPEN-HOUSING"

Don't Let A Basic American Freedom Go Down the Drain

This urgent message is directed towards every citizen—white, colored, or Oriental—who owns or rents any kind of real property... a home which he occupies himself, a residence rented to others, an apartment house or duplex, a business place, even a vacant lot.

At this precise moment, the House of Representatives in Washington, D. C. is debating a so-called "open housing" amendment to the pending civil rights bill. An identical measure has already cleared the Senate.

If enacted by the House and signed by President Johnson, this new law will forever destroy the basic American right of allowing property owners to rent or dispose of their properties as they see fit. This means that the Federal Government could force you to rent or sell to a person not of your choice. If you insisted on not renting or selling, you could be brought before Federal enforcement agencies or the Federal courts.

Forgetting the race issue, suppose you own, but don't occupy, a neat little double cottage. The mortgage is paid and you and your wife have invested considerable money fixing it up prior to offering it for rent.

Along comes some family with a half-dozen undisciplined, highly destructive children. They have just been evicted by another landlord for making a shambles of his house and now they're primed and ready to use your sparkling clean place for their own private version of Vietnam. You advise them, as diplomatically as possible, that you do not want them for tenants.

In the meantime, they find out that you and they are of different religious beliefs, and they charge you with violating the open housing act by discriminating against them because of religion. However justifiable your reasons, you could be required to assert those reasons before a Federal Agency, *at your own expense.*

Far fetched?? Not at all.

You're in serious trouble and you got there simply because—either innocently or unconsciously—you tried to uphold what you thought was your traditional American freedom of choice.

We are in favor of everybody being able to obtain decent housing, but not at the expense of taking away from any American his basic right of freedom of choice. This is the essence of private property ownership.

As property owners ourselves, we are anxious to know how, in the name of a free country, can any legislation such as this be seriously considered.

We think this question is being asked by Americans everywhere and that it must be put squarely before the people we have elected to serve as our spokesmen in the Congress.

If you agree, then you should take immediate action to see that "forced housing" (which is what it really is) doesn't become the law.

Send a telegram to Hale Boggs or Eddie Hébert or whomever else is the U. S. Representative from your Congressional District, supporting the fight against this dangerous and unconstitutional legislation.

In addition to a wire, fill in the form printed at the bottom of this page, put it in a stamped envelope, address it to your Congressman, and send it to him without delay.

Chances are, he's waiting to hear from you.

Louisiana Representatives

District	Representative	Area
1	F. Edward Hébert	New Orleans
2	T. Hale Boggs	New Orleans
3	Edwin E. Willis	St. Martinville
4	Joe D. Waggoner, Jr.	Plain Dealing
5	Otto E. Passman	Monroe
6	John R. Rarick	Baton Rouge
7	Edwin W. Edwards	Crowley
8	Speedy O. Long	Jena

Hon._____, M. C.
(Insert Representative's Name)

House Office Building
Washington, D. C.

I am strongly opposed to the "open housing" amendment to the proposed civil rights bill, and I urge you to work for its defeat.

_____
(Your name)

_____
(Your address)

LOUISIANA REALTORS ASSOCIATION
REAL ESTATE BOARD OF NEW ORLEANS, INC.
JEFFERSON BOARD OF REALTORS, INC.

Minnesota Historical Society

www.mnhs.org