10-1-1973

Notre Dame Law School Civil Rights Lectures

Philip A. Hart

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Part of the Law Commons

Recommended Citation

Available at: http://scholarship.law.nd.edu/ndlr/vol49/iss1/1

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
I. Introduction

I approached my visit here in a mixed mood. On the one hand, it is equally a privilege and pleasure to help honor Father Hesburgh to whom these lectures are so fittingly dedicated. Last year, former Chief Justice Warren reminded you that I had once called the Civil Rights Commission the “common conscience of the Nation.” If I was accurate, then I am sure no present or past member of the Commission, including its pioneering Chairman John Hannah, would demur if I add that for most Americans Father Hesburgh has become the voice of that conscience.

Now that voice has been officially stilled; but Father Hesburgh will still be heard from. His most recent eloquent plea for the long march toward racial justice indicates he will still provide the voice of conscience, even now in his unaccustomed role, if he will forgive the phrase, as a layman in the struggle. When he left the Commission, three former staff directors, whose service under him spanned almost his entire 15 years as a member and Chairman, wrote: “We regret that the conclusion of Father Hesburgh’s services with the Commission was not marked with the honor he so richly deserves.” Knowing Father Hesburgh, I doubt he regrets it. Indeed, I suspect he is not comfortable with a lecture series in his honor either. Neither are needed to memorialize his contribution to national sanity. As his three staff directors added: “The best repayment to Father Hesburgh is to heed some of what he has been telling us over the years.”

And so it is. But a review of civil rights from a Congressional perspective is also appropriate. For while the Commission served as our national conscience, it has also been the strong right arm of Congress, as these lectures bear witness. The Commission provided the solid factual foundation for every major civil rights law in its lifetime.

My ambivalence toward beginning these lectures, nonetheless, springs from a sense that, inevitably, some will read about this program and react, claiming that civil rights has been beaten to death as an issue, and that America should move on to less divisive problems. While I have no great insights to offer for these perplexing difficulties we face, my personal feeling on the matter is that we must continue to ponder civil rights questions, or we will ultimately be unable to address the other problems with a sure sense of purpose. We have made

* These lectures were delivered at the Notre Dame Law School on April 5 and 6, 1973.
** United States Senator from Michigan; A.B., 1934, Georgetown University; J.D., 1937, University of Michigan.
1 Warren, Notre Dame Law School Civil Rights Lectures, 48 Notre Dame Lawyer 14, 46 (1972).
significant strides to be sure. Yet, if the pace of progress is a guide, we will have
to dedicate our energies to civil rights for some time to come.

Let us consider a little history. In 1870, the fifteenth amendment was
ratified and Congress passed the so-called "Enforcement Act," a measure "to
Enforce the Rights of Citizens to Vote in All States."4 One hundred years later,
Congress found it necessary to pass the Voting Rights Act Amendments of 19705
in an effort to ensure Negroes' full enjoyment of the franchise.

Progress has been won by the toil and dedication of many—often by the
sacrifice of lives of some who sought to serve the cause of freedom at home. But
with a historical perspective on the steep slope we climb, it is not surprising that
in 1968, the National Commission on Civil Disorders still warned:

Our Nation is moving toward two societies, one black, one white—
separate and unequal. . . . This deepening racial division is not inevitable.
The movement apart can be reversed. Our principal task is to define that
choice and to press for a national resolution.

To pursue our present course will involve the continuing polarization
of the American community and, ultimately, the destruction of basic
democratic values.6

In these lectures, I would like to explore this area with you from the per-
spective of Congress—a viewpoint necessarily reflecting the civil rights issue in
the nation as a whole.

Last year, Chief Justice Warren recounted a provocative history of race
relations in America, from its slave trade roots, through the agonies of Civil War
and Reconstruction, to the beginning of modern civil rights legislation and to the
landmark Supreme Court decisions of the past few decades.7

First, let me briefly review the civil rights legislation of the post-Civil War
era, as it foreshadowed the legislative outburst in our own time. Then I will
examine in more detail the passage of the present civil rights laws designed to
safeguard from discrimination every American's vote, his chance to work, his
home and his children's education. What choices were made, or accepted from
political necessity, in pursuit of these goals? What lessons were learned about
techniques which held promise and about the conditions for effective action?

Next, I will discuss the problems which arose as the legislation of the 1960's
was implemented: The Voting Rights Act illustrates the importance of con-
gressional oversight to ensure useful legislation is not undermined. The EEOC's
history demonstrated shortcomings in the initial legislation and the difficulty of
strengthening it. In education, we saw the gradual pace of administrative en-
forcement quicken and then be overtaken by the courts and become embroiled in
a national controversy of still uncertain dimensions.

Finally, I will take a look at the future. What crossroads lie ahead for
school desegregation, fuller political participation, equal economic opportunity,
and open housing? What changes can we perceive in the public's attitude toward

4 Ch. 114, 16 Stat. 140 (1870).
6 Nat'l Advisory Comm'n on Civil Disorders, Final Report 1 (1968).
7 See Warren, supra note 1.
the cause of racial justice, as the problems become more complex and closer to home?

II. Civil Rights History—Congressional Perspective

The initial issue in the treatment of black Americans was the great debate over political treatment of slavery itself: first, at the Constitutional Convention, then in the struggle over the terms of incorporating new territory. The Missouri Compromise, the Compromise of 1850, and the Kansas-Nebraska Act in 1854 all signified recognition that race relations remained a crucial aspect of political power, as well as an everyday fact of life, in a rapidly expanding nation.

During Reconstruction, Congress faced the task of completing its Civil War objectives: Emancipation was ratified with the thirteenth amendment in 1865. Slaves were free, but not yet clearly citizens with defined legal rights. Southern states enacted the “Black Codes,” detailed blueprints for official segregation and subjugation.

With the literal “reconstruction” of southern delegations to Congress and statehouses, the fourteenth and fifteenth amendments swiftly followed, establishing Negroes as citizens with the right to vote and to receive “Equal Protection of the Laws.”

Simultaneously, Congress embarked on the measures known as the “Civil Rights Laws.” The Civil Rights Act of 1866 sought to place Negroes on an equal footing with whites in their power to purchase property, to contract and carry on other basic activity. This statute also outlawed interference with civil rights by individuals acting “under color of law” or by private persons acting in concert. This was the first heyday of civil rights legislation. A Voting Rights Act followed, then laws prohibiting kidnap of former slaves and enforced peonage. Later, in 1875, Congress passed the first public accommodations law, excluding only schools, cemeteries and churches, and guaranteeing Negroes jury service.

Then Reconstruction ended. In an era of reconciliation, and new political patterns, all three branches of the federal government began the process of retrenchment. A series of Supreme Court decisions, notably the Slaughter-House Cases and the Civil Rights Cases, narrowly construed the rights guaranteed to federal citizens and struck down the attempts to reach private action under
the fourteenth amendment. The Court also narrowed the scope of criminal measures not struck down entirely.\(^{19}\)

Following the controversial Hayes-Tilden election and the subsequent withdrawal of federal troops from the South by the President, Congress itself repealed or narrowed many of its own enactments.\(^{20}\) Protection of voting rights was repealed in 1894\(^{21}\) and further pruning continued for over a decade.\(^{22}\)

As federal safeguards eroded, many states passed systematic programs to suppress black voting, economic advance and public mingling with whites. Where laws proved inadequate, terror and violence became commonplace.\(^{23}\) The nation became preoccupied with industrial growth at home and hostilities abroad and America turned its back on its new black citizens.

Following the First World War, layers of official segregation thickened, not only in the South but throughout America. The resurgence of the Ku Klux Klan brought sporadic congressional efforts to provide rudimentary protection for Negroes—particularly an antilynching law.\(^{24}\) But that measure was to be deferred until, ironically, its descendant was incorporated in one of the last civil rights measures passed to date, the 1968 Civil Rights Act.\(^{25}\)

Civil rights advances like those of the 1960’s were hard to imagine during the Great Depression. Blacks struggled for subsistence. Even as they did, new federal agencies quietly adopted the official segregation of the land. The federal government put its own imprimatur on residential segregation when the Federal Housing Administration, in the 1930’s and 1940’s, formally restricted loans to racially “homogeneous neighborhoods” in the “interest of stability.”\(^{26}\)

Nevertheless, events were creating political preconditions for legislative success in Washington three decades later. The rural depression sent streams of blacks to seek work on the assembly lines and in the unskilled services enterprises of northern cities. Poverty and discrimination combined to force blacks into ghettos—starting a vicious cycle of indecent living conditions, poor health and education, and poverty, but also beginning the role of a cohesive black vote in urban politics.\(^{27}\)

World War II affected the attitudes of all Americans, although for some the impact may have been inarticulated. Negroes learned that at least in a national emergency, they might be accorded more opportunity to enter the economic mainstream. And, not surprisingly, having helped the war effort, they would look for greater concern from the government they had been asked to protect.

---


\(^{20}\) See C. Woodward, Reunion and Reaction (1951).

\(^{21}\) Ch. 25, 28 Stat. 36 (1894).

\(^{22}\) One example is Act of Mar. 4, 1909, ch. 321, 35 Stat. 1088.

\(^{23}\) See C. Woodward, The Strange Career of Jim Crow (rev. ed. 1968); Maslow and Robison, supra note 9, at 380-84.

\(^{24}\) Maslow and Robison, supra note 9, at 380-84.


\(^{26}\) Senate Select Comm. on Equal Opportunity, 92d Cong., 2d Sess., Towards Equal Educational Opportunity 249 (Comm. Print 1973) [hereinafter cited as Select Committee]; see also J. Javits, Discrimination—USA 144-45 (1960).

For whites, the rhetoric of opposition to repression was one more reminder of the gap between national promise and performance.

By the postwar period, the political power of the Negro's so-called swing vote in certain congressional seats and the Electoral College was entrenched. Negro political leaders, the Urban League and NAACP, labor and national religious organizations joined to move civil rights toward the top of the national agenda. The dozen years until the breakthrough of the sixties saw repeated efforts to make the wartime Fair Employment Practices Committee a permanent agency with enforcement power, to ban poll taxes and to bar federal aid to segregated state programs.28

The familiar pattern was action in the House, then delay or death in a Senate controlled by southern Committee Chairmen and kept under the Damocles Sword of the filibuster. As early as 1945, the House passed measures to end the poll tax and create an FEPC. A 1950 House-passed FEPC bill was filibustered in the Senate. Antilynching legislation never reached the House or Senate floor. Renewed efforts in the intervening years failed, as did the first efforts at antisegregation riders to bills for housing and other federal construction programs.29

1948 brought a presidential commitment to civil rights. President Truman called for an effective FEPC, antilynching laws, a Civil Rights Division in the Justice Department, the poll tax ban, voting protection, and integration of interstate transportation.30 Stymied in Congress and confronted with the Dixiecrat bolt from his party, Truman nonetheless took significant steps by executive order, putting the federal government for the first time since Reconstruction squarely on the side of desegregation.31

These developments also led to formation in 1949 of the Leadership Conference on Civil Rights, an alliance of civil rights, labor and religious groups and other organizations dedicated to equal opportunity. The Conference, which today comprises over 120 such organizations, has proven an extraordinarily effective lobbying arm for civil rights in all the legislative battles of the past 20 years.

The Conference grew out of the National Committee for a Permanent FEPC, organized by A. Philip Randolph during World War II. In the early postwar years, the National Committee had focused on employment as the most pressing black concern. Then when President Truman proposed his comprehensive civil rights agenda, there was a Mobilization March on Washington for civil rights laws. The organizers of that mobilization and the national FEPC Committee agreed that a permanent coalition was needed to coordinate lobbying on behalf of a broader legislative program, and they created the Leadership Conference.

The civil rights groups now turned their attention also to the procedural brambles. The 21 Day Rule for circumventing the Rules Committee passed

---

29 Id.
30 Id.; see also COMM'N ON CIVIL RIGHTS, TO SECURE THESE RIGHTS (1947).
In 1951, Rule 22, requiring a two-thirds vote for Senate cloture, was unsuccessfully attacked in the first of a long series of assaults.\(^{33}\)

Then the Supreme Court’s 1956 decision in *Brown v. Board of Education*\(^ {34}\) burst upon Washington, producing in short order a Southern Manifesto by some members of Congress and backing by others for the Powell Amendment to end federal aid for segregated schools. However, these early desegregation riders came in the midst of heightened debate over the federal government’s role in education. Some civil rights supporters felt compelled to oppose them for fear they would doom any federal education bill. In fact, many Congressmen opposed to federal education aid supported the rider in an effort to doom the education bills; they then turned around and joined with Southerners to defeat the amended bill on final passage.\(^ {35}\) The dilemma for those committed to both education and civil rights cautioned us against moral certitude about the “right” course for civil rights supporters in such complex situations.

### III. The Legislation of the Fifties and Sixties

#### A. 1957 and 1960 Civil Rights Acts

In the 1956 election year, both parties offered civil rights measures. A historic shift in that election of black voters to Republican ranks—forty percent by some estimates—produced a united White House and bipartisan congressional leadership drive for legislation. Pressure for a significant bill was strong.\(^ {36}\)

While public attention focused on the national debate over jury trials for those charged with criminal contempt of court injunctions, the most significant battle was fought over Title III of the administration’s bill, which would have permitted the Attorney General to seek injunctions against deprivation of any civil rights. This was a far-reaching request, one which would have given the Government a broad role in civil rights litigation, including suits to desegregate the schools.\(^ {37}\)

It was not clear whether there was enough support for cloture on Title III. But the Southerners took no chances. They feared the possibility that an all-out stand against any measure might lose and produce a stiff bill. They refrained from any serious filibuster in exchange for the jury trial amendment and confining Title III to voting cases.\(^ {38}\)

The Act also created the Civil Rights Commission to provide an analysis of voting and other forms of discrimination.

Thus, the initial pattern was set for the Government to limit its affirmative power to the field of voting rights. For most northern blacks, employment was

---

32 Adopted in 1949, rescinded in 1951, and reinstated in modified form in 1965, the rule permits calling up on the House floor a bill pending before the Rules Committee for 21 calendar days.
33 1 *Congress and the Nation*, *supra* note 28, at 1616.
35 1 *Congress and the Nation*, *supra* note 28, at 1206-07.
36 *Id.* at 1621.
37 *Id.* at 1622-23.
the pressing issue. But resistance to that was not regional. And sadly, it was, and still is, not as unassailable a proposition that all should have an equal chance to work as that every citizen should vote.

Even in respect to voting, however, the inadequacy of piecemeal approaches through case-by-case litigation soon became apparent. The Civil Rights Act of 1960 primarily involved a struggle over what step Congress would take next to remedy massive denial of the franchise. In a landmark study during 1959, the Civil Rights Commission called for federal voting registrars in areas with poor records of black voting.

The proposal for systematic use of federal registrars was rejected. The compromise enacted posed a series of three separate hearings before blacks could vote. First, the Attorney General had to win a voting discrimination suit. Then a separate hearing would be sought for a ruling that there was a pattern or practice of such denials in the jurisdiction. Finally, a black would have to convince a court-appointed referee that he had been improperly refused registration subsequent to the court's "pattern or practice" finding.\(^39\)

Needless to say, the time, man-hours and perseverance needed to run this gauntlet did not swell the voting rolls. But the Government was inching towards the kind of systematic approach which would finally succeed. Moreover, the 1960 Act required localities to retain their voting records (a requisite for justifying tighter legislation in the future) and it added anti-bombing provisions to the federal criminal law.\(^40\)

The Southerners defeated proposals in both Houses to add provisions on employment and school desegregation. For different reasons, both the bipartisan leadership in Congress and the Eisenhower Administration also sought to limit the bill's focus to voting protection. The efforts at a stronger bill had little chance, and a liberal cloture attempt, opposed by the Senate leadership as premature, failed even to muster a majority vote. The overwhelming consensus for a narrow bill was explained partly by the fact that neither party wanted to alienate the South in a presidential election year. But it showed, too, the lack of substantial support for a strong civil rights package.\(^41\)

The 1960 Act also extended the life of the Civil Rights Commission for two years. This pattern of temporary reprieves for the Commission has continued up to today—itself a sad reflection upon our commitment to attack the problems of discrimination.

Nevertheless, despite these limitations, we should not underestimate the symbolic importance of the 1957 and 1960 Civil Rights Acts. They were the first civil rights laws of this century and formed the beachhead for the enactments in the next decade. And, procedurally, they introduced the practice of preventing civil rights bills from being bottled up in committee, either by keeping them from the Judiciary Committee altogether, or by referring them there only for a time certain.

\(^39\) 16 Cong. Quarterly Almanac, \textit{supra} note 38, at 191-95.
B. The Civil Rights Act of 1964

In 1964 Congress passed the most comprehensive civil rights measure since Reconstruction and established a national commitment in all areas of racial discrimination.\(^4\) Together with the Voting Rights Act the following year, its passage was the recent highwater mark of the forces seeking federal action. What made it possible?

I have mentioned the inadequacies in the 1957 and 1960 voter protection laws and their deferral of action in other areas. More important was the brave assertion by southern blacks of their birthright to equality. Civil rights initiatives did not have priority in the first years of the Kennedy Administration.

But events often overtake political timetables. Sit-ins, which had begun in a small trickle during the late 1950's, swelled to massive demonstrations under the uniquely charismatic leadership of Martin Luther King. The issue of civil rights was dramatized in the most elemental terms as hoses and snarling dogs faced courageous citizens seeking access to public facilities. Civil rights were forced to the forefront of our consciousness, and became the most pressing issue on Capitol Hill.\(^4\)\(^3\)

With unprecedented pressure for action, both proponents and opponents of the new measure faced strategic judgments on how far to press their positions. How much might proponents seek and still hold public support for the bill? Would their opponents accept some progress—as they had in 1957—to avert complete defeat of a filibuster?

The tragedies in Birmingham, the assassination of Medgar Evers, and continued confrontations throughout the South underlined the need for a major response. In the Senate, the prospect of a public accommodations law and restrictions on federal aid programs were too much for the Southerners to accept without a filibuster. Unlike Lyndon Johnson, who had kept the Senate in round-the-clock sessions during the 1960 battle, Majority Leader Mike Mansfield kept the Senate going at a less grueling but steady pace which lasted for more than three months. But, in fact, dramatic all-night sessions in 1960 had produced little more than frayed tempers and stubbed toes as Senators stumbled bleary-eyed from their cots to answer quorum calls. And in 1964, the bill's proponents were willing to engage in some debate—rather than make the Southerners hold the floor—in order to expose the Southerners' positions and, hopefully, build the support among their uncommitted colleagues and the public necessary for cloture.\(^4\)\(^4\)

As had the jury trial amendment in the 1957 bill, once again a relatively minor issue dominated the headlines: Mrs. Murphy's boardinghouse achieved instant notoriety in the struggle to delineate the public accommodations title. But there were other strong bases of opposition to the Act, even in the North where concern centered on the equal employment legislation and the bill's im-

\(^4\)\(^3\) D. MORGAN, CONGRESS AND THE CONSTITUTION, ch. 14 (1966); 20 CONG. QUARTERLY ALMANAC 338-82 (1965).
\(^4\)\(^4\) 20 CONG. QUARTERLY ALMANAC, supra note 43, at 338-82.
lication for de facto school segregation, which was then stirring controversy in several major cities.

The symbolic heart of the bill was the public accommodation section. Initially, the Republican leadership in the Senate would support only a voluntary conciliation provision. Gradually, public support, private pressure and persuasion produced a bipartisan coalition sufficient to get cloture. But that road was paved with weeks of painstaking negotiations among the Senate liberals, the Justice Department and Minority Leader Everett Dirksen who extracted several major compromises.

As passed, the 1964 Act barred discriminatory literacy tests for voting registration and discrimination in public accommodations. The Attorney General was authorized to sue to desegregate public facilities, including schools, if the complainants were unable to or feared reprisal. He also was authorized to intervene in any civil rights case of "public importance" brought under the fourteenth amendment. Title VI, which I will examine later, enacted the long-sought ban on federal funding of segregated programs. Title VII provided the first federal fair employment law, barring discriminatory practices by employers, unions or employment agencies.

Cloture did not come cheaply. Federal enforcement power in regard to public accommodations and equal employment was deleted. Initial reliance on conciliation by state agencies was required and, except for a limited power of the Justice Department to bring "pattern or practice suits," enforcement of these two titles was left to private litigation.

Another important deletion, with consequences only now becoming fully clear, was the proposal to aid voluntary elimination of racial separation in the school systems not found guilty of illegal segregation. Instead, Congress expressly emphasized that nothing in the Act authorized courts or administrative officials to require student transportation to achieve racial balance.45

Still in all, a combination of circumstances not likely to be repeated in the near future had produced a far-reaching bill—and the first successful cloture of a civil rights filibuster:

—Action to relieve the tension of confrontation in Montgomery and elsewhere had become the number-one national issue.

—The media focused attention almost daily on both the demonstrations and the debate of the bill.

—A nationwide coalition of religious groups, civil rights organizations and labor unions conducted an unprecedented campaign to win grassroots support; the conspicuous role of leading clergy in particular focused the issue in moral terms for many Americans.

—Because of the urgency which all these developments imparted to members of Congress, the bill’s proponents worked out an elaborate

45 Id.
system of marshalling information, updating strategy and coordinating tactics with the Johnson Administration. In the Senate, for example, the bill was divided by title among bipartisan teams of captains responsible for debating and negotiating the provisions of their part. And the enormous resources of the Justice Department were invaluable.\(^{46}\)

**G. The 1965 Voting Rights Act**

The following year, with large sympathetic majorities returned to Congress, a sustained effort was made to pass the strong voting rights provisions deferred from the 1964 Civil Rights Act.\(^{47}\)

Following on their 1959 recommendations, the Civil Rights Commission had by 1963 compiled a second, and even more thorough, study of voting discrimination. It documented numerous instances of violence and intimidation and exposed the discriminatory application of literacy tests and other devices. I had noted one example of these blatant practices during the 1964 debates. Here is the illustration I described:

As recently as April 1963, in a voting case in Walthall County, Mississippi, the Department of Justice was attempting to register a young lady who was a Woodrow Wilson fellow in political science at Radcliffe College of Harvard University. The Harvard graduate had “failed” the voter registration test—she was a Negro. The Government in this case called seven white witnesses who had applied to register. They were illiterate. They were white. They had passed the same voter registration test.

The measure proposed by President Johnson was unprecedented in scope and uncompromising in its operation. Thanks to the Civil Rights Commission, it was based on an equally unprecedented and uncompromising record of the need for such drastic measures.

In the eight years of litigation by the Justice Department, no substantial progress had been made, despite strenuous efforts and devotion of considerable government resources. The Commission had found that in one hundred particularly troublesome counties in eight southern states, about five percent of the voting age blacks were registered in 1956 before any federal legislation. By 1962, the best estimate was that the figure had only increased to 8.3 percent. As I indicated then, at that pace it would have taken over a century to get even a majority of the blacks in those counties registered.

Government’s lawsuits were ineffective for several reasons. The Department’s limited resources were divided among many suits throughout the South. It often took hundreds of man-hours to establish a discriminatory pattern. Even then, the Department had the difficult burden of proving the discriminatory intent, often confronted by a hostile white judge and jury.

Nor did piercing this maze necessarily ensure local blacks the vote—even when individual suits were successful. For by the time a court order enjoined

---

46 Id.
one procedure, a new stratagem had been devised and implemented. Often, too, the election was over and the courts would not upset the result. For the Justice Department, the situation was akin to that faced by those poor greyhounds at the racetrack who can never quite catch the mechanical rabbit.48

The counterstrategy devised was a complementary set of remedies. First, there could be a ban on all literacy tests and similar devices, rather than a challenge to their individual application.

Second, federal "examiners" could be sent to areas where local election officials were clearly recalcitrant. The federal agents would be empowered directly to certify eligible blacks for registration.

Third, to ensure registered blacks would be allowed to vote, federal observers could also be sent on election day.

Most important, the burden of compliance was shifted from the Justice Department to local jurisdictions. This was the so-called "preclearance" provision of section 5. No new local law which affected voting rights could be implemented without submitting it to the Attorney General or a three-judge district court in Washington for prior clearance. The burden of proof was placed on the submitting jurisdiction to demonstrate the law was not discriminatory in either purpose or effect. Thus, the status quo was frozen until the federal government had had a chance to review the new law.49

The remedies I have outlined automatically applied to any state or local government in which registration of eligible residents, or voting by those registered, in the 1964 presidential election were less than 50 percent. But the same remedies were also available in any other jurisdiction when a federal court found a violation of the fifteenth amendment.50

Like the 1964 Act, the Voting Rights Act was passed against a tragic backdrop. In early 1965, the stepped-up efforts of civil rights workers to register black voters focused on Selma, Alabama. In Selma, between 1962 and mid-1964, only 93 of the 795 blacks who tried to register were enrolled; only 335 of the city's 15,000 blacks had been permitted to vote. Increasingly violent confrontations culminated in naked brutality and three deaths. Once more the nation was reminded of the grievous scars upon its conscience.51

In the House, a weaker proposal was offered as a substitute for the President's bill by several northern Congressmen. It was defeated when it was embraced as a reasonable compromise by several southern speakers. Meanwhile, the Senate had instructed its Judiciary Committee to report a bill out on a day certain and then proceeded to vote down a series of Southern floor amendments by large majorities.52

The major floor fight in the Senate involved a proposed outright ban on poll taxes for state elections. The compromise eventually adopted contained no ban; but it included congressional findings that such taxes inhibited enjoyment

50 Id.
51 21 CONG. QUARTERLY ALMANAC 357-59 (1966).
52 Id. at 359-62.
of fourteenth amendment rights and directed the Attorney General "forthwith" to bring a test case directly under the amendment. The Senate then voted cloture, for only the second time in history on a civil rights measure. In conference, the House poll tax ban was dropped and the Act became a law.  

The Act's impact was immediate. In some counties, the Justice Department obtained voluntary compliance. Federal examiners were appointed in only 32 southern counties in the first year but the total black registration in the five states with the worst records increased 40 percent in the first half year.  

In less measurable ways, the 1964 Act could boast of similarly spectacular successes. With a few notable exceptions, most public facilities and private establishments subject to the public accommodations provisions had been peacefully desegregated. As we shall see later, the administrative compliance provisions of Title VI began to take hold with regard to school desegregation and major litigation was begun under the Equal Employment provisions of Title VII.

D. The 1968 Fair Housing Act

The unfinished agenda was still a long one, as it included black jury service, fair housing, enforcement power for the Equal Employment Opportunity Commission, and protection for civil rights workers. But the following year served notice that the heady pace of 1964 and 1965 was not inexorable.

In 1966 President Johnson sent Congress another omnibus bill calling for civil rights worker protection, federal jury access, Justice Department authority for suits to enjoin any civil rights deprivations, and a ban on private discrimination in housing.

In the context of a changing national mood on civil rights, opposition to the fair housing provision splintered the Senate coalition which had triumphed in the two previous sessions. Minority Leader Dirksen, who had been crucial to obtaining cloture in 1964 and 1965, rejected anything but voluntary compliance programs. Although the Senate Judiciary Committee was successfully bypassed, a House-passed measure with a modified version of the President's housing bill was filibustered to death.

Beyond opposition to the housing measure, 1966 saw the general public interest in further civil rights legislation ease perceptibly. Racial demonstrations in northern cities from Watts to Chicago and New York had produced violence viewed differently than the brutality in Selma and Montgomery. Whites were uneasy about a new black militancy symbolized by the "black power" slogan. The civil rights coalition itself was fissured. Some argued that black demands had become too diffuse for effective mobilization of political effort.

Others, perhaps more realistically, noted the specific black concerns which challenged northern school segregation, slum conditions and unemployment. These observers suggested that the calls for further legislation simply were getting too close to home for northern supporters of the 1964 and 1965 Acts.

53 Id.
54 Comm'n on Civil Rights, Political Participation (1968).
56 Id.
At the start of 1967, the prospects for significant legislation were bleak. I reintroduced the administration's omnibus measure—this time with added enforcement powers for the EEOC and for the fair housing program. At the same time, the measure was split up and other Senators introduced each title separately in the hope of gaining hearings, and perhaps more, for at least one or two elements.

The southern counterstrategy was twofold: keep the other provision tied to the fair housing controversy, and keep the main spotlight on the renewed outbreak of riots in the summer of 1967.

Unperturbed by our grand strategy, Senator Ervin had his Subcommittee on Constitutional Rights hold hearings on my omnibus bill, and he also highlighted the recent violence.\(^5\)

The issue seemed to be, as John Hannah observed, whether any measure would be withheld for fear it would seem to reward rioters, or whether we would realize the pent-up frustrations involved and pass some measure to "redeem a long overdue pledge to 20 million Americans."\(^8\)

The House, having seen a hard-fought housing measure die in the Senate in 1966, passed a limited worker protection act and sent it to us at the end of 1967. As a good example of how omniscient politicians are, the majority leader, administration strategists and I were all convinced we would be lucky to pass even that in the Senate; a fair housing measure seemed out of the question and would doom the worker protection bill. In fact, liberals on the Judiciary Committee found themselves in the embarrassing position of voting to defeat a fair housing amendment to the House bill, which Chairman Eastland helpfully offered, he admitted, "as a little dose of medicine which will be fatal."\(^9\)

However, to my pleasant surprise, within six months we had not only the worker protection provisions but a comprehensive federal fair housing law as well.\(^6\)

On the eve of adjournment in December, 1967, Senator Mansfield, an unsung hero of the Housing Act story, quietly made the House bill the pending business for Congress' return in January. At the start of the new Congress, the civil rights bloc reviewed the bidding and decided to chance a fair housing floor amendment. Senator Mansfield, still dubious about the prospects, left the bill up for six weeks of debate and four attempts at cloture—resisting numerous pressures to proceed to other business—while a compromise was hammered out with Senator Dirksen and cloture votes were slowly picked up.

As in the Title VII compromise of 1964, federal enforcement power was limited to pattern or practice suits by the Department of Justice. Various exemptions also were made for owner-occupied homes—Mrs. Murphy revisited—and for private individuals selling up to three houses without a broker.\(^6\) The Act, however, does prohibit refusals to rent or sell, and the use of discriminatory

\(^5\) 23 CONG. QUARTERLY ALMANAC 774-81 (1968).
\(^8\) Id.
\(^8\) Id.
terms, advertising or mortgage lending. It also bans blockbusting. Apart from conciliation by state agencies or HUD, enforcement is by private lawsuit.

What explains Congress' ability to pass the Housing Act in 1968 after the effort was rebuffed two years earlier? Some would point to external events, such as the 1967 riots in several Northern cities, particularly Detroit and Newark, or the ensuing Kerner Commission Report whose preliminary conclusions on the growing racial division became public shortly before the successful Senate cloture vote. Some have suggested the assassination of Martin Luther King, shortly before the key House maneuvers to avoid sending the bill to conference, was a factor. However, I believe that tragedy came too late in the process to have much impact.

Perhaps some members of Congress hoped passage would affect the Supreme Court's decision in the then-pending case of *Jones v. Alfred H. Mayer Co.* which involved the potentially greater reach of the 1866 Civil Rights Enforcement Act. Notwithstanding passage of the 1968 law, however, the Court held the earlier statute barred all racial discrimination, public or private, in the sale or rental of realty.

One might look instead to the unswerving commitment and extraordinarily effective efforts of Mr. Clarence Mitchell, both personally, and in coordinating the forces of the Civil Rights Leadership Conference.

And some might simply say that the nation needed a breathing space after the 1964-1965 period before passage of another major civil rights bill opens up new areas to federal intervention.

The final verdict can be left to the historians. The important point was that the last major sphere of daily activity—the effort to find housing of one's choice—had been brought under the scrutiny of federal law.

The worker protection portion of the Act met a statutory construction problem which the Supreme Court had raised with the original criminal civil rights laws. In *Screws v. United States*, the Court held that to avoid vagueness defects, the 1870 Enforcement Act had to be read as requiring specific intent to interfere with the victim's constitutional rights. The 1968 Act spells out the specific areas of interference with Negroes exercising their civil rights or with those assisting that exercise. The Act says if you intend, for example, to intimidate someone because he seeks open housing, you have committed the offense, whether or not you advert to the fact that this is interference with his "civil rights." The requirement that force or the threat of force be used was retained.

In 1968 Congress also passed separately a bill to ensure fairly drawn jury panels in the federal courts.

E. The End of the Decade—Where We Stood

In retrospect, enactment of these major civil rights laws was extremely significant from several perspectives.

63 24 CONG. QUARTERLY ALMANAC 166-68.
64 325 U.S. 91 (1945).
First, it laid to rest substantial doubt about the constitutionality of sweeping legislation to enforce civil rights or curtail the impact of discrimination on the free flow of commerce. In *Heart of Atlanta Motel Inc. v. United States*, the Supreme Court found congressional power to ban discrimination in public accommodations because of its disruptive effect on interstate commerce and to reach local incidents which have a harmful impact upon that commerce. Upholding the Voting Rights Act in *Katzenbach v. Morgan*, the Court found it unnecessary to decide whether state laws prohibited by the Act directly contravened the fourteenth amendment. The Court said Congress has broad authority under section 5 of the amendment to implement it with power parallel to the authority bestowed by the "Necessary and Proper" clause of article I. Besides section 5 and the commerce clause, there seem few roads Congress might take to implement the fourteenth amendment's guarantees or remove the impact of discrimination upon our economy which would be held to be beyond its constitutional reach.

Second, these measures gave the lie to an old adage, often heard in the halls of Congress, that we cannot change people's attitudes by new laws, that the order must be reversed, that we cannot legislate brotherhood. Consider the compliance with the public accommodations and public facilities titles of the 1964 Act—not to mention school desegregation in many southern communities under Title VI plans. Or recall that in some southern communities local Negro officials are accepted for the first time in history. I believe these developments make clear that new laws can create new situations in which perceptions of reality are sharpened and one's attitudes do change.

True, laws only govern our external behavior. But, by creating new situations of experience and controlling permissible actions, they have an eventual effect upon a person's thoughts as well. As Mr. Justice Thurgood Marshall once put it: "Laws not only provide concrete benefits; they can even change the hearts of men—some men, anyway, for good or evil." Passage of these laws demonstrated, too, that the Senate filibuster was not a permanent roadblock to civil rights legislation if the time was ripe.

But what were the right conditions for effective action? The 1960's taught us what a kaleidoscopic pattern of circumstances might be needed: historic, sometimes tragic events; forceful personalities; broad coalitions of dedicated private groups. Each of these elements seemed necessary to convince a majority of Americans to help achieve equality for a minority—even though that achievement would serve the interest of all.

We saw the critical importance of executive leadership, too. For the President does indeed speak from the "Bully Pulpit," as Teddy Roosevelt called it. Without the President's energetic support, forward movement may be extremely difficult. The majesty of the White House and the direct voice to the people it provides can be an incalculable force for good or ill.

But most important, this period witnessed substantial involvement of

---

Congress in the struggle for civil rights beyond the limited sphere of voting. Thus the foundation was laid for all three branches of Government to share the awesome responsibilities of fulfilling the promise of equality. Regrettably, the opportunity to follow up this initial commitment with further legislative attacks on the complex problems of discrimination were not utilized by Congress or the Executive. As a result, the end of the decade saw the judiciary once more become the lightning rod for difficulties reaped from a century of neglect.

IV. The First Years of the Seventies

By the end of the decade, the importance of follow-up efforts by the Congress was clear. The progress made under Voting Rights Act and Title VI termination provisions of the 1964 Act had produced a sharp reaction against each. The Equal Employment provision had proven inadequate without greater power for the EEOC.

A. Extending the Voting Rights Act

By 1969, the 1965 Act was hailed as the most successful civil rights law ever passed. In eight years of litigation from 1957 to 1965, the Justice Department had been able to help only 46,000 blacks register in the South. In the first four years under the Act, 800,000 blacks registered. In the single state of Mississippi, registration jumped from seven percent to 60 percent. Over 300 black-elected officials won posts throughout the South.\(^7\)

Despite these gains, much remained to be done. Black registration was still glaringly less than that of whites in most of the Deep South—in many counties less than half. There was still widespread intimidation. Moreover, the progress which had been made came under intense counterattack. Many communities began to shift their emphasis from denying the ballot to diluting the impact of votes through a variety of election laws and laws affecting the local political structure. There were many ingenious ways to eliminate or diminish the potential impact of the new Negro vote:

- gerrymandering reapportionments
- annexing predominately white communities
- making elective posts appointive
- switching from district to at-large elections
- and other more complex devices to prevent the impact of a cohesive Negro vote. All these were used. Congress had been aware that new techniques might be attempted in this fashion. That is why the key innovation of the Act, section 5, froze the status quo until changes in election laws passed federal scrutiny.\(^7\)

While the initial focus of the Act's operation had been on registering voters, implementing section 5 in the first few years was less a matter of clearing pro-

\(^7\) Joint Views of the Senate Judiciary Committee on H.R. 4249 to Extend the Voting Rights Act of 1965, 116 Cong. Rec. 5517-29 (1970). This statement by a majority of the Committee was treated as the committee report inasmuch as the Judiciary Committee did not convene to vote on the measure. See 116 Cong. Rec. 5529 (1970). (Remarks of Sen. Scott.)

\(^7\) Id.
posals than getting them submitted in the first place. Many states and towns either chose to ignore it completely, or maintained a proposed change was not within its purview. In 1969, the Supreme Court ruled that Congress had sought a broad remedial power in section 5.72 The Court emphasized that section 5 aimed at the subtle, as well as the crude, impediments to meaningful political participation. The Court observed, "The right to vote can be affected by a dilution of voting power as well as an absolute prohibition on casting a ballot."73

This was the setting when the Voting Rights Act came up for extension in the 90th Congress, and the crucial importance of the "trigger provisions" of section 5 formed the focus of the debate.74

In 1965, President Johnson's original proposal was for the Act to stay in full force ten years. In Congress that was shortened, with no recorded explanation, to five years. While the Act would remain on the books, southern states which had used voting tests discriminatorily until 1965 would have been able to get out from under the trigger provision and automatic coverage of section 5 in late 1970.

Under the Act, a state subject to the automatic triggering formula could remove itself from that coverage by proving in court that, although it had low registration levels, there had been no discriminatory use of literacy tests or similar devices for at least five years. In 1965 the Act itself had suspended any use of such tests at all in those states, so they would automatically have been able to make such a showing in 1970 and come out from under the coverage of section 5.75 Civil rights groups simply urged an extension of the entire Act for the second five-year period.76

Attorney General John Mitchell proposed substantial revisions of the Act. He claimed section 5 was unworkable and no longer needed, and suggested going back to a case-by-case approach, under which the Attorney General could seek examiners or enjoin voting laws only after winning a court suit. He also suggested a nationwide ban on literacy tests and a limit on residency requirements imposed for federal elections.77

The civil rights groups uniformly opposed this purported expansion of the Act as a thinly disguised emasculation. They noted the plan was, at best, no more than reversion to the very case-by-case approach the inadequacy of which had led to passage of the Act. Once again the Attorney General would have to find out about new voting laws as best he could, divide his resources among a welter of suits, let the new procedures take effect until he won in court, and carry the burden of proof. This was little more than existing law, already available under the Voting Rights Act for those areas not under the trigger provisions.78

Another timely survey by the Civil Rights Commission provided vital ammunition. Political Participation, published in 1968, amply documented the

---

73 Id. at 569 (citation omitted).
75 Joint Views, supra note 70.
76 Senate Hearings, supra note 74, at 90, 272, and 313 (testimony of Clarence Mitchell).
77 Id. at 182, 220 (testimony of Attorney General Mitchell).
78 Joint Views, supra note 70.
continued need for section 5. Testifying to the House Committee on the Judiciary for the Commission, Father Hesburgh warned its elimination would "turn back the clock to 1957." 79

The House of Representatives passed the administration proposal as a last-minute floor substitute for the simple extension which the Judiciary Committee had reported. In the Senate, members supporting section 5 offered a compromise: An extension of the 1965 law intact, plus the separate addition of a nationwide literacy test ban and restriction of residency requirements. But it was uncertain whether cloture for any bill could be obtained without White House aid, and the President's position was unclear. 80

There was, however, a fortuitous, and ironic, development. The nomination of Harold Carswell to the Supreme Court had been reported by the Judiciary Committee and was waiting in the wings. Judge Carswell's supporters apparently felt time was working against the nomination and sought to avert a prolonged filibuster over the Voting Rights Act. They had sought permission to have the Carswell nomination considered before the Voting Rights Act extension was taken up. But the Majority Leader insisted the Voting Rights Act be disposed of first. That made possible the civil rights group's strategy of holding the Carswell nomination hostage to any filibuster on the Voting Rights Act. 81 It is difficult to tell whether the Southerners' strategy was based on their judgment that in the end cloture would have come or their concern for the Carswell nomination, but in any event, they did not filibuster.

The compromise prevailed in the Senate and was accepted without conference in the House. The Act would continue in full force with no new laws implemented until federal review. 82

B. Oversight of Section 5 Enforcement

But Congress soon found that the Justice Department was trying to accomplish through administrative policy what it had lost on the legislative battlefield. The incident repays some study as an example of a seemingly narrow procedural wrangle which can jeopardize a major statute and require close congressional oversight.

As I have indicated, the usefulness of section 5, to a great extent, turns on the state or county having the burden of proof to show a proposed new law is not discriminatory. If the Attorney General enters an objection during the 60-day waiting period which follows its submission, the law may not be implemented. The Act's supporters assumed this was amply clear from the language and from the legislative history. Repeatedly during passage of the Act in 1965 and its extension in 1970, both its proponents and its most vigorous opponents acknowledged that the burden of persuasion would be on the submitting jurisdiction.

In November, 1970, Mississippi submitted a statewide reapportionment

79 House Hearings, supra note 74, at 301.
80 26 CONG. QUARTERLY ALMANAC 192-98 (1971).
81 Id. at 159; see R. HARRIS, DECISION (1971).
plan to the Attorney General for preclearance. The Attorney General indicated he would not object, despite his finding some evidence of discriminatory purpose, because he could not make up his mind one way or the other and the 60 days had run. In effect, this response told Mississippi that the Attorney General would shoulder the burden of proof—contrary to the legislative intent—and would not object unless he affirmatively found discrimination.

The national civil rights community was alarmed at the implications of this interpretation. Concern that the Mississippi ruling might prove a precedent was well founded. Congress learned of impending regulations to implement the Act. Numerous procedural questions had arisen, and it made sense to prescribe some procedures for handling them. But the regulations initially proposed also would have stated that the Attorney General would object only if he could make a finding of discrimination. The issue was not minor. The danger posed was a hole through which one could drive a truck.

For any submission, there were three possible outcomes. A finding of discriminatory purpose or effect would produce an objection. A finding that there was no discrimination would preclude an objection. Everyone agreed on those two positions. But what of the middle case, where the Attorney General had insufficient information to make a firm finding one way or the other? Would he object or wouldn’t he? In such situations, it would be easy for an Attorney General to throw up his hands and say, in effect: “Well, this is all very difficult, and see my time has run out, but I can’t reach a conclusion whether it’s discriminatory or not. So I won’t object.” Any jurisdiction could submit a complex change with scanty data on its genesis or impact, create an ambiguous situation and, if the Department was inclined to be sympathetic, obtain clearance because the issue had not been resolved and the review period had run.

Consultation between the Justice Department and interested members of Congress left no doubt of the opposed positions. A bipartisan group of Senators and Congressmen conveyed their concern. They were joined by a large number of private civil rights, labor and religious organizations, professors from numerous law schools and several of the nation’s leading private attorneys. All urged the Attorney General to reconsider.

Eventually, the Administration did review its position, and the guidelines were issued with the desired statement. Of course, the Justice Department might still approve a questionable submission: the umpire might agree that the rules of the game permitted three strikes and four balls; but he could still cry, “Ball Four,” as the batter swung furiously at a full-count pitch, and missed. Nevertheless, it will be far harder to do this if there must be an articulated finding of no discrimination.

C. Amending the Equal Employment Opportunity Law

In contrast to the substantial success of the Voting Rights Act, experience with the Equal Employment Opportunity Commission under Title VII of the

84 Id.
1964 Civil Rights Act underlined the high cost of the compromises which had been thought necessary to obtain cloture with that title in the bill.

In 1964, the House had approved a Commission with power to bring suit against discriminating employers. The Senate Committee bill had been even stronger, providing so-called "cease and desist" power under which the Commission, like other regulatory agencies, could issue its own enforceable orders. Indeed, a fair employment agency with teeth had been the single main legislative goal of the civil rights coalition since 1944. But in 1964, it was still clear that insistence upon federal enforcement power would jeopardize even provision of a private right of action.

The Commission was given the power to investigate complaints and determine "probable cause" to believe there had been a violation. But it was limited to negotiating voluntary compliance. Except for pattern and practice litigation by the Attorney General, enforcement was limited to private lawsuits under the Act.

Moreover, given the general tenor of debate over the 1964 Act, the focus was on blatant acts of discrimination in employment. Once documented, explicit exclusionary policies or actions by identifiable individuals in a company could be brought to management's attention and, it was hoped, handled to a large extent through conciliation. In areas where overt management resistance was expected, it seemed possible that private litigation could be effective, particularly since attorneys' fees were provided where appropriate.

A second major defect was the large loophole left when employment discrimination by state and local government agencies was expressly excluded from Title VII coverage. Nor could such discrimination be reached through federal fund termination under Title VI of the 1964 Act. Employment discrimination generally, with minor exceptions, had been exempted from Title VI. Thus, despite the furor about Government interference with private activity, it was employment discrimination by government itself which fell between the two provisions and was left untouched.

This exemption was defended on the ground that the fourteenth amendment already permitted suits against official discrimination. However, there was little reason to expect more substantial impact from individual lawsuits against local government without support from a federal agency in this area than had been made by litigation in the voting rights area even with Justice Department assistance.

In its 1969 report, *For All the People . . . By All the People*, the Civil Rights Commission had detailed discrimination in government employment through the nation:

> The basic finding of this study is that State and local governments have failed to fulfill their obligation to assure equal job opportunity. In many localities, minority group members are denied equal access to responsible

85 *Developments, Title VII*, 84 HARV. L. REV. 1109, 1196-97 (1971).
government jobs... and often are excluded from employment except in the most menial capacities.89

At the same time, several presidential commissions noted the distrust and hostility toward government caused by the small numbers of blacks in agencies dealing with local communities in such vital services as welfare, the police, and, in the case of rural areas, the county agricultural agents.90

The need for putting some teeth in the EEOC was even clearer. The impetus for EEOC enforcement power increased as the focus of attacks on employment discrimination shifted away from the more obvious barriers of segregated pay scales and departments, explicit refusals to hire or union exclusion policies.

Instances of such blatant discrimination expressly directed at particular individuals or groups remain, but they no longer constituted the most typical or significant target for an effective campaign to assure equal opportunity. Attention shifted to the more fundamental problem of institutionalized discrimination which results when the effect of past segregation is perpetuated through seniority and recruitment policies, or from the use of job testing and other practices of questionable business necessity.91 Exclusion of black applicants, or bias against their advancement that is systematically embedded in personnel policies or plant organization, of course, is hardly less devastating to the individuals affected than cruder forms. And in terms of the number of workers affected, its impact is far more serious.

In the years following the passage of the 1964 Act, the civil rights forces sought repeatedly to remedy these two defects and finally met with partial success eight years later in the Equal Employment Opportunity Act of 1972, which amended Title VII to provide coverage of public employees and limited enforcement power for the Commission.92 That battle is also instructive.

In 1970, a renewed campaign was mounted to grant the Commission power to issue cease and desist orders after a full hearing. The arguments for cease and desist seemed impressive. Thirty-four of the 38 states with equal employment agencies had provided such authority; Congress had given cease and desist power to the other federal regulatory agencies; and its effectiveness in promoting uniformity and development expertise was clear.93

This last point was particularly important in view of the increasingly intricate cases before the EEOC and its mounting backlog. The advantage in such situations of accumulated expertise for both the advocate and the tribunal is the essential rationale for committing adjudication to any administrative agency. Agency expertise, combined with the power to issue enforcement orders, also is critical to reducing backlogs with limited resources. Together they are likely to produce a much higher rate of negotiated compliance than the mere

89 Comm'n on Civil Rights, For All the People... By All the People 131 (1969).
90 See, e.g., Nat'l Advisory Comm'n on Civil Disorders, supra note 6, at 165.
threat of a regular lawsuit before judges having limited familiarity with the field.\textsuperscript{94}

Nevertheless, there was still substantial opposition throughout the country to cease and desist power for the Commission. The traditional fate of tough fair employment legislation reflected the difficulties it had always encountered, even while northern public opinion pressed for an end to segregation in the South.

By 1970, the new administration's restraints on the economy had produced a recession. Unemployment was the main concern of many white workers. This, plus the publicity received by the initial efforts to implement affirmative action programs such as the "Philadelphia Plan," made white workers uneasy about the impact which enforcement powers for the EEOC would have on their own job security. Nor were businessmen throughout the country anxious to face an EEOC with teeth.

Among the opponents of cease and desist in Congress, those who were willing to provide any enforcement mechanism at all for Title VII offered a compromise "court enforcement procedure," under which the EEOC could sue in a district court, like any other litigant, but not issue its own orders.

Their main argument, that cease and desist power denied due process by letting a single agency act as "prosecutor, judge and jury," had long been raised against other agencies. Proponents of cease and desist countered with assurance that there would be the separation of function required by the Administrative Procedures Act and a statutorily independent General Counsel as in the NLRB.\textsuperscript{95}

Nevertheless, the "court-enforcement" substitute procedure prevailed. After three years of intense maneuvering, the issue was finally resolved in 1972. In the House of Representatives, a committee cease and desist bill was replaced on the floor by the court-enforcement proposal. In the Senate, a substantial majority demonstrated support for cease and desist power on three separate occasions, but in a struggle worthy of Sisyphus they were defeated by the still-potent power of the filibuster.

The Senate had passed a bill providing cease and desist power in 1970 which died in the House. In 1972, the same bill was promptly reported. On the floor, a court-enforcement substitute was defeated and, after a few days of the Byzantine parliamentary confusion at which the Senate excels, the substitute was again defeated. So far so good, but it proved not quite good enough. Cloture failed twice, and after a month's debate it was clear that the cease and desist approach did not have the two-thirds support necessary for cloture. Finally, a variant of the court-enforcement approach was accepted and the House then concurred.\textsuperscript{96}

A major factor in the intensity of opposition to cease and desist power was that the courts had begun to construe Congress' intent that Title VII reach business and union practices with a discriminatory effect, and not merely those where a discriminatory purpose could be proven. In \textit{Griggs v. Duke Power Co.},\textsuperscript{97} decided in 1971, the Supreme Court ruled that any employment or promotion

\textsuperscript{94} Id.
\textsuperscript{95} Id. \textit{See} 28 Cong. Quarterly Almanac 246-56 (1973).
\textsuperscript{96} Id. at 247-56.
\textsuperscript{97} 401 U.S. 424 (1971).
test which perpetuated past segregation had to be job-related to survive scrutiny under Title VII, even absent a showing of discriminatory intent by the employer. The unanimous Court explained:

We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in head winds" for minority groups and are unrelated to measure job capacity.98

Similarly, an increasing number of lower courts have held that Title VII requires fair job recruitment efforts to ensure equal opportunity where a company's former segregation makes neutral recruitment discriminatory. For example, a past "Whites only" policy would make word-of-mouth recruitment palpably discriminatory in its impact on potential black employees or union members. In such situations, courts have remedial power to order recruitment efforts to overcome that "built-in head winds" from the past.99

If a sufficient body of case law continues to develop with regard to practices that have a discriminatory effect, the EEOC may be able to encourage substantial numbers of negotiated remedies even without the cease and desist power.

When we compare the successful preservation of the Voting Rights Act with the failure to add cease and desist power for the EEOC, what considerations account for the different results? For one thing, geography. The Voting Rights Act is a nationwide law. But the dissatisfaction with its growing impact was confined to the South.100 The prospect of cease and desist authority, on the other hand, aroused elements of the business community throughout the nation. It was time for Northerners to reexamine the South's charge that there was a double standard in the reception given civil rights proposals. Second, the proposed change in the Voting Rights Act—whatever the technicalities—could be explained simply and accurately as an effort to weaken a successful law and thereby risk considerable progress. In the EEOC struggle, it was necessary to build public support for an additional measure which opponents charged would have dire unforeseen results.

Both situations reflected the repercussions as civil rights enforcement began to move beyond examples of naked motive, and began removing the burdens of discriminatory effects, where purpose was unclear or the immediate racial impact was unintentional. But denial of the vote carries a special stigma—it is hard to rationalize on any basis, whatever one's perception of the minority's problems in jobs, housing or education.

Finally, the EEOC fight came two years after the Voting Rights Act renewal, and during that period concern increased substantially about the backlash over school desegregation court decisions and their impact under Title VI of the 1964 Act. The national mood on civil rights had changed again.

98 Id. at 432.
100 For states under the "trigger formula" (essentially the "Deep South"), the stringent remedies applied automatically; elsewhere they are available only upon a judicial finding of discrimination. See text supra at note 49.
D. Title VI Enforcement in Education

The provision of Title VI for terminating federal aid applied to local programs of every kind. But the main focus of congressional oversight has been the duty of the Secretary of Health, Education and Welfare to insure that no recipient school district used federal funds if it was not in compliance with the school desegregation required by the Constitution. By the late 1960's, this compliance program prompted intensive review in Congress, not only by some who sought more vigorous enforcement of the Act, but also by others who sought to limit the power of the Secretary to require full desegregation as a condition of federal funding.

The stakes involved under Title VI rose sharply one year after it took effect, when Congress passed the Elementary and Secondary Education Act of 1965. Until then, federal spending on precollege education amounted to only a few million dollars annually. In the 1965 Education Act, it jumped sharply to several hundred million dollars. Now local school districts had a lot more to lose. Indeed, had the Elementary and Secondary Education Act been on the books in 1964, there would have been considerably stiffer opposition to enacting Title VI at all.

Title VI prohibits discrimination under any program of activity receiving federal financial assistance. The Act directs each agency administering a federal program to ensure compliance. The legislative history of Title VI and its interpretation by the courts meant that the standard for compliance would be geared to the fourteenth amendment obligation to desegregate as enunciated by the Supreme Court. In 1964, that standard was still "deliberate speed" and few districts were integrated. In fact, although a decade had passed since the Brown decision, only 2% of the black children in the South were attending school with any white pupils.

Accordingly, HEW's initial efforts to implement Title VI did not press for significant school desegregation in the short run. Instead, emphasis was placed on obtaining from every segregated school district a formal commitment to the process, known in the bureaucracy, with mixed feelings, as "paper compliance." This was an important first step; it constituted a formal acknowledgment of the obligation to desegregate and to submit a plan for working toward that goal. It should be remembered that the years of "massive resistance" to any official action were, in 1964, a very recent memory.

For many with high hopes for Title VI, the step was too small in light of a ten-year-old precedent that segregated schools were clearly unconstitutional. Nevertheless, the establishment of this compliance system and the official recognition by district officials of their duty to comply laid the foundation for developing substantive guidelines and for gradually insisting upon greater and greater progress toward full desegregation. Merely installing this systematic mechanism for monitoring the desegregation process and working with districts to develop feasible plans—always with the ultimate threat of financial sanction—had great

102 Select Committee, supra note 26, at 193-94.
advantage over the less coordinated court efforts to supervise desegregation in each state.

The initial HEW guideline followed then operative Supreme Court precedent. It called for gradual implementation of free choice plans—four grades per year—looking towards desegregation of all grade levels by the 1967-68 school year. In 1966, revised guidelines called for faculty integration and spelled out the requirements of a meaningful freedom-of-choice approach.\(^{103}\)

In these years, the advantage of an administrative agency emerged as HEW accumulated considerable expertise in evaluating the actual results of freedom-of-choice plans. Building on this experience, the Supreme Court’s 1968 decision in *Green v. County School Board of New Kent County*\(^{104}\) held that the time for “deliberate speed” had passed. The Court ruled that freedom-of-choice plans would thereafter meet fourteenth amendment obligations only if they worked realistically and promptly to desegregate schools as much as possible. The Court also cast doubt upon the acceptability of such plans in many situations. HEW issued parallel guideline revisions indicating that plans acceptable for Title VI purposes would have to go beyond freedom of choice in most cases. The guideline called for full desegregation by the 1969-70 school term, two years later, and for the first time, referred to northern school districts as well as those in the South.\(^{105}\) Termination proceedings were begun against the Ferndale school district in my own state of Michigan.

Then, in July of 1969, the new administration announced a major shift in its primary enforcement effort from HEW’s Title VI compliance program to reliance on Justice Department litigation. It claimed that Title VI sanction, in contrast to a court order for desegregation, would only hurt affected children. At the same time, the Justice Department sought a year’s delay in the courts’ desegregation timetables.\(^{106}\) This new posture signalled encouragement to recalcitrants, undermined good faith efforts of other community leaders to comply, and, generally, proved a self-fulfilling prophecy that Title VI would break down. In fact, the overwhelming majority of southern school districts were then in compliance, and the remainder largely were districts which received little federal funding. In most instances, problems had never gone to termination because compliance was negotiated at an earlier stage. Even with the more stringent standard imposed by the *Green* decision, revised plans had been negotiated successfully.\(^{107}\)

But when the administration signalled that HEW enforcement would subside and the Justice Department sought delay of several major desegregation cases before courts, the situation changed: a third of the southern districts which had submitted plans for substantial steps in the fall of 1969 reneged on their commitments.\(^{108}\) In accordance with the new policy under Title VI, no termination proceedings were commenced.\(^{109}\) Despite this setback in Title

\(^{103}\) *Id.* at 195-96.

\(^{104}\) *391 U.S. 430* (1968).

\(^{105}\) *SELECT COMMITTEE*, *supra* note 26, at 197-98.

\(^{106}\) *Id.*

\(^{107}\) *Id.*

\(^{108}\) *Id.* at 199.

\(^{109}\) A United States District Court has recently concluded that this inaction, coupled with
VI, the momentum of school desegregation continued when the Supreme Court rejected Justice Department requests for delays and ruled in *Alexander v. Holmes County Board of Education*\textsuperscript{110} that the time had finally come for full and immediate elimination of segregated schools. Fifteen years after *Brown*, further denial of desegregated education was ruled constitutionally impermissible.

The new policy of putting HEW enforcement efforts on the back burner had cooled the pressures from many members of Congress to curtail its activity. But that policy also had accomplished a more fundamental and regrettable development. It put the entire burden of political responsibility for school desegregation back onto the federal courts, rather than having that responsibility shared by the Executive Branch implementing a law of Congress. The virulent controversy over transportation of students to desegregate schools was about to burst on the national landscape. And with the courts left standing alone to take the heat, this controversy produced an attack on the federal courts that paralleled similar assaults on an isolated judiciary in the years immediately following the *Brown* decision. A year later, the Title VI program came under increased attack when the most recent major Supreme Court case on school desegregation, *Swann v. Charlotte-Mecklenburg Board of Education*\textsuperscript{111} held that student transportation was a valid desegregation tool: The Court's emphasis on the word "reasonable"\textsuperscript{112} was soon lost in the ensuing furor. The Court had made clear that fundamental interests of white or black children would not be sacrificed: pupil age would be a principal consideration, and in any event, no transportation would be permitted which endangered student safety, or impaired the educational process.

Nonetheless, as urban school systems in the South and North began to face the possibility of student transportation for desegregation purposes, efforts in Congress mounted to prevent either HEW or the courts from requiring such steps. These restrictions, which we will examine later, were eventually enacted in modified form. As the busing controversy became caught up in the swirl of presidential politics, even more sweeping proposals to curtail desegregation remedies were debated in Congress. The future of Title VI compliance in education was cloudy to say the least.

Whatever its prospects, Title VI had played a very significant role in the tremendous progress made over six short years. Particularly in the period from 1964 to 1969 the systematic compliance approach had complemented judicial litigation and enabled hundreds of southern communities to undertake the unsettling task of dismantling the dual school systems. But the record of the last few years has been mixed. Many members of Congress had joined the rising pressures to curtail HEW's Title VI activity—pressures which finally elicited a response from the White House. Moreover, congressional oversight hearings heard disturbing testimony of HEW's failure to take steps against clear disregarding of HEW policies, constituted a clear failure to enforce the 1964 Act—in short, one more administrative repeal of Congressional intent in the civil rights field. *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973). But see *Hearings on the Nomination of Stanley Pottinger To Be Assistant Attorney General Before the Senate Judiciary Comm., 93d Cong., 1st Sess.* (1973).

\textsuperscript{110} 396 U.S. 19 (1969).

\textsuperscript{111} 402 U.S. 1 (1971).

\textsuperscript{112} Id. at 31.
crimination within individual schools and classrooms of "dismantled" dual systems. Black students, teachers and administrators were "resegregated" or forced from the schools in a variety of crude and subtle techniques. This so-called "second generation segregation" of students and faculty who are housed in close proximity in some ways is even more harmful than the former practice of separate schools. In 1970-1971, HEW reported the recorded demotion or dismissal of 4,000 black teachers and administrators in desegregated school districts in six southern states. The Senate Select Committee on Equal Educational Opportunity concluded that the Government's failure to monitor and prevent this so-called "second generation segregation" had "poisoned" the school experiences of thousands of school children in 1969 and 1970 and was still a problem.

E. The Early Seventies in Retrospect

The implementation of the three civil rights measures I have reviewed—the Voting Rights Act, the Equal Employment Opportunity Commission and the Title VI fund termination—sheds some light on the strengths and weaknesses of the various techniques which Congress employed in the legislation of the 1960's. There is a broad spectrum of sanctions and mechanisms from which Congress can select. At one extreme, of course, are penal sanctions. But apart from the practical problems of prosecuting before a hostile jury, experience with the early civil rights acts reveals legal difficulties of establishing criminal intent to interfere with civil rights, even though this problem was mitigated by the refinements of the 1968 Act. Moreover, criminal laws lack the flexibility of equity proceedings in which the court may mold affirmative relief to fit the circumstances. They are perhaps best reserved for deterring acts of violence and intimidation or ending official policies of flouting regulatory schemes. In creating civil remedies, Congress' initial preference has been to confine them to private rights of action—with a limited role of federal participation through intervention or the ability to bring "pattern or practice" cases. And in any case, resort to primary jurisdiction of state agencies or federal investigation and conciliation was also provided.

Given the limit on federal litigating resources likely for the foreseeable future, private rights of action—made meaningful by provision for attorneys' fees and, where appropriate, class actions—permit a far broader attack on widespread discrimination than could government litigation alone. But where conciliation is unlikely to succeed in areas of entrenched discrimination, the plaintiff must have the wherewithal and incentive to persevere in lengthy litigation which is itself preceded by a significant waiting period while the agencies go through the motions or add the complaint to a mountainous backlog.

As the problems of discrimination which move to the fore become more complex, involving interwoven strands of government policy, private actions and changing social forces, the adequacy of any approach based on case-by-case lit-
gation lessens. In different contexts, several types of more systematic methods for achieving compliance in a reasonable manner have proven useful when energetically applied. Thus the stiff preclearance provisions of the Voting Rights Act put the burden of review on the proponent of a potentially discriminatory measure. This approach is unlikely to be used except in the most extreme situations. An alternative is the development of agency expertise backed by the power to issue its own enforceable orders, as was unsuccessfully sought for the Equal Employment Opportunity Commission. Similar systematic compliance mechanisms can be built upon federal funding programs with the sanction of fund termination. And, finally, there are carrots as well as sticks. Congress has considerable potential to encourage communities or individual enterprises to help reverse the trend toward an America of two divided nations. Positive incentives, without the emotional baggage of coercive sanctions, may prove the most effective way to achieve fully the goal of equality as we move beyond the elimination of existing barriers and seek to undo the effects of long past and recent segregation.

F. Supreme Court Nominations

This discussion of Congressional perspectives on civil rights for the last few years would be incomplete without noting the Senate's reassertion of its role in scrutinizing Supreme Court nominees. The opposition to no recent nominee has focused exclusively on his attitude toward the constitutional promise of equal treatment under law. But that inquiry has played a significant role in several instances.115

This is a field strewn with straw men, but hopefully, they have been laid to rest. Slogans such as "strict constructionist" or "judicial liberal" are slippery labels at best. Nominees cannot be divided into those who would let their personal views and predilections affect their reading of the constitution and those who would not. Inevitably, one brings his past experience and his viewpoint to such majestic generalities as "Equal Protection of the Laws" and "Due Process." Rather, the point is that a record of insensitivity to the Constitutional mandate against discrimination raises legitimate questions. The nominee need hardly have been a civil rights activist. But if his record reflects disturbing evidence of indifference to discrimination—let alone hostility to its redress—in the year 1973, then there are many Senators who feel compelled to search for some evidence that he would be able to perform his constitutional duty in this area with an open mind and fidelity to the Constitution.116

115 See Hearings on the Nomination of Clement Haynsworth To Be Associate Justice of the Supreme Court Before the Senate Judiciary Comm., 91st Cong., 1st Sess.; Hearings on the Nomination of George Harrold Carswell To Be Associate Justice of the Supreme Court Before the Senate Judiciary Comm., 91st Cong., 2d Sess.; Hearings on Nominations of William H. Rehnquist and Lewis F. Powell To Be Associate Justices of the Supreme Court, 92d Cong. 1st Sess.

V. The Role of Congress in the Future of Civil Rights

What does the future hold for the cause of civil rights? I would be kidding if I pretended to have easy, or even clear, answers. Perhaps all a survey of this kind really can do is to suggest a few possibilities. Nor can one pretend that from the vantage point of Capitol Hill that the picture looks rosy right now. In each area I have discussed—voting, employment, housing, education—substantial opposition exists to any further advance. And even some of the progress that has been made is threatened.

Nevertheless, let me touch on the most recent events and the immediate prospects for congressional decision in these fields, so that I then might offer some tentative conclusions which emerge from this survey. The first point is the degree to which we must now concentrate on the interwoven strands of job, school and housing conditions for minorities in the larger urban areas. The complexity and subtlety of their mutual reinforcement requires far greater coordination of our efforts in each area than seemed necessary in the initial period of civil rights legislation. Their interplay also requires greater recognition that statutes outlawing discrimination must now be supplemented by increased incentives for massive programs of affirmative action. In that context, we should, particularly encourage voluntary cooperation among neighboring communities in each metropolitan region. Second, there is the serious threat which civil rights controversies now pose for the judicial system as a result of our overloading one branch of Government with responsibility for resolving these problems. Finally, we come back to the critical role of leadership in the difficult tasks of defusing tensions and building an atmosphere of dialogue and informed public debate.

A. Voting

What of the future of voting rights protection for blacks and other minorities? Several amendments were offered in Congress last year, but were never called up, which would have repealed the central safeguard now in force under the Voting Rights Act. There may well be other efforts before the 1970 extension expires in mid-1975. Such proposals, in one form or another, probably would follow the basic position of the administration's revision discussed in the last lecture; that is, the position that success of the Act and changed attitudes in the "new South" now permit a return to surveillance through specific lawsuits. This picture suggests the severe problems are now history, that the preclearance procedures are now too burdensome for their meager results since few submitted changes have been objected to, and those are allegedly isolated cases of backwater resistance.117

There is undeniably a "new South." Black voters are a force to be reckoned with. Brutality and violence are no longer common reprisals for exercising political rights. Black registration has risen dramatically from very low levels.

and been accompanied by the election of numerous black officials. Efforts to preserve the Act intact until 1975, so that we can then review the bidding, would be met with charges of persecution against the South. All this will come in the context of growing northern sensitivity about double standards in regard to discrimination.

There are really two separate issues: continued opportunity for more blacks to register and vote; and continued protection of that vote from efforts to dilute its impact. In regard to each, careful study of the present situation might lead to a less sanguine view than the one I have just painted. Despite the dramatic improvement, black registration is still disproportionately low, particularly in rural counties. This is so alarming because city and county officials have an immense impact on the benefits available to or denied the local residents. The pervasive role of discrimination is still apparent. Violence is not completely a memory in the worst places. More common is intimidation based on the economic dependence of rural blacks which is hard to exaggerate. This coercion has been documented in a number of forms: eviction, firings, threatened denial of food stamps, welfare checks and even retaliation by local draft boards. The overall effect is still a pervasive reluctance among the less economically independent and politically active to register.

Nevertheless, the Act may have reached a plateau of effectiveness under foreseeable levels of enforcement. The more educated, politically active or economically secure have registered. The use of examiners has virtually become a dead letter; very few have been sent South in recent years. The prospect of this, or any future administration, following suggestions that there be more vigorous use of examiners where participation remains presumptively low is, I am afraid, fairly dim. At this point, the best hope for further progress may be passage of universal voter registration for federal elections, with incentives for its use at all levels. A national agency would contact eligible citizens by mail and offer an opportunity to register simply by returning an enclosed card. Numerous presidential commissions and national organizations have long recommended such a program to increase political participation generally.

As for "preclearance," the small number of new laws objected to is misleading for several reasons: only recently has there developed clear precedent on what changes have to be submitted; questionable standards of review have sometimes been applied; and informal negotiation by the Justice Department often obtains modifications before new laws are finally submitted and approved. It should be possible at some point to revise the safeguards now in force. Perhaps Congress could specify those kinds of changes which experience has shown suspect and still require preclearance of proposals in those categories. Other changes in election law or political structure would be scrutinized by the Department and could be handled through litigation if it had a discriminatory purpose or impact on

118 Hunter, supra, note 83, ch. 2.
119 Id.
120 Id. at 49-59.
121 On May 9, 1973, the Senate passed S. 352, embodying such a plan for universal voter registration by post card; it is pending in the House.
122 Hunter, supra, note 83, chs. 6, 7.
the minority vote. But we should have hearings and thorough surveys of the present situation on which to base such judgments and not act hastily.

B. Employment

Equal employment opportunity increasingly will focus on the charged issue of affirmative action to equalize job market access. The demonology of "quotas" has already begun to threaten the possibility for dialogue about reasonable approaches to the problem. It will be an uphill fight, to say the least, to explain to workers concerned about job security the difference between mandatory racial quotas and target goals, or to explain to them the moral and economic reasons for taking some initiatives. Without leadership by business, labor and government, we face the prospect of a national controversy equaling the one over student busing. Quota requirements inexorably demand that a percentage of the employer's work force, by category, be minority members. At the least they may require filling all new openings preferentially until the quota is reached. Carried to extreme, they raise the specter of actually terminating present employees to achieve a different work force composition.\footnote{123} Affirmative action programs, on the other hand, raise a presumption. They assume that if employers make a good faith effort to utilize fully the black labor market and to ensure full access to promotion for those already employed then the employer will, in the process, come close to reasonable target goals for minority hiring and advancement. For both factory and white-collar jobs, the employer must closely examine standards which are not adequately job-related, or which mask the degree of subjectivity involved in hiring and promotion. If the employer is still unable to reach the targets and can demonstrate good-faith efforts, that is accepted. He is not penalized.\footnote{124} It should be made especially clear that there would be no "bumping," or forced termination, of those already working. Absent past discrimination, normal seniority patterns of layoffs and reductions could apply. Nor should an employer be forced to hire or promote those genuinely unqualified for the job in question. The precise boundaries of Title VII relief remain unclear. Title VII expressly bars "preferential treatment" based on the ratio of a company's employees to the total minority population or work force of a community. But the courts have suggested that this provision does not preclude affirmative action within the narrower framework of the available minority job force for particular jobs.\footnote{125}

In any event, apart from Title VII enforcement, the main immediate arena for affirmative action is provided by the Government's immense role as contractor and as an employer itself. Its own agencies have made substantial progress; but as the Civil Rights Commission has pointed out, there is still a long way to go.\footnote{126} Beyond that, there is the even greater potential for affirmative action efforts spurred by Government's encouragement and incentives. Such in-

\footnote{124}{Id. at 128-29, 148, n. 111, 177-78.}
\footnote{126}{Comm'n on Civil Rights, The Federal Civil Rights Enforcement Effort—A Reassessment (1973).}
centives can be undertaken in connection with federally funded manpower training and job development programs.

Yet even such affirmative action is stoutly opposed by many as an illegitimate form of "racial preference" in hiring or promotion.\textsuperscript{127} Can this approach be justified in terms acceptable to those who view it as a reverse form of discrimination? The answer will depend upon whether the public can be helped to appreciate the systematically "built-in head winds" which reinforce each other as obstacles to black employment and can be made aware of their immense social cost. It must also be made clear that for many Americans seeking a better job, the immediate problem is simply to penetrate the employment market, to be known to potential employers and to learn of potential jobs, and that without such penetration, equal opportunity pledges are worth little.

Most important, we must avoid the disaster of blacks and whites feeling they are pitted against one another for scarce jobs. It is imperative to ensure full employment and an expanding economy. Slicing a pie already shriveled by the Government's economic policies will incalculably complicate acceptance of equal employment opportunity. All the clarification and explanation and reasonableness in the world will cut little ice with a man who feels his job threatened by forces beyond his control, and who, at the same time, is told that his company will be making a special effort to recruit and hire minority workers.

In the short run, public service employment will probably be necessary. In that case we must also avoid the pitfall of creating new categories of low-level jobs which permanently come to be viewed as available to relieve the pressure of minority economic aspirations. That could well serve as a dangerous excuse for not fully opening up every area of economy.

And, finally, we must keep in mind the degree to which equal opportunity in employment, as in education, is inextricably tied to the problem of housing, through the growing problem of job relocation to the suburbs and the inability of minority workers to locate there.

C. Education

The most pressing civil rights issue in Congress remains that of school desegregation involving student transportation—the "busing controversy." Following the decision of the \textit{Swann} case in the summer of 1971, the House of Representatives moved to add three amendments to the measure for financial aid to desegregating school districts then pending before it.\textsuperscript{128} First, the use of any federal funds for student transportation undertaken to desegregate was forbidden. Second, both HEW and Justice Department officials were forbidden to suggest, much less require, such busing, either in litigation or as a condition of other federal assistance. Finally, the House bill purported to restrain federal courts from implementing any order reassigning students on a racial basis, whether or not busing was involved, until all appeals were exhausted. The last provision was made ambiguous, however, by language that seemed to confine its effect to

\textsuperscript{127} See generally, \textit{Race Quotas}, supra note 123.

\textsuperscript{128} \textit{SELECT COMMITTEE}, supra note 26, at 203.
reassignments ordered to overcome "racial imbalance." It seemed hard to imagine a more self-defeating accomplishment than the first of these amendments: the proposed ban on federal assistance to desegregating districts where busing is involved. Members of Congress were, in the same breath, decrying the financial burden imposed by such orders and also denying to the community the very aid which might alleviate the strain on their pinched education budgets.

The Senate accepted these amendments in modified form, the so-called Scott-Mansfield Compromise. As the measures were enacted in the Higher Education Act of 1972, federal funds may be used to defray the cost of busing for desegregation under two conditions: the local authorities must request it for that purpose, and the transportation involved must meet the Supreme Court’s requirement in *Swann* that it neither harm the children nor impinge on the educational process.\(^{129}\) Federal officials, however, are not forbidden to require such transportation as a condition of federal assistance where it is constitutionally required. The law did retain the original House version of the court order stay provision (the Senate would have applied it only to metropolitan orders involving novel questions of relief which it was arguably appropriate to have the Supreme Court review first). However, in several subsequent cases, the Supreme Court made clear that the intended scope of the stay provision was restricted to cases in which the court had not found *de jure* segregation.

In the meantime, as the threat of court-ordered busing became a live prospect for several northern communities, the pressure on Congress continued. While Congress was considering the Higher Education Amendments, the President submitted a twin-barrelled proposal and urged speedy action: a "Moratorium Act" was to provide an interim halt of new busing until Congress acted on the President’s substantive measure, the “Equal Educational Opportunities Act of 1972.” The latter called for sharp restrictions on the judiciary’s ability to utilize busing in formulating desegregation orders.\(^{130}\)

The Equal Opportunities Act underwent considerable revision in the House Labor Committee and on the House floor, to the point that several of its original sponsors voted against it, claiming it had been rendered unconstitutional.\(^{131}\) As it passed the House, the bill prohibited court-ordered transportation of a student to any school except the one next closest to his own neighborhood school. The prohibition gives no consideration to the travel time or trip length which might be involved, or to what amount of busing might be deemed harmful to different age groups from kindergarten pupils to high school seniors. Nor is weight given the present extent to which student transportation is already used in that community. Even if the court determines there is no other way to desegregate schools found to have been unlawfully segregated in violation of the fourteenth amendment, it cannot employ transportation beyond the "next closest school."


\(^{130}\) [*SELECT COMMITTEE, supra* note 26, at 204-05; *Hearings Before House Judiciary Committee on Legislation Relating to Transportation and Assignment of School Pupils*, 92d Cong., 2d Sess. (1972); *Hearings Before House Education and Labor Committee on H.R. 13915*, 92d Cong., 2d Sess. (1972)].

\(^{131}\) 30 CONG. QUARTERLY WEEKLY REP. 2199-201 (1972).
The Equal Educational Opportunities Act came to the Senate in September, 1972, on the eve of adjournment and after several very hectic closing weeks of that session. Members were anxious to adjourn and take part in the remainder of the election campaign. It was difficult enough to bring the issues into focus through the haze of election-year rhetoric. But the Senate had not held hearings on the House bill and the House hearings were not yet printed and available. Several Senators, including myself, argued that a bill of this magnitude required more than a couple of days of debate under the trip-hammer pressures to adjourn. We indicated that when the matter had been fully aired and explored by both sides we were willing to let the Senate vote on the measure. Nevertheless, few observers missed the opportunity to note the ironic reversal of roles. The Senate, once the bastion against civil rights legislation, now had become the place to preserve desegregation progress against precipitous action. And some of those senators who had led the fight in recent years to change Rule 22, the requirement for cloture, now, in those unusual circumstances, sought to defeat cloture and delay action on the bill until the end of the session. After three cloture votes failed, the Senate moved on to other business and then adjourned.

In this session, the bill is likely to be resurrected as an amendment to the extension of the Elementary and Secondary Education Act, which is now being considered in the House. Looming behind this legislation is the specter of a constitutional amendment to ban busing. Hearings on a series of resolutions to amend the Constitution in this regard began in the Senate Judiciary Committee in April, 1972.

This year, with the election campaigns behind us, Congress must take another hard look and ask itself whether we really need any more legislation dealing with this problem. Busing is at best an awkward short-run tool to achieve desegregation. Changes in school systems are unsettling to students. Parents concerned about education and convenience may prefer their neighborhood schools. Such concerns are not necessarily prejudiced, and we must understand that they are not. Legitimate concerns must be weighed, as the Supreme Court did in setting outside limits on the use of busing for school desegregation. At the same time, we must recognize that years of hostility, suspicion and fear have also played their role in opposition to new school assignment plans. It would be foolish to pretend otherwise.

The fundamental question still remains: If you find a violation of a black student's constitutional rights, do you fix it, or do you forget it and try to sweep it under the rug of a new ghetto schoolhouse? A string of Supreme Court decisions, unbroken by a single Justice's dissent, makes clear the obligation of a community whose schools have been segregated by official action to undo that effect to the maximum feasible extent in a way that works and works now. This mandate embodies the American commitment to equal educational opportunity, viewed in the context of our experience with racial discrimination. But its core is the more fundamental proposition that the fourteenth amendment forbids treating people differently because of their race or creed. That simple proposi-

---

tion is easy to lose sight of in the welter of statistics, monographs and studies about educational achievement. The Supreme Court, after all, did not count shade trees or compare golf scores before it ordered integration of public parks and golf courses. It did so, ultimately, because actions of racial separation sanctioned by the state are, as the Court had reminded us, "... by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."323

The hardest question is this: Can Congress tell the courts that they cannot remedy violations of the fourteenth amendment? One argument advanced is that Congress' power to regulate the jurisdiction of the inferior federal courts permits it to limit or prescribe the remedies available as well, even though Congress could not limit the constitutional right itself. However, this distinction between rights and remedies breaks down at some point, if in a particular situation the remedy denied is the only means of vindicating the right. In that case to deny the remedy is to deny the right itself, or render it illusory. The bill's supporters also rely upon Congress' power under section 5 of the fourteenth amendment to enforce the amendment by "appropriate legislation." But the Supreme Court has indicated that section 5 only empowers Congress to protect minority rights not to dilute or diminish them. The fabric of the fourteenth amendment comes to Congress already sanforized. We can iron out wrinkles in its enforcement, but we cannot shrink the mantle of its protection.324

As for the prospect of a constitutional amendment, most of the pending resolutions go beyond a ban on student transportation. They would make it unconstitutional to require any student assignment on the basis of race, even to a walk-in school. Do we really wish to make the United States Constitution an express instrument for the perpetuation of segregation? I hope the American people will think long and hard on that one. If we are going to do that, why confuse things with a new amendment? We could be more direct and simply rewrite the fourteenth amendment to read for all the world to see:

Nor shall any state . . . deny to any person within its jurisdiction the equal protection of its laws . . . except Black, Spanish American and Indian schoolchildren.

D. Housing

One effect of the busing controversy has been to bring our attention back to the more fundamental problem of racial and economic polarization between the nation's central cities and their suburbs. Segregation is the residential pattern in America, and it is increasing. We know the suburbs received a dramatic influx of whites in the past few decades while the central cities became increasingly poor and black. The trends are clear and ominous: isolated affluent suburbs encircling blighted inner cities.325 Employment, too, has made its exodus

133 Himabayashi v. United States, 320 U.S. 81, 100 (1943).
135 SELECT COMMITTEE, supra note 26, at 247.
from our cities. Almost 80 percent of the new jobs created in major metropolitan areas during the sixties were located in the suburbs.\textsuperscript{136}

Of course, there is also the basic problem of simply providing enough decent low- and moderate-income housing anywhere for our less affluent citizens. Tackling that job alone, in the face of recurrent program failures and scandals, seems hopeless enough for the foreseeable future without trying to make a dent in residential segregation as well.\textsuperscript{137} Still, the dispersal of low-income housing, and access to the regular real estate market by participants in expanded subsidy programs, is one of the few broad avenues for breaking down the racial and economic barriers which threaten to divide us completely into two nations. The interlocking practice and policies of state and local governments, federal agencies and private interests which have promoted and perpetuated these divisions are also well known:

\begin{itemize}
\item FHA policies to ensure neighborhood stability and "red-lining" by financial institutions and insurers;
\item urban renewal and highway programs creating new ghettos in their wake and cutting them off from the rest of the city and its suburbs;
\item local zoning laws, building codes and realtor practices which block low- and moderate-income housing and hinder black home buyers who seek regular housing;
\item location of large federal installations outside the central city.
\end{itemize}

Direct refusal to sell or discriminatory brokerage and mortgage practices are amenable to litigation under state laws and the 1968 Act. But that is the tip of the iceberg.

How can Congress make a major impact in the overall problem of segregation? Several civil rights organizations have urged the Government to exercise greater authority and take more vigorous action under Title VI of the 1964 Act as well as the 1968 Housing Act.\textsuperscript{138} Where a city seeks public housing funds, the Government can try to ensure that the site selection and the size of the project will not perpetuate residential segregation. The Secretary of Housing and Urban Development is obligated to do that under the Housing Act. It is not only important to disperse public housing built within large cities away from the central ghetto areas, but it is also important that suburban communities willing to participate in federal programs not be overwhelmed with such an influx of low-income housing that the racial and economic concentration creates a new suburban ghetto.\textsuperscript{139}

\begin{itemize}
\item[\textsuperscript{136}]\textit{National Advisory Commission on Civil Disorders, supra} note 6 at 256-60.
\item[\textsuperscript{137}]\textit{Select Committee, supra} note 26, at 249-51.
\item[\textsuperscript{138}]\textit{Hearings Before the Senate Select Committee on Equal Education Opportunity, Part 5 —De Facto Segregation and Housing Discrimination, 91st Cong., 2d Sess. (1970) [hereinafter cited as 1970 Hearings].}
\item[\textsuperscript{139}]\textit{Select Committee, supra} note 26, at 254-55.
\end{itemize}
The situation is different, and the Government's powers less clear, in the case of the suburbs or smaller cities which do not seek federal assistance for public housing or participate in federal subsidy programs. Right now, this is the main area of controversy over what power HUD has under existing law, and whether Congress should provide additional leverage with more explicit statutes. Should HUD, for example, cut off all urban development grants—for sewer and water, or roads—if a community zones out low-income housing, even where an intent to discriminate racially cannot be proven? Scholarly arguments have been offered for still moving in such instances under Title VI of the 1964 Act or the 1968 Housing Act. However, the area is hardly free from legal uncertainties. Congress might provide more explicit authority, but there are other approaches which may prove more fruitful in the long run. The Government can exert leverage by locating its own facilities only in communities which assure adequate housing opportunities for every economic group in the installation's work force. Senator Abraham Ribicoff has offered a bill extending this approach to impose a similar obligation on all government contractors and their affiliates. That would cover a very substantial fraction of American industry.

Ultimately, however, the central question in the next few years will be the degree to which we should continue to rely on negative sanctions of denying funds and terminating benefits. Has the time come instead for greater stress on positive incentives to encourage action and to meet the legitimate concerns of communities which might participate in voluntary programs for integrated housing and schools? The Senate made a start in this latter direction in 1971 when it passed the Quality Integrated Education Act. President Nixon had proposed expenditures of $1.5 billion both for aid to desegregating school districts and assistance to voluntary efforts undertaken to reduce racial isolation in schools not under court order or an HEW Title VI plan. The Quality Integrated Education Act sought to spell out how the money for voluntary initiatives might be spent. Set-asides were prescribed for interdistrict cooperation, educational parks, development of community relations groups to make integration projects a success, and bilingual education. The central feature was the development of individual "quality integrated schools" with the prospect for stability and with adequate planning and funding to carry out integration under auspicious circumstances. A modified version of the bill was accepted by the House and incorporated into the President's Emergency School Aid Act, which is now law. However, the administration's failure to fund even this tentative beginning beyond negligible amounts has made the program virtually a dead letter for the present. It should be given life.

Congress has also begun to explore the possibilities of utilizing large-scale incentive programs to engage more communities in voluntary efforts to reduce racial isolation in both education and housing. We are well aware of the apprehensions which individual communities have expressed about accepting a large-scale housing project or a very large number of educationally disad-

140 1970 Hearings, supra note 138.
142 Select Committee, supra note 26, ch. 17.
vantaged pupils in cooperative arrangements with inner-city schools. The suburban community might fear it would be overburdened financially with greater demands for public services in relation to its tax revenues. It may be concerned about maintaining the desirable socioeconomic mixture of students in its schools, a goal which studies suggest is also needed for maximum benefit to students from less educationally advantaged backgrounds. There is also the problem of any one community fearing white flight to neighboring suburbs which have not accepted any low-income housing and are not participating in a cooperative student placement program. The most promising answer may be to use special revenue sharing grants or other additional incentives which can pay the costs of low-density attractive housing and well-run quality integrated schools. Such programs should provide maximum encouragement and assistance for the kind of "fair share" programs such as the one pioneered by the Miami Valley Regional Planning Association, the metropolitan area group for Dayton, Ohio. If each community accepts a so-called "fair share" of the federally assisted housing within a metropolitan area, none will be overwhelmed by a massive influx of projects. And there will remain few white havens. The federal government could encourage metropolitan councils of governments or other regional bodies to plan for the distribution of low- and moderate-income housing. Each community would be expected to take a sufficient share of the housing to enable the regional planning agency to meet its goals consistent with school capacity, public services, proximity to employment and commuter transportation, recreational facilities and other criteria for each community. And Congress should foot the bill.

Exploring this type of approach in recent Senate testimony, Father Hesburgh noted that it

... has the greatest potential for meeting the housing problems of lower-income families in a way that would contribute to the social and economic health of the entire metropolitan area ... for doing away with the irrationality of the existing system by which federally subsidized housing programs are operated, of making order out of what is now little short of chaos. At some point, the same group of cooperating governments could also explore the possibility of interdistrict school cooperation along similar lines and within well-defined limits on the amount of transportation involved for the students. Hopefully, then, Congress will move positively to promote more opportunity in housing, employment and education. That will restore Congress' rightful role of sharing responsibility with the courts for the achievement of equality, rather than leaving the courts as isolated scapegoats or, worse yet, joining the attack. This is particularly important because the recent antibusing bills not only pose a threat to the enforcement of constitutional rights, but also threaten the independence of the judiciary itself.

The Senate Select Committee on Equal Educational Opportunity has

143 Id. at 260-61.
144 Id.
warned of the cost we pay for the sloganeering in debate over busing. "The focus of national debate on the misleading issues of 'massive busing' and 'racial balance' has contributed to deteriorating public confidence in the justice of constitutional requirements and in the essential fairness of our judicial system." Burke Marshall put it more bluntly when he offered the disturbing reminder that many Americans now feel "the Federal judiciary has suddenly become peopled with a bunch of wild men arbitrarily ordering indiscriminate and massive busing."

The situation is reminiscent of debates over crime legislation in the second half of the 1960's. Instead of busing, the controversy then was over court decisions on the rights of criminal defendants. But as it is now, the effective thrust was an assault on the independence of the judiciary and an effort to undermine public confidence in their integrity. A similar effort was made then to blame the courts for difficulties caused by neglect of our unfinished agenda. In some ways, the judiciary is well suited to the role of moral leadership. It can justify social obligations by appealing to the rule of law and the overarching precepts of the Constitution. And the courts are, or should be, above the frictions of national politics. But the judiciary's role as legal arbiter is also its weakness. Courts must address the precise issues presented and adjust the immediate interests of those before it. Courts can take the stability of possible solutions into account, but they cannot shape the larger social framework in which that stability will be tested. Acting on each case, a court cannot defend itself or hold press conferences to clear up misunderstandings about decisions. While a court of equity has broad, flexible remedial powers, they do not approach the legislature's powers to provide subsidies, shape incentives and provide leadership over a long period. There is one other thing the courts cannot do. They cannot pass the buck. The inadequate response from Congress and the President on these problems over the years has led us to the perplexing pass in which congressional efforts have been overtaken by the inherent dynamics of constitutional litigation, a process which the courts cannot halt for our political convenience. If Congress and the Executive shoulder their "fair share" of the responsibility to promote equal opportunity, we may avoid the danger of placing too much responsibility on the judiciary for bringing blacks and whites together. We would do well to remember the observation of Judge Learned Hand, who wrote:

In a society where the spirit of moderation is lost, no court can save it.

A society where that spirit flourishes, no court need save.

And in a society which thrusts upon its courts the responsibility for the nurture of that spirit of moderation, that society will, in the long run, perish.

Like most fields of controversial policy, the civil rights arena has been viewed by the public largely in terms of vivid images and simple slogans. In the days of the marches for service at lunch counters, of snarling police dogs and upraised
billy clubs, these helped to mobilize public opinion behind the effort to pass legislation. Now we must admit the same process has facilitated misunderstanding and distortion of what the courts, or the Congress, seek to do. The unknown is a fertile breeding ground for exaggerated rumors and dire predictions. Anxieties can be magnified many times by misleading political rhetoric about “quotas” or “massive busing to achieve racial balance”—a rare and unusual animal well known to every American, yet still to be found in any actual court order. The public has little interest in esoteric debate about the Congress’s constitutional powers to interfere with the judiciary. It can, however, readily comprehend superficially appealing arguments that since the “Constitution is color-blind,” affirmative relief is illegal. That sophistry would mean that the courts must also be color-blind to the exclusion of racial analysis which identifies illegal segregation in the first place. Obviously the courts and Congress must be color conscious in searching out discrimination; just as clearly, solutions to undo that discrimination must take race into account.

Nonetheless, as the issues become particularly complex and subtle in each of the areas I have reviewed, the difficulty of fashioning legislative responses is more than matched by the increased difficulty of arousing the public conscience and convincing those of good will that the problems of institutionalized discrimination require redress. Without strong leadership to help explain these considerations, there is danger of a self-defeating hysteria which would doom even the most reasonable and carefully implemented efforts. But we also should not kid ourselves that the present public mood and lack of support for new civil rights initiatives are simply a matter of misunderstanding and lack of information. We in the North are, as my southern colleagues often remind us, “getting close to home.” Many feel or perceive their most basic interests threatened: their jobs, their home investments, their children’s education. Lower- and middle-income white families feel unfairly put upon, asked to pay the price for the rest of society so that we can catch up in the areas of unequal opportunity.

The tangible concerns which underlie this opposition cannot be maligned or lightly dismissed. Unfounded fears must be met with facts. Legitimate interests must be taken into account and met with a meaningful response. The immediate acid test is to convince Americans that adequately funded school desegregation with reasonable amounts of student transportation where necessary can work to the benefit of all our children. In some cities the students have already shown us this. Once the television cameras move on, Americans in general will realize this, and we must tell them.

Without positive leadership from our highest officials, the task may well prove hopeless. But we must try. There are numerous excuses we can use to defer or avoid further efforts. The leaders of the civil rights movement and their allies in Congress are far less certain or unanimous about what steps should next be taken than they were a decade ago. A lower estimation of our own omni-science will, I am sure, prove healthy. It is not a justification for inaction.

Father Hesburgh wrote recently in a leading newspaper:

There is a feeling among the poor and the powerless today that some-
how the firm commitment just isn’t there, or that it has drifted or weakened. Even good people are losing heart.

Americans like quick victories. We tended to lose interest and concern when the brave new rhetoric concerning equal opportunities and civil rights in the sixties led us into the stormy waters of the seventies.

... As one who can, with some experience, testify to the growing unpopularity of this cause today, may I say that it was never more important to our nation and to the world that we rededicate ourselves to the growing realization of equality of opportunity in America.\(^{147}\)

To these words, I would only add, “Amen.”