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Nondiscrimination Implications of Federal Involvement in Housing

I. INTRODUCTION

The problem of the American Negro is a vicious circle. Large numbers of Negroes are poorly educated and are thus unable to obtain jobs offering good pay. Because they can't get "good-paying" jobs they are poor and must live in slums. But, since they live in slums their children tend to be poorly educated, and, therefore, the Negro remains poor. This is but a small aspect of the multifarious cycle. To break this cycle and thoroughly assimilate the Negro into American culture, it is necessary to attack the problem in a number of different ways. For example, segregation in public schools must be abolished, discrimination in employment must be forbidden, and voting rights must be secured.

Segregated housing patterns are another aspect of the Negro's problem; they tend to result in segregated schools, feelings of separation and inferiority on the part of Negroes, and an absence of friendships between whites and Negroes which, in turn, leads whites to fear and, at the same time, to have a lack of concern for Negroes. For this reason even decent segregated housing is not a sufficient solution to the Negro assimilation problem. Negroes need to live among, go to school with, and have friendships with whites in order to raise their standard of living to that of the rest of the population. While even the most liberal persons have an initial reaction against restricting a man's right to deny selling his home to whomever he chooses, this initial reaction is mitigated by the realization that the end result of the federal government's hands-off policy has been segregated housing pernicious to Negroes and that government enforcement of nondiscrimination in housing is necessary to achieve Negro equality. A further factor which helps to mitigate the initial reaction against government enforcement of nondiscrimination in housing is the fact that the federal government is involved in almost every phase of private housing, and where there is government involvement discrimination is particularly obnoxious. In this note it will be shown that the federal government is more or less directly involved in at least 70 per cent of the housing transactions in the United States. Various government housing programs will be examined to determine whether the governmental involvement is so significant as constitutionally to require nondiscrimination. Existing and possible congressional legislation and presidential executive orders will also be considered. The vote was largely completed before the

Civil Rights Bill of 1966,¹ was introduced in Congress and, for that reason, the bill is not extensively discussed.

Throughout this note, Negroes will be deemed discriminated against if persons offering homes, apartments or loans to the general public refuse to sell, rent or loan to Negroes solely because of their race; or if the seller, renter or lender seeks to exact a higher price from them or in any other way treats them differently than he treats the general public. An aggrieved Negro will, of course, have to prove his claim of discrimination, but this is an evidentiary problem and frequently proof of discrimination will not be too difficult.

II. GENERAL PRINCIPLES OF LAW

The *Civil Rights Cases*² have established that private persons engaged in purely private conduct are not prohibited by the United States Constitution from practicing racial discrimination. *Brown v. Board of Education*,³ and cases decided thereafter,⁴ have, however, made it clear that state and local governments are prohibited by the equal protection clause of the fourteenth amendment from providing their services on a racially segregated basis. Furthermore, the Supreme Court has held that whenever a state or local government becomes significantly involved in private conduct that private conduct becomes "state action" and subject to the nondiscrimination requirements of the equal protection clause.⁵ It is, of course, often difficult to determine how much government involvement is "significant" involvement.

*Burton v. Wilmington Parking Authority*⁶ is a recent and leading Supreme Court decision dealing with the amount of government involvement in private conduct necessary to make that private conduct "state action" under the fourteenth amendment. The Wilmington Parking Authority, an agency of the state of Delaware, owned and operated a public garage in which it leased a suitable enclosed space to the privately owned defendant restaurant. The restaurant

1. H.R. Doc. No. 14765, 89th Cong., 2d Sess. § 25 (1966). The bill was introduced by Congressman Celler on May 2, 1966. See Appendix II *infra*.

2. 109 U.S. 3 (1883). See also *Shelley v. Kraemer*, 334 U.S. 1 (1948). Of course some forms of private racial discrimination can be prohibited by Congress under the commerce clause. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), 9 RACE REL. L. REP. 1650 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964), 9 RACE REL. L. REP. 1669 (1965).

3. 347 U.S. 483 (1954).

4. See *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955) (cemeteries); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (golf courses); *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954) (parks).

5. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), 6 RACE REL. L. REP. 379 (1961).

6. *Ibid.*

refused to serve plaintiff, a Negro solely because of his race, and he brought suit demanding service. The Court held that the cumulative effect of the following facts and circumstances made the restaurant so significantly involved with the city government that its refusal to serve plaintiff was "state action" and unconstitutional because it was racially discriminatory: The land and building were publicly owned, and their costs were defrayed in part from donations by the city of Wilmington and from revenue bonds issued by the Authority; upkeep and maintenance of the building were the responsibilities of the Authority and payable out of public funds; improvements effected in the leasehold by the restaurant were exempt from state property taxation; the rental paid by the restaurant was an indispensable element in the financial success of the Authority; the mutual benefits afforded by the fact that the restaurant was located in the garage provided additional demand for each party's services; and as an entity the building was dedicated to public uses in the performance of the Authority's essential governmental functions. While the Court did state that it will, in the future, rely upon a case-by-case "sifting of facts and weighing of circumstances"⁷ to determine whether a particular private-state involvement is sufficient to establish state action, it is clear from *Burton* that the Court views the state action concept expansively and that there need be no showing that the private party is actually an "agent" or "instrumentality" of the state government in order for it to be impressed with the fourteenth amendment prohibitions against racial discrimination.

In the "state action" cases in which the lower federal courts have interpreted and applied *Burton*, particular importance has been given to types of state involvement which show that the private party has received financial or other aid from the state government, that it is under extraordinary control and regulation by the state government, and that it has voluntarily become an integral part of a state program such that its discrimination would frustrate the objectives of that program. *Simkins v. Moses H. Cone Memorial Hospital*⁸ is a case in point. There a private hospital applied for and received federal grants under the Hill-Burton program to help defray the cost of certain additions to the hospital. As a condition to receiving the federal funds the hospital had to consent to follow an intricate pattern of federal and state regulations concerning such matters as administration, clinical services, auxiliary services, nursing services and food services. After participating in the Hill-Burton program the hospital refused to admit Negro patients. The court held that the

7. *Id.* at 722.

8. 323 F.2d 959 (4th Cir. 1963), *cert denied*, 376 U.S. 938 (1964), 8 RACE REL. L. REP. 1551 (1964).

receipt of financial aid from the federal government, the extraordinary state and federal regulations over the hospital, and the fact that the hospital voluntarily became a part of a government plan designed to protect the public health constituted sufficient government involvement with the private hospital to impress it with the constitutional duty to operate on a nondiscriminatory basis.⁹ *Hampton v. City of Jacksonville*¹⁰ is another interesting case in that the court relied solely upon the element of extraordinary government control to establish state action. There the city had been enjoined from operating its public golf courses on a discriminatory basis. To avoid integration it sold the property to a private person with the proviso that if the property should ever cease to be used as a golf course it would revert to the city. The private party thereafter refused to allow Negroes to use the golf course and plaintiff, a Negro, brought suit demanding admittance to the property. The court, relying heavily upon *Burton*, held that the city's continuing control over the property, by virtue of the reversionary clause, was sufficient government involvement with the private golf course to create state action, and thus nondiscrimination was constitutionally required.

The fifth amendment, which is applicable to the federal government, does not contain an equal protection clause similar to that of the fourteenth amendment which is applicable only to the states. The Supreme Court has held, however, that the providing of services by the federal government on a racially segregated basis, when not reasonably related to any proper governmental objective, is violative of the due process clause of the fifth amendment.¹¹ It has also held that it is not a proper governmental objective for a government to pass a law requiring segregation in housing¹² and that neither state¹³ nor federal¹⁴ courts can enforce private racially restrictive covenants. In *Bolling v. Sharpe*,¹⁵ the companion case to *Brown* which dealt with segregation in the federally administered public schools of the District of Columbia, the Supreme Court stated that, in view of its decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be "unthinkable that the same Constitution would impose a lesser duty on the Federal government."¹⁶ While the Court did state that it was not implying that the equal

9. See also *Eaton v. Grubbs*, 329 F.2d 710 (4th Cir. 1964), 9 RACE REL. L. REP. 304 (1965), for a similar hospital case.

10. 304 F.2d 319 (5th Cir. 1962), 7 RACE REL. L. REP. 499 (1962).

11. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

12. *Buchanan v. Warley*, 245 U.S. 60 (1917).

13. *Shelley v. Kraemer*, *supra* note 2.

14. *Hurd v. Hodge*, 334 U.S. 24 (1948).

15. *Bolling v. Sharpe*, *supra* note 11.

16. *Id.* at 500.

protection and due process clauses are always interchangeable, it seems reasonable to assume that in future cases the Court will hold that all types of racial discrimination which are prohibited against the states by the fourteenth amendment are also prohibited by the fifth amendment against the federal government. The lower federal courts in cases such as *Simkins*¹⁷ have seemed to assume that the due process clause of the fifth amendment, like the equal protection clause of the fourteenth amendment, is an absolute command against any racial discrimination in the providing of services by the federal government. In view of these decisions and the Supreme Court's abhorrence of governmental racial discrimination, it appears clear that the due process clause of the fifth amendment would be held to prevent the federal government from providing its housing services on a racially segregated basis. The problem of joint federal and private involvement is, of course, also present in fifth amendment cases. It would seem that the "significant involvement" cases arising under the fourteenth amendment state action concept¹⁸ would be directly applicable in fifth amendment federal action cases.

By way of illustration, if a private person were to buy land and build a house using his own funds and receiving no form of governmental aid, he would probably be free under both the fifth and the fourteenth amendments to refuse to sell to Negroes upon resale.¹⁹ But if the federal government were to use federal funds to build a home, it would probably be required by the fifth amendment to sell the home on a nondiscriminatory basis. Finally, if the federal government were to give a 5000 dollar grant to a private builder to help defray the cost of building a home, the federal government might well be so significantly involved with the private builder that he would be required by the fifth amendment to sell the home on a nondiscriminatory basis.

III. LOW RENT PUBLIC HOUSING

A. *The Federal Low Rent Public Housing Program*

The federal government has adopted a program of assisting local

17. *Simkins v. Moses H. Cone Memorial Hosp.*, *supra* note 8.

18. See *Burton v. Wilmington Parking Authority*, *supra* note 5; *Simkins v. Moses H. Cone Memorial Hosp.*, *supra* note 8; *Hampton v. City of Jacksonville*, *supra* note 10.

19. It should be noted that it is possible that Congress has the power to prohibit all discrimination in housing under the commerce clause. See *Heart of Atlanta Motel, Inc. v. United States*, *supra* note 2; *Katzenbach v. McClung*, *supra* note 2; *Wickard v. Filburn*, 317 U.S. 111 (1942). For a discussion of the constitutionality of the nondiscrimination in housing provision of the proposed "Civil Rights Act of 1966" by Attorney General Nicholas deB. Katzenbach see Appendix III *infra*. It has also been suggested that some forms of racial discrimination in housing may be prohibited by the antitrust laws. See GREENBERG, RACE RELATIONS AND AMERICAN LAW 302-04 (1959).

governments in providing decent rental housing to families who, but for the governmental subsidy, could not afford it.²⁰ Under this program a municipal public housing authority selects a site and draws up plans for the proposed rental units. It then submits the plan to the federal Public Housing Administration (PHA).²¹ If the plan is approved, the PHA contracts with the local agency to advance a long-term loan for the acquisition and construction of the project.²² Such loans, generally in the form of government bonds, may cover as much as 90 per cent of the initial cost of the project.²³ Income from the local agency's sale of these bonds to the public is exempt from federal taxation, as is any net income derived from the project by the local agency.²⁴ The federal government guarantees the repayment of all such bonds sold to the public.²⁵ It also agrees to make annual contributions to the local agency to cover the difference between the rent the occupants can afford to pay and the cost of operating the rental units.²⁶ It is these contributions which maintain the low rent character of the projects. The PHA may make up to 366,250,000 dollars from such contributions each year.²⁷ As of January 1, 1965 there were 737,592 low rent public housing units under construction or available for occupancy. Approximately 1.1 per cent of the total United States' population lived in these units.²⁸

B. *The Nondiscrimination Implications of the Federal Low Rent Public Housing Program*

In these low rent public housing programs the apartment buildings are owned and operated by the local governments. There is thus no problem in establishing state action, and the *Brown v. Board of Education* line of cases²⁹ would seem to make it clear that the fourteenth amendment requires that these projects be operated on a nondiscriminatory basis. While this particular issue has not been decided by the Supreme Court, the lower court decisions since *Brown* have been unanimous in holding that discrimination in low

20. Housing Act of 1937, 50 Stat. 888, as amended, 42 U.S.C. §§ 1401-36 (1964). See generally 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 109-18.

21. Housing Act of 1954, § 815, 68 Stat. 647, 42 U.S.C. § 1411 (d) (1964).

22. Housing Act of 1937, § 9, 50 Stat. 891, as amended, 42 U.S.C. § 1409 (1964).

23. *Ibid.*

24. Housing Act of 1937, § 6, 50 Stat. 890, 42 U.S.C. § 1405(e) (1964).

25. Housing Act of 1937, § 20, 50 Stat. 898, as amended, 42 U.S.C. § 1421 (a) (1964).

26. Housing Act of 1937, § 10, 50 Stat. 891, as amended, 42 U.S.C. § 1410 (a) (1964).

27. Housing Act of 1937, § 10, 50 Stat. 891, as amended, 42 U.S.C. § 1410 (e) (1964).

28. 18 HOUSING & HOME FINANCE AGENCY ANN. REP. 235-36 (1964).

29. See cases cited *supra* note 4.

rent public housing projects is unconstitutional.³⁰

In 1962, President Kennedy issued an executive order entitled "Equal Opportunity in Housing" in which he directed all the federal agencies whose functions related to housing to take action to insure that there be no racial discrimination in housing provided in part with the aid of federal loans or grants.³¹ Pursuant to this order the PHA required those local public agencies contracting for loans or annual contributions after November 20, 1962, to agree to operate low rent housing projects on a desegregated basis.³² The Civil Rights Act of 1964 also requires that no person be discriminated against under any program receiving federal financial assistance.³³ The Housing and Home Finance Agency has adopted regulations under this act specifically requiring that all low rent housing projects receiving federal funds be operated on an integrated basis.³⁴

IV. URBAN RENEWAL

A. *The Federal Urban Renewal Program*

The federal government has adopted a substantial program to assist local governments in carrying out urban renewal projects.³⁵ Under this program a community seeking federal assistance must submit a workable program for community improvement to the Administrator of the Housing and Home Finance Agency (HHFA). This program must include plans for slum clearance, rehabilitation of blighted areas, housing for displaced families, adequate zoning regulations, and community-wide participation in the program.³⁶ If the Administrator approves the plan he enters into a contract with the state or municipal public housing authority whereby the federal government promises various types of financial aid upon faithful execution of the plan by the local housing authority.³⁷ In a typical slum clearance project the

30. See, e.g., *Heyward v. Public Housing Administration*, 238 F.2d 689 (5th Cir. 1956), 1 RACE REL. L. REP. 347 (1956); *Detroit Housing Comm'n v. Lewis*, 226 F.2d 180 (6th Cir. 1955); *Davis v. St. Louis Housing Authority*, 1 RACE REL. L. REP. 353 (1956). See generally GREENBERG, *op. cit. supra* note 19, at 287-93; Seiner & Sloane, *Equal Housing Opportunity and Individual Property Rights*, 24 FED. B.J. 47, 62 (1964); Sloane, *Housing Discrimination—The Response of Law*, 42 N.C.L. REV. 106, 115-16 (1963).

31. Exec. Order No. 11063, § 101(a)(ii), 27 Fed. Reg. 11527 (1962), 7 RACE REL. L. REP. 1019 (1962).

32. PHA Circular Letter, Nov. 28, 1962; Bernhard, *Civil Rights After Five Years*, 42 N.C.L. REV. 50, 58 (1963).

33. Civil Rights Act of 1964, § 601, 78 Stat. 252, 42 U.S.C. § 2000 (d) (1964).

34. C.F.R. Subtitle A §§ 1.1-1.12 and Appendix A § 7 (1965).

35. Housing Act of 1949, 63 Stat. 413, 42 U.S.C. §§ 1441-86 (1964). See generally 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 81-108.

36. Housing Act of 1949, 63 Stat. 414, as amended, 42 U.S.C. § 1451 (1964).

37. Housing Act of 1949, 63 Stat. 414, as amended, 42 U.S.C. § 1451(c) (1964).

federal government will lend money to the local public housing authority which is used to purchase the slum property.³⁸ The local public housing authority then demolishes the existing structures and sells or leases parcels to various private developers on the condition that the land be used in a designated manner, such as for an apartment building, motel or for single family homes. The federal government then reimburses the local public housing authority for an amount anywhere from two-thirds to three-fourths of the excess of the total cost of land acquisition and demolition over the money received in resales of the land to the private developers.³⁹ As of 1964, Congress had authorized 4,725,000,000 dollars of the general funds of the United States Government for such capital grants.⁴⁰ The local public housing authorities place restrictive covenants in the deeds of all property they sell stating that no future owner of the property can make any substantial alterations without prior approval from the local authority.⁴¹

Congress has also authorized direct government low-interest-rate loans to owners or tenants of business or residential property in urban renewal areas to finance the rehabilitation of deteriorated structures.⁴² There is also special FHA mortgage insurance available for construction loans on property located in urban renewal areas,⁴³ and for low income housing in non-urban renewal areas, preference being given to persons displaced by urban renewal projects.⁴⁴

As late as 1961, William L. Slayton, Urban Renewal Commissioner, stated that the Urban Renewal Administration had no requirements expressly prohibiting racial discrimination in the sale or rental of property built in urban renewal project areas by private developers.⁴⁵ As discussed below, the Urban Renewal Administration has subsequently adopted significant nondiscrimination policies.

B. Nondiscrimination Implications of the Urban Renewal Program

State and federal government involvement in the urban renewal program raises the question whether private developers who buy land

38. Housing Act of 1949, 63 Stat. 414, as amended, 42 U.S.C. § 1452 (1964). The total amount of loans outstanding at any one time can not exceed \$1,000,000,000. *Id.* § 1452(e).

39. Housing Act of 1949, § 103, 63 Stat. 416, as amended, 42 U.S.C. § 1453(a) (1964).

40. Housing Act of 1949, § 103, 63 Stat. 416, as amended, 42 U.S.C. § 1453(b) (1964).

41. Discussions with several Urban Renewal Administration officers.

42. Housing Act of 1949, 63 Stat. 416, as amended, 42 U.S.C. § 1452 (b) (1964).

43. National Housing Act, as added, 68 Stat. 596 (1954), as amended, 12 U.S.C. § 1715 (k) (1964).

44. National Housing Act, 48 Stat. 1252, as amended, 12 U.S.C. § 1713 (1964).

45. 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 101.

from local public housing authorities are so significantly involved with the state and federal governments that they are required by the equal protection clause or the due process clause to sell their homes or rent their apartment on a nondiscriminatory basis. The private developer has received aid from the state government in that the land has been made available to him through the power of eminent domain at a price below its net cost to the government. Also the private developer is under the continuing control of the state government since his homes and apartments must conform to the specially imposed government standards and he must often get government approval before making any substantial alterations to the property. Finally, he has voluntarily become an integral part of a government program to provide decent housing to all Americans and, to the extent that he discriminates against Negroes because of their race, he thereby frustrates that government program. This state involvement, along with indirect federal financial aid, is extensive and is of the same general character as that present in the *Burton*,⁴⁶ the *Simkins*,⁴⁷ and the *Hampton*⁴⁸ cases. The private developers and the defendants in *Burton* and *Simkins* were all the beneficiaries of government grants. They and the defendant in *Hampton* were all subject to extraordinary government regulation, and they were all participants in government programs designed for the benefit of the general public. It is true that the defendant in *Burton* was a lessee of a government agency, whereas private developers own land in fee simple absolute; but in view of the fact that Negroes are evicted from an area by the exercise of the power of eminent domain and then denied re-entry because of their race, this factor would not seem controlling.⁴⁹ While the specific issue of the constitutionality of discrimination by home or apartment house developers in urban renewal areas has not been litigated, *Smith v. Holiday Inns of America, Inc.*,⁵⁰ is a case closely in point. There the defendant motel bought land from a local public housing authority under a typical urban renewal program and it re-

46. *Burton v. Wilmington Parking Authority*, *supra* note 5.

47. *Simkins v. Moses H. Cone Memorial Hosp.*, *supra* note 8.

48. *Hampton v. City of Jacksonville*, *supra* note 10.

49. *Smith v. Holiday Inns of America, Inc.*, 336 F.2d 630 (6th Cir. 1964). "It seems to this court clearly to be the sort of injustice which the Fourteenth Amendment prohibits, for the State of Tennessee to conceive and (in concert with the United States agency involved) carry out a plan to effect great improvement in the aesthetic qualities and public convenience of the area immediately surrounding its Capitol building and to do so by using the power of eminent domain to acquire the property of and evict many of its Negro citizens, and then to require and provide for a public accommodation (a motel) so that its citizens can conveniently visit the Capitol and then to allow the operators of that motel to ban some of Tennessee's own citizens from use of these accommodations thus provided, solely on grounds of race." *Id.* at 635.

50. *Ibid.*

fused service to the plaintiff, a Negro, solely because of his race. The Court of Appeals for the Sixth Circuit, relying heavily upon *Burton*, held that the federal and state grants, the fact that the motel was under continuing government control since it could not alter its building without the consent of the local public housing authority, and the public design and administration of the urban renewal project, together made the motel so significantly involved with the state government that the equal protection clause required it to provide services on a nondiscriminatory basis. Although the court noted that in *Burton* the discriminator was a lessee of the state whereas the motel owned the land in fee simple absolute, it held that this difference was insignificant. It would thus appear that since developers of urban renewal land are involved with the state government in the same general manner as the defendants in *Burton*, *Simkins*, *Hampton* and *Smith*, they should be required by the fourteenth amendment to sell their homes and rent their apartments on a nondiscriminatory basis.⁵¹

President Kennedy's executive order on equal opportunity in housing⁵² directed the Urban Renewal Administration to take action to insure that residential property in urban renewal areas thereafter receiving federal financial assistance be sold and rented on a nondiscriminatory basis. Pursuant to this order the Urban Renewal Administration has taken several increasingly stringent steps⁵³ and it is now (March, 1966) requiring that private developers agree to sell their homes and rent their apartments on a nondiscriminatory basis.⁵⁴

51. See GREENBERG, *op. cit. supra* note 19, at 293-97; Semer & Sloane, *supra* note 30, at 62-66; Sloane, *supra* note 30, at 116-22.

52. Exec. Order No. 11063, § 101(a)(iv), 27 Fed. Reg. 11527 (1962), 7 RACE REL. L. REP. 1019 (1962).

53. URA, Local Public Agency Letter No. 256, Nov. 30, 1962; URA, Equal Opportunity in Housing; Policies and Procedures, Apr. 24, 1963, p. 7; URA, Local Public Agency Letter No. 273, July 22, 1963. See Bernhard, *Civil Rights After Five Years*, 42 N.C.L. REV. 59 (1963).

54. The following is an excerpt from a *Contract for Disposition of Land for Private Development* which the Nashville Housing Authority requires all developers of urban renewal property to sign. "The Redeveloper agrees for itself, and its successors and assigns, and every successor in interest to the Property, or any part thereof, and the Deed shall contain covenants on the part of the Redeveloper for itself, and such successors and assigns, that the Redeveloper, and such successors and assigns, shall: (a) Devote the Property to, and only to and in accordance with, the uses specified in the Urban Renewal Plan; (b) Not discriminate upon the basis of race, color, creed, or national origin in the sale, lease, or rental or in the use or occupancy of the Property or any improvements erected or to be erected thereon, or any part thereof. It is intended and agreed, and the Deed shall so expressly provide that the covenant provided in this paragraph shall be a covenant running with the land and that it shall, in any event, and without regard to technical classification or designation, legal or otherwise specifically provided in the Agreement, be binding, to the fullest extent permitted by law and equity, for the benefit and in favor of, and enforceable by, the Agency, its successors and assigns, the City and any successor in interest to the

The Civil Rights Act of 1964 also requires that no person be discriminated against under any program receiving federal financial assistance.⁵⁵ The Housing and Home Finance Agency has adopted regulations under the act which specifically require developers of urban renewal land to sell their homes or rent their apartments on a nondiscriminatory basis.⁵⁶

Assuming that builders of urban renewal property would be constitutionally required to sell their homes on a nondiscriminatory basis, the question arises whether the individual who buys from the builder is also required to sell on a nondiscriminatory basis if he decides to put his house on the market. The individual homeowner is an indirect beneficiary of the government's exercise of its power of eminent domain and of government grants and loans which subsidized the cost of land acquisition. Were it not for these two factors, either he could not have bought the home, or, had he been able to buy, it would have cost him considerably more money. Further, he is frequently under continuing governmental control with regard to altering the structure, a control much greater than that imposed by ordinary zoning laws. And, finally, his discrimination frustrates the objectives of a government program designed to aid the general public. These factors make it appear possible that the Supreme Court will in the future hold that private homeowners in urban renewal areas are so significantly involved with the state government that they are required by the fourteenth amendment to sell on a nondiscriminatory basis.

The regulations adopted pursuant to the Civil Rights Act of 1964 specifically exempt the ultimate beneficiary homeowner of urban renewal land from any nondiscrimination requirements in the sale of his property.⁵⁷ But local officers of the Urban Renewal Administra-

Property, or any part thereof, and the owner of any other land (or of any interest in such land) in the Project Area which is subject to the land use requirements and restrictions of the Urban Renewal Plan and the United States, against the Redeveloper, its successor and assigns and every successor in interest to the Property, or any part thereof or any interest therein, and any party in possession or occupancy of the Property or any part thereof. It is further intended and agreed that the agreement and covenant provided in this paragraph shall remain in effect without limitations as to time: Provided, that such agreement and covenant shall be binding on the Redeveloper itself, each successor in interest to the Property, and every part thereof, and each party in possession or occupancy, respectively, only for such period as such successor or party shall have title to, or an interest in, or possession or occupancy of, the Property or part thereof. The terms 'uses specified in the Urban Renewal Plan' and 'land use' when used in this Agreement refer to provisions of the Urban Renewal Plan, and shall be applicable to and include the land and all building, housing and other requirements or restrictions of the Urban Renewal Plan pertaining to such land."

55. Civil Rights Act of 1964, § 601, 78 Stat. 252, 42 U.S.C. § 2000 (d) (1964).

56. 24 C.F.R. §§ 1.1-1.12 and Appendix A § 10 (1965). See especially § 1.2(f).

57. 24 C.F.R. § 1.2(f) (1965).

tion are presently implementing a policy, pursuant to President Kennedy's executive order on equal opportunity in housing, requiring that a covenant be placed in the deeds of all urban renewal properties to the effect that no owner of the property will ever discriminate in the sale or rental of the property.⁵⁸ The inclusion of such an anti-discrimination covenant will allow any Negro at any future time to bring suit to compel the current owner to offer the property to him on the same terms as it is offered to the general public. In view of the harm done to Negroes by segregated housing patterns and the substantial government aid in the urban renewal projects, it is suggested that Congress should amend the Housing Act of 1949, to require that such anti-discrimination covenants be placed in the deeds in all urban renewal properties.

V. FEDERAL INVOLVEMENT WITH MORTGAGE LENDING INSTITUTIONS

A. *Savings and Loan Associations*

The buyer of a home usually desires and can only afford to pay a small part of the purchase price of a home with his own funds. Thus when he and the seller reach a general agreement he typically goes to a mortgage lending institution and applies for a mortgage. The mortgage lending institution then pays the seller the balance of the sales price of the home in exchange for the buyer's note and mortgage on the home. Over the past twenty years savings and loan associations have consistently made over 30 per cent of the home mortgage loans.⁵⁹ Savings and loan associations also finance some apartment buildings and make construction loans to builders who sell homes on the open market. The capital of savings and loan associations consists of subscriptions by individual "share-owners" who receive dividends on their shares.

Congress has authorized the Federal Home Loan Bank Board (hereinafter referred to as the Board) to provide for the organization, incorporation, and regulations of "Federal" savings and loan associations.⁶⁰ The Board closely regulates these federally chartered federal savings and loan associations in such matters as minimum number of share-owners and subscriptions,⁶¹ minimum construction standards of homes on which mortgages can be made,⁶² maximum loan to value ratios of individual mortgages,⁶³ and standards of appraisal

58. See note 54 *supra*.

59. CONWAY, MORTGAGE LENDING 15 (1960). In 1959 and 1960 savings and loan associations made 41% of the home mortgages. *Ibid*.

60. Home Owners Loan Act of 1933, 48 Stat. 132, 12 U.S.C. § 1464(a) (1964).

61. 48 Stat. 132 (1933), 12 U.S.C. § 1464(b) (1964).

62. 48 Stat. 132 (1933), 12 U.S.C. § 1464(c) (1964).

63. 48 Stat. 132 (1933), 12 U.S.C. § 1464(c) (1964).

for home values.⁶⁴ The Board also conducts periodic examinations of the institutions.⁶⁵ In exchange for this close federal regulation, federal savings and loans receive a number of benefits from the federal government. They are automatically members of the Federal Home Loan Bank System⁶⁶ (FHLBS) and are thus entitled to borrow money from the various Regional Federal Home Loan Banks at low interest rates.⁶⁷ This money is then used to increase the mortgage portfolio. While the funds of the Regional Banks consist entirely of the initial subscriptions of the member banks, the member banks can borrow in excess of their subscriptions and, since the Regional Home Loan Banks can transfer their funds from one region to another, the members can freely overcome intermittent regional credit shortages.⁶⁸ Federal savings and loans are also automatically members of the Federal Savings and Loan Insurance Corporation (FSLIC) and they thereby receive insurance for each share account up to 10,000 dollars.⁶⁹ While each federal savings and loan must pay premiums to the FSLIC for this insurance, the general funds of the federal government are available to share-owners should the accumulated premiums ever prove insufficient.⁷⁰ The salaries and office expenses of the Board, the FHLBS, and the FSLIC are met from the general funds of the federal government.⁷¹ As of 1960, federal savings and loan associations held approximately 20 per cent of the outstanding nonfarm residential mortgage debt.⁷²

State-chartered savings and loan associations can also become members of the FHLBS and thus obtain the full borrowing privileges outlined above.⁷³ They can also get the FSLIC insurance outlined above.⁷⁴ While it is not required, virtually all of the state-chartered savings and loan associations which have obtained deposit insurance have also become members of the FHLBS. Some, however, have become members of the FHLBS but have not obtained FSLIC in-

64. 48 Stat. 132 (1933), 12 U.S.C. § 1464 (1964).

65. 48 Stat. 132 (1933), 12 U.S.C. § 1464(a) (1964).

66. 48 Stat. 132 (1933), 12 U.S.C. § 1464(f) (1964).

67. Federal Home Loan Bank Act, 47 Stat. 731 (1932), 12 U.S.C. § 1430(a) (1964).

68. 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 33.

69. 48 Stat. 1256 (1933), as amended, 12 U.S.C. § 1725 (1964).

70. *Ibid.*

71. *Ibid.* Frequently these agencies will earn enough interest on their funds to meet their salaries and office expenses.

72. See U.S. HOUSING AND HOME FINANCE AGENCY, HOUSING STATISTICS 57 (1961) and 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 28-30. The total amount of outstanding nonfarm residential mortgage debt was \$160 billion and of this amount \$32.3 billion was held by federal savings and loan associations.

73. 47 Stat. 726 (1932), 12 U.S.C. § 1424(a) (1964).

74. 48 Stat. 1257 (1933), as amended, 12 U.S.C. § 1726 (1964).

insurance.⁷⁵ Both the FHLBS and the FSLIC exercise extensive controls over the state-chartered savings and loan associations which receive their benefits.⁷⁶ As of 1960, approximately 16 per cent of the outstanding nonfarm residential mortgage debt was held by state-chartered savings and loan associations which were members of FHLBS and which were also insured by the FSLIC.⁷⁷

B. Commercial Banks

Commercial Banks make construction loans to builders and mortgages to home and apartment house owners.⁷⁸ In 1960 they held approximately 13 per cent of the total outstanding nonfarm residential mortgage debt.⁷⁹ Nearly all of these commercial banks are supervised by, and receive benefits from, the federal government.

Congress has provided that the Comptroller of the Currency may issue a certificate authorizing any group of five or more applicants to commence banking as a national (commercial) bank provided it meets various requirements such as requisite paid-in capital.⁸⁰ After a national bank is thus chartered it is subject to continual federal regulation in such matters as dividends,⁸¹ profits,⁸² directors,⁸³ loans,⁸⁴ and interest rates.⁸⁵ The Comptroller of the Currency closely inspects

75. Sloane & Freedman, *The Executive Order on Housing: The Constitutional Basis for What It Fails To Do*, 9 How. L.J. 1, 8-9 (1963).

76. State-chartered savings and loan associations insured by the FSLIC must make monthly and annual reports to FSLIC [12 CFR § 563.18 (Supp. 1966)], and they must submit to periodic examinations [12 CFR § 563.17 (Supp. 1966)]. They are restricted as to the type of advertising they may carry on [Exec. Order No. 9070, 7 Fed. Reg. 1529, (1942)]; the geographical radius in which they may make loans [38 U.S.C. § 1801, (1958)]; and the proportion of their assets which may be loaned [Exec. Order No. 9686, 11 Fed. Reg. 1033 (1946)].

77. As of 1960 there was \$160 billion outstanding nonfarm residential mortgage debt. Of this amount \$24.5 billion was held by state-chartered savings and loan associations insured by FSLIC and \$26.2 billion was held by state-chartered savings and loan associations which were members of the Federal Home Loan Bank System. The vast majority of state-chartered savings and loan associations which were insured by FSLIC were also members of the Federal Home Loan Bank System, and vice-versa. See U.S. HOUSING AND HOME FINANCE AGENCY, HOUSING STATISTICS 57 (1961); 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 28-36.

78. They also engage in various other activities such as checking accounts, and trust work.

79. The total outstanding nonfarm residential mortgage debt was \$160 billion in 1960, and of this amount appropriately \$20 billion was held by commercial banks. See U.S. HOUSING AND HOME FINANCE AGENCY, HOUSING STATISTICS 57 (1961, and 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 28-39.

80. National Bank Act, 13 Stat. 100 (1864), as amended, 12 U.S.C. §§ 21, 26, 27 (1964). See generally 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 39-53.

81. National Bank Act, 13 Stat. 109 (1864), as amended, 12 U.S.C. § 60 (1964).

82. National Bank Act, 13 Stat. 109 (1864), as amended, 12 U.S.C. § 60(c) (1964).

83. 48 Stat. 194 (1933), as amended, 12 U.S.C. § 71a (1964).

84. National Bank Act, 13 Stat. 110 (1864), as amended, 12 U.S.C. § 82 (1964).

85. National Bank Act, 13 Stat. 108 (1864), as amended, 12 U.S.C. § 85 (1964).

the national banks to insure compliance with these statutory requirements.⁸⁶ National banks receive substantial benefits from the federal government. They are automatically made members of the Federal Reserve System⁸⁷ and thus are entitled to borrow from the Regional Federal Reserve Banks when temporarily in need of additional funds. They can also use the Federal Reserve facilities for collecting checks, transferring funds to other cities, and acquiring currency when needed.⁸⁸ National banks also automatically have their individual deposits insured up to 10,000 dollars by the Federal Deposit Insurance Corporation (FDIC).⁸⁹ The national bank must pay an annual premium for this deposit insurance, but if the accumulated premiums should ever prove insufficient, the general funds of the federal government are available to the depositors. The salaries and office expenses of the Comptroller of the Currency and the FDIC are met from the general funds of the United States Government. As of 1960, the national banks held approximately 7 per cent of the total outstanding nonfarm residential mortgage debt.⁹⁰

State-chartered commercial banks can apply for membership in the Federal Reserve System and for deposit insurance from the FDIC.⁹¹ Those which do become members are required to get deposit insurance from the FDIC and are subjected to stringent regulation by those agencies in such matters as adequacy of capital structure, character of management, loan policies, and safety and soundness of practices in conducting the business of the bank.⁹² By accepting this regulation they receive the benefits outlined above. A number of state-chartered non-member banks have obtained deposit insurance

86. National Bank Act, 13 Stat. 109 (1864), as amended, 12 U.S.C. § 161 (1964).

87. Federal Reserve Act, 38 Stat. 251 (1913), as amended, 12 U.S.C. § 222 (1964). As a member of the Federal Reserve System the national bank must buy stock in the Regional Federal Reserve Bank equal to a maximum of 6% of the national bank's paid-in capital and surplus. Federal Reserve Act, 38 Stat. 251 (1913), as amended, 12 U.S.C. § 282 (1964). It also must keep additional funds on deposit with the Regional Federal Reserve Bank. The Federal Reserve Bank invests much of its paid-in stock and deposits in government securities and with the interest earned it pays the salaries of its staff and various other expenses. It also pays a 6% cumulative dividend on its paid-in capital stock.

88. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, THE FEDERAL RESERVE SYSTEM: PURPOSES AND FUNCTIONS 66 (1961).

89. Federal Deposit Insurance Act, 64 Stat. 875 (1950), as amended, 12 U.S.C. 1813(L)(1) (1964).

90. The total outstanding nonfarm mortgage debt was \$160 billion in 1960, and of this amount national banks held \$11.4 billion. See U. S. HOUSING AND HOME FINANCE AGENCY, HOUSING STATISTICS 57 (1961) and 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 28, 40.

91. Federal Deposit Insurance Act, 64 Stat. 876 (1950), as amended, 12 U.S.C. § 1815 (1964).

92. Federal Reserve Act, 64 Stat. 876 (1950), as amended, 12 U.S.C. § 1816 (1964).

from the FDIC. As of 1960, approximately 5½ per cent of the outstanding nonfarm residential mortgage debt was held by state-chartered member and non-member commercial banks insured by FDIC.⁹³ State-chartered mutual savings banks also can get deposit insurance from the FDIC. They must, of course, consent to the normal FDIC regulation. As of 1960, state-chartered FDIC-insured mutual savings banks held approximately 13.5 per cent of the outstanding nonfarm residential mortgage debt.⁹⁴

*C. Nondiscrimination Implications of Federal Involvement
With Mortgage Lending Institutions*

The United States Commission on Civil Rights, in its 1961 Report on Housing, found that there was a widespread practice among savings and loan associations and commercial banks to refuse to lend money to Negroes seeking to purchase homes in predominantly white residential areas. This practice was a major cause of the existing segregated housing patterns.⁹⁵

As discussed above, the federal government is involved with these mortgage lending institutions holding approximately 62 per cent of the outstanding nonfarm residential mortgage debt.⁹⁶ Therefore, the question arises whether these institutions are so significantly involved with the federal government that they are required by the due process clause of the fifth amendment to provide their services on a non-discriminatory basis. That is, are they constitutionally required to lend to qualified Negroes seeking to purchase houses in white residential areas, and are they constitutionally required to sell their repossessed properties on a nondiscriminatory basis. The nature of the federal involvement with each of the types of mortgage lending institutions here under consideration⁹⁷ is quite similar. Nearly all the institutions have voluntarily applied for the aid of loans from, and the services of, either the Federal Reserve System or the FHLBS.

93. As of 1960 the outstanding nonfarm mortgage debt was \$160 billion and of this amount state-chartered commercial banks insured by the FDIC held \$8.9 billion. See U. S. HOUSING AND HOME FINANCE AGENCY, HOUSING STATISTICS, 57 (1961); 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 30. It appears that state-chartered commercial banks who were members of the Federal Reserve System held \$4.8 billion in nonfarm residential mortgage debt in 1960. Most of these banks were also insured by FDIC. See 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 30.

94. 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 30.

95. *Id.* at 28-31, 37, 51.

96. Federal savings and loan associations hold 20%, *supra* note 72; state-chartered savings and loan associations which are members of the FHLBS and insured by FSLIC hold 16%, *supra* note 77; national banks hold 7%, *supra* note 90; state-chartered commercial banks which are members of the FRS or insured by the FDIC hold 5½%, *supra* note 93; and state-chartered mutual savings banks which are insured by the FDIC hold 13.5%, *supra* note 94.

97. That is, those types of institutions listed in note 96 *supra*.

Nearly all of these institutions have also voluntarily applied for the aid of FDIC deposit, or FSLIC share-owner, insurance, both of which are backed ultimately by the general funds of the United States Government. The salaries and office expenses of many of the federal agencies needed to operate these systems come from the general funds of the federal government. Moreover, while only federal savings and loan associations and national banks are federally chartered, each type of institution has voluntarily applied for close regulation by one or more federal agencies.⁹⁸ There is thus federal regulation of, and federal aid flowing to, each of these institutions. This governmental involvement in private action is of the same general character as that present in *Burton* and the subsequent lower federal court cases⁹⁹ and thus it would appear that the mortgage lending institutions here under consideration are constitutionally required to provide their services on a nondiscriminatory basis. While this issue does not seem to have been litigated, there is a decision of the United States Supreme Court which is closely in point. In *Public Utilities Commission v. Pollak*,¹⁰⁰ a privately owned transit company was granted a franchise by Congress to conduct business in the District of Columbia. The service and equipment of the company were subject to close regulation by a federal agency. The Court held that the relationship between the federal government and the private transit company was sufficiently close to require the company to provide its services according to the dictates of the due process clause of the fifth amendment. The single factor which seemed uppermost in the Court's thinking was the regulatory supervision exercised over the company by a federal agency. The mortgage lending institutions here under consideration are subject to the same type of regulation from federal agencies as was present in *Pollak*. Moreover mortgage lending institutions get greater aid from the federal government (FDIC and FSLIC insurance and membership in the FRS and FHLBS) than the transit company received in *Pollak*. Thus it seems probable that the Supreme Court would also hold that the mortgage institutions herein discussed are subject to the non-discrimination requirements of the fifth amendment both in their lending practices and in their sales of repossessed property.

Neither the Comptroller of the Currency¹⁰¹ nor the Federal Reserve

98. That is, the Federal Home Loan Bank Board, the FSLIC, the FHLBS, the Comptroller of the Currency, the Federal Reserve System and the FDIC.

99. *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); *Hampton v. City of Jacksonville*, 304 F.2d 319 (5th Cir. 1962); *Smith v. Holiday Inns of America, Inc.*, *supra* note 49.

100. 343 U.S. 451 (1951).

101. 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 40-43.

Board¹⁰² appear to have required banks under their regulation and receiving their aid to lend on a nondiscriminatory basis. Earl Cocke, Sr., Chairman of FDIC stated:

There are circumstances under which a bank in its consideration of a real estate loan application may consider the race of a potential borrower or the racial composition of a neighborhood. There exists a possibility that the financing of a real estate purchase for a member of a minority group might have a serious effect upon values in a neighborhood. If the bank already had a substantial number and dollar volume of mortgage loans in the neighborhood, it would necessarily consider the effect upon these assets. The bank management's important responsibility for safe investment of its depositor's funds may include the consideration of such aspects of any loan . . . aside from the moral aspects of racial or other discrimination, every bank has a moral as well as legal obligation and responsibility toward the economic welfare of its depositors and stockholders.¹⁰³

In 1961, the chairman of the Federal Home Loan Bank Board indicated to the United States Commission on Civil Rights that the Board had adopted a policy which "opposes discrimination, by financial institutions over which it has supervisory authority, against borrowers solely because of race, color, or creed."¹⁰⁴ He also stated that he intended to require that any racial discrimination practiced by the institution be discontinued.¹⁰⁵

President Kennedy's executive order on Equal Opportunity in Housing does not deal with the lending practices of mortgage lending institutions except insofar as such practices relate to FHA mortgage insurance or Veterans Administration (VA) mortgage guaranties.¹⁰⁶ The Civil Rights Act of 1964 also fails to deal with mortgage lending institutions.¹⁰⁷

The United States Commission on Civil Rights, in its 1961 Report on Housing, recommended that Congress take action to require that all financial institutions which are engaged in the mortgage loan business and which are supervised by a federal agency conduct their business on a nondiscriminatory basis.¹⁰⁸ In view of the serious harm done to Negroes by segregated housing patterns, the fact that mortgage lending institutions closely involved with the federal government account for approximately 62 per cent of the outstanding

102. *Id.* at 43-47.

103. *Id.* at 49.

104. *Id.* at 36.

105. *Ibid.*

106. Exec. Order No. 11063, § 101(b), 27 Fed. Reg. 11527 (1962), 7 RACE REL. L. REP. 1019 (1962). The nondiscrimination implications of FHA mortgage insurance and VA mortgage guaranties are discussed in section VI of this article.

107. Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. §§ 2000d-1 to d-4 (1964), 9 RACE REL. L. REP. 961 (1964).

108. 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 151.

nonfarm residential mortgage debt, and that these institutions have been reported to practice discrimination in their lending practices,¹⁰⁹ it is submitted that the recommendation of the Commission is sound and that Congress should amend the appropriate banking acts to require that all mortgage lending institutions which are chartered by the federal government or which receive federal aid via FDIC or FSLIC insurance or membership in the FHLBS or the Federal Reserve System be required to lend on a nondiscriminatory basis.¹¹⁰ That Congress has the power to impose such requirements seems clear. If Congress can regulate them in such matters as number and type of permissible loans, it surely has the power to require them to operate on a nondiscriminatory basis as a condition to continued federal aid from such agencies as the FDIC and FSLIC.¹¹¹

The United States Commission on Civil Rights also suggested in its 1961 Report on Housing that the President, by executive order, direct such agencies as the FDIC, FSLIC, Federal Reserve System and the Federal Home Loan Bank Board to require the institutions they supervise to conduct their business on a nondiscriminatory basis.¹¹² It appears that the President does have power to issue such an order.¹¹³

In view of the fact that 62 per cent of the home mortgages are held by the institutions here under consideration, it is of great importance to determine whether the individual home owner whose home is mortgaged with one of these institutions is so significantly involved with the federal government that he is constitutionally required to sell his home on a nondiscriminatory basis if he later puts it up for sale. It has been shown above that there is such federal regulation of, and aid to, the mortgage institutions that they are probably required to lend on a nondiscriminatory basis.¹¹⁴ The fact that the federal government operates the systems aiding the mortgage lending institutions redounds to the benefit of the individual mortgagor. Before the federal government entered the field of home finance by chartering federal savings and loans, national banks, and allowing state-chartered banks to participate in the FDIC, FSLIC, FHLBS and the Federal Reserve System, it was difficult for those lacking the full purchase price at the time of sale to purchase a home.

109. See note 95 *supra*.

110. Such a recommendation was also made by Martin E. Sloane and Monroe H. Freedman in their article, *supra* note 75.

111. See Home Owners Loan Act of 1933, 48 Stat. 1260 (1933), as amended, 12 U.S.C. § 1730 (1964). Therein it is provided that the FSLIC can cancel the insurance of any insured institution if it has violated its duty or conducted unsafe or unsound practices.

112. 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 151.

113. See Sloane & Freedman, *supra* note 75.

114. See text starting at note 95 *supra*.

The prevalent financing vehicle was the short-term, low loan-to-value, high interest rate mortgage.¹¹⁵ These home-financing practices have changed radically in the years following the federal government's entrance into the field and it is widely believed that federal aid to these institutions has been a major cause of the change.¹¹⁶ In 1920, there were only 17½ million nonfarm dwelling units in the entire country, and only 40 per cent of them were owned by the occupants. By 1960, the number of homes had tripled and the number of owner-occupied units had more than quadrupled.¹¹⁷ Thus, in a very real sense, many individual home owners have been enabled to purchase their homes because of the federal government's operation of the systems aiding these mortgage lending institutions. Moreover, a main purpose for the government's intervention is to assist the public in purchasing decent homes and, if a homeowner voluntarily participates in this program and then later refuses to sell to a Negro, he frustrates the objectives of the program. This issue of whether the federal government is so significantly involved with the mortgagor of a federally regulated and aided institution that he is required to sell on a nondiscriminatory basis does not appear to have been litigated, but there is a sufficient connection between the government and the mortgagor to warrant bringing such suits to court.

Today, large numbers of builders constructing houses finance their projects with construction loans from the institutions here under consideration. The issue of whether these builders are so significantly involved with the federal government that they are constitutionally required to sell on a nondiscriminatory basis is quite similar to that of the mortgagor discussed above. The builder is the indirect beneficiary of federal aid flowing to the lending institution. The federal systems which have nurtured the institutions redound to his direct benefit in that he has been able to finance the construction of his houses. And, finally, he has voluntarily become a link in a federal program aimed at the provision of decent housing to all citizens. Thus, there are substantial connections between the builder and the federal government, and aggrieved Negroes should bring suits for a judicial determination of their rights.

In view of the great harm done to Negroes by the laissez-faire attitude of the federal and state governments in regard to discrimination in housing it is recommended that Congress amend the various banking acts to require that these institutions not take a mortgage on any property unless a covenant is placed in the deed stating that neither

115. 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 27-28.

116. *Ibid.*

117. *Ibid.*

the owner nor his successors in interest will ever refuse to sell the property to a prospective purchaser on account of race. If Congress has the power to charter, regulate and aid these institutions, it would seem that it also has the power to condition its granting of future benefits on the institutions' compliance with such a directive. Further such an anti-discrimination covenant would be directly enforceable by an aggrieved Negro. *Shelley v. Kraemer*¹¹⁸ holds only that racially restrictive covenants are not enforceable. The requirement by Congress of the inclusion of such an anti-discrimination covenant admittedly infringes on the basic conceptions of rights of private property, but against this factor must be weighed the harm done to Negroes by the widespread practice of discrimination in housing and the aid flowing from the federal government to the mortgage institutions and the individual homeowners.

It is suggested that the President, by executive order, direct the various federal agencies involved to require that the anti-discrimination covenants discussed immediately above be required in the deeds of all property mortgaged with the herein discussed¹¹⁹ institutions.¹²⁰

VI. FHA MORTGAGE INSURANCE AND VA MORTGAGE GUARANTIES

A. *FHA Mortgage Insurance*

The buyer of a home usually gets a mortgage lending institution to advance the bulk of the purchase price to the seller in exchange for the buyer's note and mortgage on the property. Before granting the mortgage, the mortgagee can apply to the Federal Housing Administration (FHA),¹²¹ a federal agency, for mortgage insurance. Under this mortgage insurance system the FHA insures the mortgagee against any loss on the mortgage¹²² in exchange for the payment of annual mortgage insurance premiums by the mortgagee.¹²³ The FHA will insure a mortgage for up to 97 per cent of the combined value of the land and structures,¹²⁴ but will not issue mortgage insurance if it

118. 334 U.S. 1 (1948).

119. See note 96 *supra*.

120. For discussion of the President's power to issue such an executive order, see Sloane & Freedman, *supra* note 75.

121. National Housing Act, 48 Stat. 1246 (1934), 12 U.S.C. §§ 1701-15 (1964). See generally 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 58-74; HAAR, FEDERAL CREDIT AND PRIVATE HOUSING 19-73 (1960).

122. National Housing Act, 48 Stat. 1249 (1934), as amended, 12 U.S.C. § 1710 (1964).

123. The per annum premium ranges from 0.25% to 1.0% of the outstanding principal obligation. National Housing Act, 48 Stat. 1248 (1934), as amended, 12 U.S.C. § 1709(c) (1964).

124. National Housing Act, 48 Stat. 1248 (1934), as amended, 12 U.S.C. § 1709(b)(9) (1964). The FHA maintains its own staff of appraisers.

finds the mortgagee irresponsible,¹²⁵ the interest rate¹²⁶ or the term¹²⁷ of the mortgage excessive, or the mortgagor unable to afford the property.¹²⁸ If the mortgagor defaults on the mortgage, the mortgagee can tender the property to the FHA and receive debentures equal to the outstanding principal obligation.¹²⁹ The FHA then sells the house on the open market¹³⁰ and, if it receives an amount greater than it paid the mortgagee, it distributes the excess to the mortgagor.¹³¹ As of March 31, 1962, the FHA had acquired a total of 46,141 properties.¹³² While the FHA has an enforceable claim against the mortgagor for any loss sustained,¹³³ it has apparently adopted a policy of not seeking enforcement of deficiency claims.¹³⁴ The FHA pays for its insurance losses from the Mutual Mortgage Insurance Fund which consist of both the mortgage insurance premiums paid by mortgagees and an original 10,000,000 dollar grant from the Treasury of the United States.¹³⁵ To date this fund has been sufficient to meet the FHA insurance obligations, but the United States Government would be directly liable to the insured mortgagees should the fund ever prove inadequate. To date the interest earned on the accumulated mortgage insurance premiums has been sufficient to meet the salaries and office expenses of the entire FHA organization.

FHA mortgage insurance is available on both new and used homes. As of January 1, 1965, approximately 20 per cent of the outstanding nonfarm residential mortgage debt was FHA insured.¹³⁶ Some of these FHA insured mortgages are held by the federally chartered, regulated and aided institutions discussed earlier. FHA mortgage insurance is also available for home improvement loans,¹³⁷ apartments

125. National Housing Act, 48 Stat. 1248 (1934), as amended, 12 U.S.C. § 1709(b)(1) (1964).

126. The interest rate on the mortgage must not exceed 6% per annum. National Housing Act, 48 Stat. 1248 (1934), as amended, 12 U.S.C. § 1709(b)(5) (1964).

127. The maturity of the mortgage must not exceed 35 years. National Housing Act, 48 Stat. 1248 (1934), as amended, 12 U.S.C. § 1709(b)(3) (1964).

128. National Housing Act, 48 Stat. 1248 (1934), as amended, 12 U.S.C. § 1709(b)(3) (1964).

129. National Housing Act, 48 Stat. 1249 (1934), as amended, 12 U.S.C. § 1710 (1964).

130. National Housing Act, 48 Stat. 1249 (1934), as amended, 12 U.S.C. § 1710(g) (1964).

131. National Housing Act, 48 Stat. 1249 (1934), as amended, 12 U.S.C. § 1710(f) (1964).

132. 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 67.

133. National Housing Act, 48 Stat. 1249 (1934), as amended, 12 U.S.C. § 1710(a) (1964).

134. Discussions with several FHA officers.

135. National Housing Act, 48 Stat. 1248 (1934), as amended, 12 U.S.C. § 1708 (1964).

136. 18 HOUSING & HOME FINANCE AGENCY ANN. REP. 422 (1964).

137. National Housing Act, 48 Stat. 1248 (1934), as amended, 12 U.S.C. § 1709(k) (1964).

and rental housing,¹³⁸ cooperative housing projects,¹³⁹ condominiums,¹⁴⁰ and various other specialized types of housing. Builders can, and often do, submit their proposed construction plans (including overall plans in the case of large subdivisions) to the FHA and, if the plans meet FHA standards, the FHA will issue a "commitment" by which it promises the builder that if the homes conform to the submitted plans it will approve them for mortgage insurance.¹⁴¹ This commitment is of great benefit to the builder in that it assures him of the potentially larger FHA market.

B. VA Mortgage Guaranties

Congress has created a system of home mortgage insurance specifically for veterans of World War II, the Korean War and the "Cold War"¹⁴² which is quite similar to the FHA mortgage insurance system.¹⁴³ Under this system, as under FHA, the prospective mortgagee of a veteran home buyer applies to the Veterans Administration (VA), a federal agency, for a mortgage guaranty. If the mortgagee is deemed a responsible institution, the interest rate and term of the mortgage are not excessive, and the property is within the veteran's means, the VA will guarantee the mortgagee against any loss on the mortgage.¹⁴⁴ The VA mortgage guaranty differs from FHA mortgage insurance in that the mortgagee pays no premium for the government mortgage guaranty.¹⁴⁵ Thus, the funds needed to recompense the guaranteed mortgages and the salaries and office expenses of the VA organization come from the general funds of the United States Government.

The number of mortgages guaranteed by the VA varies from year to year. As of January 1, 1965, approximately 15.5 per cent of the outstanding nonfarm residential mortgage debt was guaranteed by

138. National Housing Act, 48 Stat. 1252 (1934), as amended, 12 U.S.C. § 1713 (1964).

139. Housing Act of 1950, 64 Stat. 54, as amended, 12 U.S.C. § 1715(e) (1964).

140. National Housing Act, 48 Stat. 1246 (1934), as amended, 75 Stat. 160 (1960), 12 U.S.C. § 1715(y) (1964).

141. Housing Act of 1954, 68 Stat. 642, as amended, 12 U.S.C. § 1701j-1 (1964).

142. Veterans' Readjustment Benefits Act of 1966, 80 Stat. 12, 38 U.S.C.A. § 1818 (1966).

143. Servicemen's Readjustment Act of 1944, 58 Stat. 291, as amended, 38 U.S.C. § 1801-25 (1964). See generally 1961 U.S. COMM'N ON CIVIL RIGHTS REP. HOUSING 68-74, and HAAR, *op. cit. supra* note 121. Of course the mortgage, the mortgagor, and the terms of the mortgage will also have to meet FHA standards.

144. Servicemen's Readjustment Act of 1944, 58 Stat. 291, as amended, 38 U.S.C. § 1803 (1964).

145. Servicemen's Readjustment Act of 1944, 58 Stat. 291, as amended, 38 U.S.C. § 1802 (1964).

the VA.¹⁴⁶ Some of these VA guaranteed mortgages are held by the federally chartered, regulated and aided institutions discussed earlier. The recent extension of VA coverage to cold war veterans should cause an increase in the use of VA mortgage guaranties. As of the end of 1960, the VA had acquired a total of 61,149 properties through its mortgage guaranty system.¹⁴⁷ It is the VA's policy to sell these acquired properties as quickly as possible, usually through local brokers.¹⁴⁸

The VA, like the FHA, issues a type of "commitment" to builders upon approval of proposed plans. It is also authorized to make direct loans to veterans for the construction, purchase or repair of a home if the Administration finds that private capital is not available in the area.¹⁴⁹ Through the end of 1960, the VA had financed over 177,000 homes under its direct loan program.¹⁵⁰

C. *Nondiscrimination Implications of the FHA Mortgage Insurance and VA Mortgage Guaranty Systems*

There are two ways in which the FHA or the VA could directly practice racial discrimination. They could discourage or refuse to insure mortgages for Negroes in white residential areas and they could discourage or refuse to sell their acquired properties in white residential areas to Negroes. Until as late as 1950, the FHA engaged in the former practice to such an extent that the inclusion of a racially restrictive covenant in real estate sales contracts and deeds became almost a prerequisite of issuance of FHA mortgage insurance.¹⁵¹ There have also been reports that the FHA and VA, and the real estate brokers having listings with them, have discouraged and refused to sell acquired properties in white residential areas to Negroes.¹⁵² As discussed below, both the FHA and VA have recently adopted significant nondiscrimination policies.

In both the granting of FHA insurance and VA guaranties and the sale of FHA and VA properties, an agency of the federal government is providing services directly to the public and, therefore, there is

146. 18 HOUSING & HOME FINANCE AGENCY ANN. REP. 422 (1964).

147. 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 73.

148. *Ibid.*

149. Servicemen's Readjustment Act of 1944, 58 Stat. 292, as amended, 38 U.S.C. § 1811 (1964).

150. 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 68.

151. *Id.* at 16-17, 25, 62. The explanation for this practice was the belief that the property values of a neighborhood suffered when residents were not of the same social, economic and racial group. FHA UNDERWRITING MANUAL § 937 (1938). It is widely believed that these FHA discriminatory policies were a major cause of segregated housing patterns. 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 62.

152. 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 67-68, 72-74.

no problem of establishing federal action. Thus, under the *Brown*¹⁵³ and *Bolling v. Sharpe*¹⁵⁴ line of cases¹⁵⁵ any racial discrimination in the granting of FHA or VA insurance or the sale of FHA or VA acquired properties seems clearly prohibited by the due process clause of the fifth amendment. An aggrieved Negro would, therefore, have a right to bring suit in federal court to enforce his right to get FHA or VA financing or to purchase FHA and VA properties.¹⁵⁶

Both the FHA and VA have abandoned their policies of actively discouraging Negroes from purchasing homes in white residential areas.¹⁵⁷ President Kennedy's executive order on equal opportunity in housing directed the various federal agencies to insure that all properties owned by the federal government are sold on a nondiscriminatory basis.¹⁵⁸ Pursuant to this order the FHA has adopted regulations specifically stating that properties reacquired by the FHA must be sold on a nondiscriminatory basis.¹⁵⁹ The regulations also seem to require all real estate brokers collecting listings for FHA properties to agree to refrain from any discriminatory practices with respect to the sale of the properties,¹⁶⁰ and they provide a regular complaint procedure for aggrieved parties.¹⁶¹ The problem of preventing discrimination practiced by these brokers can be especially insidious if prospective Negro buyers have difficulty in learning which homes are FHA or VA properties. Both agencies should, therefore, make special efforts to insure wide circulation of their list of properties and should refuse to deal with any broker found guilty of racial discrimination. Some local offices follow a practice of multiple broker listings and direct advertisement in local newspapers. This seems to prevent discrimination possible in single broker listings and thus should be required of all FHA and VA offices. Further, a note should be placed in all advertisements that the homes must be sold on a nondiscriminatory basis. Finally each local FHA and VA office should be required to keep a current list of its properties available to any interested party.

The issue of whether a builder who obtains FHA and VA commitments has become so significantly involved with the federal government that he is required by the due process clause of the fifth amendment to sell his homes on a nondiscriminatory basis is particularly

153. 347 U.S. 483 (1954).

154. 347 U.S. 497 (1954).

155. See cases cited note 4 *supra*.

156. U.S. CONST. art. III, § 2.

157. 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 62-63, 70-71.

158. Exec. Order No. 11063, § 101(a)(i), 27 Fed. Reg. 11527 (1962).

159. 24 C.F.R. §§ 200.300(d), 200.330 (1965).

160. 24 C.F.R. § 200.335 (1965).

161. 24 C.F.R. § 200.340 (1965).

important in view of the wide use of the commitments and the widespread racial discrimination practiced by builders.¹⁶² By voluntarily obtaining an FHA or VA commitment, the builder has been significantly aided by the federal government by virtue of the potentially larger FHA and VA market. He has also been indirectly aided by the mere existence of the FHA and VA financing systems which have greatly liberalized home mortgage lending practices and have thus been a substantial factor in the great increase in the demand for homes.¹⁶³ In addition, he is subject to a type of extraordinary governmental control in that he must make his homes conform to his submitted plans as a condition to the actual granting of the mortgage insurance. Finally, the builder obtaining FHA and VA commitments has voluntarily become an integral part of a government program designed to provide decent housing for all Americans and his discriminatory sales policies frustrate the objectives of that program. This federal aid, control, and participation in a program aimed at all Americans is the same type of private government involvement present in *Burton*¹⁶⁴ and the subsequent lower federal court cases,¹⁶⁵ and thus it is quite possible that the Supreme Court would hold that builders obtaining FHA and VA commitments are required by the fifth amendment to sell their homes on a nondiscriminatory basis.¹⁶⁶

The specific issue of whether the builder who has obtained FHA and VA commitments is constitutionally required to sell on a non-discriminatory basis has been twice litigated, both times in pre-*Burton* cases. In *Ming v. Horgan*,¹⁶⁷ a California state court held the relationship between the federal government and the builder was such that the builder was constitutionally required to sell on a non-discriminatory basis. In *Johnson v. Levitt & Sons*,¹⁶⁸ however, a federal district court held that the builder was free to sell on a discriminatory basis. In so holding the court stated that the aid and involvement of the federal government with Levitt do not "result in making Levitt . . . the government of the United States or a branch or agency of it nor do they make the government of the United States the builder

162. 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 2-3. GRIER, PRIVATELY DEVELOPED INTERRACIAL HOUSING IN THE UNITED STATES (1960).

163. See 1961 U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 27-28.

164. 365 U.S. 715 (1961), 6 RACE REL. L. REP. 379 (1961).

165. *Smith v. Holiday Inns of America, Inc.*, 336 F.2d 630 (6th Cir. 1964); *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); *Hampton v. City of Jacksonville*, 304 F.2d 319 (5th Cir. 1962).

166. See GREENBERG, RACE RELATIONS AND AMERICAN LAW 297-300; Semer & Sloan, *Equal Housing Opportunity and Individual Property Rights*, 24 FED. B.J. 47, 66-68 (1964); Sloane, *Housing Discrimination—The Response of Law*, 42 N.C.L. REV. 106, 121-23.

167. 3 RACE REL. L. REP. 693 (1958).

168. 131 F. Supp. 114 (E.D. Pa. 1955).

. . . of Levittown.”¹⁶⁹ Thus, according to the court, the plaintiffs in *Johnson* had to establish either that Levitt was a branch or agency of the federal government or that the federal government was, in fact, the builder of the project. In *Burton*, however, the Supreme Court specifically stated that state action arises whenever “to some significant extent, the State (or federal government) . . . has been found to have become involved”¹⁷⁰ with a private party. Thus *Ming* would appear to rest on more solid ground than *Johnson*.¹⁷¹

President Kennedy’s executive order on equal opportunity in housing directs all federal agencies to insure that homes “provided in whole or in part by loans . . . insured, (or) guaranteed . . . by the credit of the Federal Government” be sold on a nondiscriminatory basis.¹⁷² Pursuant to this order the FHA¹⁷³ and VA¹⁷⁴ have both required builders to agree to sell their homes on a nondiscriminatory basis as a condition to issuing commitments. If a builder or his agent is found guilty of discrimination against an interested purchaser because of his race, that builder is blacklisted from any further participation in FHA or VA¹⁷⁵ programs. The party discriminated against by the

169. *Id.* at 116.

170. 365 U.S. 715, 722 (1961).

171. See Sloane, *supra* note 166, at 121-23.

172. Exec. Order No. 11063 § 101(a)(iii), 27 Fed. Reg. 11527 (1962), 7 RACE REL. L. REP. 1019 (1962).

173. 24 C.F.R. § 200.320 (1965). The pledge which must be signed before the FHA will issue a commitment is as follows: “The undersigned is the seller of the property involved in an application for FHA mortgage insurance identified as case number This certificate is executed by the undersigned in order to assist the applicant in such case to obtain the benefits of FHA mortgage insurance. The property involved in the foregoing case is a part of a subdivision, tract or project identified as follows: By executing this certificate the undersigned agrees that he does not and will not decline to sell or otherwise make available to a prospective purchaser because of his race, color, creed or national origin any of the properties involved in the said subdivision, tract or project. He further agrees that he will comply with state and local laws and ordinances prohibiting discrimination and that his failure or refusal to comply with this agreement and any such laws or ordinances shall be a proper basis for the Federal Housing Commissioner to reject requests for future business with which the undersigned is identified or to take such other corrective action he may deem necessary to carry out the requirements of FHA Regulations.”

174. 38 C.F.R. § 36.4363 (1965). The pledge which must be signed before the VA will issue a commitment is as follows: “To induce the Veterans Administration to establish a reasonable value for property or properties included in this request, the undersigned builder, sponsor, or other seller hereby agrees that: a. Neither it nor anyone authorized to act for it will decline to sell any such property to a prospective purchaser because of his race, color, creed, or national origin; and b. Noncompliance with (a) shall be a proper basis for the rejection of requests for appraisal of properties with which the undersigned is identified. In addition, the undersigned agrees that the denial of his participation in any program administered by the Federal Housing Administration because of refusal to sell a residential property to any person on account of his race, color, creed, or national origin shall be a proper basis for rejection by the Veterans Administration of requests for appraisal of properties with which the undersigned is identified.”

175. 24 C.F.R. § 200.345 (1965).

builder has no right to force the builder to sell to him,¹⁷⁶ but the threat of being blacklisted from the FHA and VA programs is so potent that it should induce builders to comply. In view of the large numbers of homes built with an FHA or VA commitment this requirement that builders sell on a nondiscriminatory basis is of great importance in that it assures Negroes access to many more of the new homes being built. This potential access is, however, of little value if the public is unaware of its rights. The FHA and VA should, therefore, take affirmative action to notify the public of the builder's obligation to sell on a nondiscriminatory basis. A requirement that all newspaper advertisements for homes built with FHA and VA commitments contain a statement that federal law requires the homes to be sold on a nondiscriminatory basis would be one particularly good method of informing the public of its rights. Another effective method would be to require a like sign to be posted at the homes. The local FHA and VA offices are now required to post a list of all homes on which they have issued commitments. This is of great importance since it provides an easy means for prospective Negro buyers to learn which properties must be sold to them on a nondiscriminatory basis.

As has been shown, approximately 35 per cent of the outstanding nonfarm residential mortgage debt is FHA insured or VA guaranteed. The question thus arises whether the individual homeowners, whose mortgages are FHA or VA financed, are so significantly involved with the federal government that they are required by the due process clause of the fifth amendment to sell their homes on a nondiscriminatory basis. To date, this question does not appear to have been litigated, but there are several factors present which make it arguable that the homeowners are required to sell on a nondiscriminatory basis. The homeowner has voluntarily requested and received significant aid from the federal government in that the government's promise to save the mortgagee harmless has enabled the homeowner to get a larger loan at a lower rate and for a longer term than he could otherwise have obtained. The element of voluntary participation in the government program designed for all Americans is also present, and thus the homeowner's discrimination is a frustration of that program. Due to these factors it is possible that the Supreme Court could find that there is sufficient federal involvement with the homeowner having FHA or VA financing to require him to be bound by the dictates of the fifth amendment.

176. It is possible that a court would hold that the prospective purchaser has an enforceable right to buy the property as a third party beneficiary of the contracts quoted in notes 173-74 *supra*.

President Kennedy's executive order on equal opportunity in housing directs all federal agencies to take action to prevent discrimination because of race in the sale of residential property which is provided in whole or in part by loans insured or guaranteed by the credit of the federal government.¹⁷⁷ The regulations issued pursuant to this order, however, specifically exempt the individual homeowner whose mortgage is FHA insured or VA guaranteed from any nondiscrimination requirements when he sells his home.¹⁷⁸ This regulatory exemption from the nondiscrimination requirements of the executive order does not appear to be warranted by the language of the order itself. The Civil Rights Act of 1964 requires that no person be subject to racial discrimination in any program receiving federal financial assistance,¹⁷⁹ but it specifically exempts the FHA and VA programs from its coverage.¹⁸⁰ In view of the vast use of the FHA and the VA mortgage programs, the substantial federal aid flowing to the benefit of the mortgagors in both programs, and the serious harm done to Negroes by the present hands-off government policies in respect to discrimination in housing, it is suggested that both the FHA and the VA should require that a covenant be placed in the deeds of all property insured or guaranteed by them stating that neither the owner nor his successor in interest will ever discriminate against a prospective purchaser of the property because of his race. In time this would give Negroes a judicially enforceable right to buy vast numbers of homes. If Congress has the power to adopt and administer the FHA and VA programs it would seem it also has the power to require the inclusion of such covenants in deeds as a requisite to granting the benefits of the program. Moreover, it would appear that the President, by executive order, also has the power to require the FHA and VA to adopt such a policy.¹⁸¹

The FHA has required that all apartment houses, condominiums, and other multifamily units financed with FHA mortgage insurance be operated on a nondiscriminatory basis.¹⁸²

VII. CONCLUSION

From the foregoing, it is readily apparent that the federal govern-

177. Exec. Order No. 11063, § 101(a)(iii), 27 Fed. Reg. 11527 (1962), 7 RACE REL. L. REP. 1019 (1962).

178. 24 C.F.R. § 200.315(b) (1965).

179. Civil Rights Act of 1964, § 601, 78 Stat. 252, 42 U.S.C. § 2000(d) (1964), 9 RACE REL. L. REP. 961 (1964).

180. Civil Rights Act of 1964, § 601, 78 Stat. 252, 42 U.S.C. § 2000(d)-(4) (1964), 9 RACE REL. L. REP. 961 (1964).

181. See Sloane & Freedman, *The Executive Order on Housing: The Constitutional Basis for What It Fails To Do*, 9 How. L.J. 1 (1963).

182. 24 C.F.R. § 200.325 (1965).

ment is substantially involved in the field of housing in the United States. Sixty-two per cent of the outstanding residential mortgage debt is held by institutions aided and regulated by the United States Government. Thirty-five per cent of the outstanding residential mortgage debt is insured by either the FHA or the VA, both federal agencies. Large numbers of homes are built with FHA or VA commitments. Vast areas of urban slums have been revitalized through the use of federal funds. And over 1 per cent of the population now lives in low rent units subsidized by federal funds. Despite this huge federal involvement in housing, and despite the fact that the federal government's presence has been a major cause of the proliferation of homeownership, most American Negroes continue to live in segregated residential areas which all too often are slums.

It is indisputable that the Negro's standard of living is considerably below that of the white population. While there are many causes responsible for this condition, one of them certainly is the segregated housing patterns. The cures are also many, and one must be the opening of white residential areas to Negroes. In his 1966 State of the Union address, President Johnson¹⁸³ stated that he desired legislation requiring that all homes must be sold, and all apartments rented, on a nondiscriminatory basis. On May 2, 1966, a bill to this effect was introduced in Congress.¹⁸⁴ Such legislation, reaching virtually all homes and apartments, is the most effective method for dealing with the problem of discrimination in housing. Failing the passage of such an act, there is much that can be done by working from the government's vast involvement in housing. Throughout this note many discriminatory practices in housing have been shown to be of questionable constitutionality. Further, it has been shown that the government could require anti-discrimination covenants to be placed in the deeds of all land it touches by way of mortgages held by federally aided and regulated banks, FHA insured and VA guaranteed mortgages, and urban renewal lands.

The adoption of federally enforced nondiscrimination in housing admittedly infringes upon traditional concepts of private property rights, but the discrimination facing Negroes is so all-pervasive, and their need for integrated housing so vital, that such a governmentally imposed requirement seems justified. The lack of intercourse with society-at-large which is concomitant with segregated housing leads to the development of a culture which is out of touch with the "American way of life." There is a failure to grasp the necessity of

183. "I propose: Legislation resting on the fullest constitutional authority of the Federal Government to prohibit racial discrimination in the sale of rental of housing." 112 CONG. REC. 129 (1966).

184. See Appendix II *supra*.

education, a failure to inculcate by mere osmosis the drives and needs of American culture and, as a result, a failure to equip individuals for competition in the "American way of living." Middle class white Americans frequently have little sympathy for intelligent slum dwelling Negro youths who don't "pull themselves up by their own bootstraps." But the fact that such a youth lives and associates only with persons in a similar position blinds the youth to the incentive and method of bettering himself. No other ethnic group of Americans lives separately, and Negroes must cease to do so if they are to take their place in all levels of society in proportion to their numbers. With the passage of laws giving Negroes a judicially enforceable right to purchase houses in white residential areas, Negroes will begin to infiltrate into previously all-white residential areas. On occasion the Negro family will not be wholly welcome and some of their white neighbors may insult and harass them. But by leading a decent life, the Negro family can do much to build up good will between whites and Negroes and thus break the barriers of discrimination. And even those few Negro families who do not lead such a decent life will at least have enabled their children to begin the hard, slow process of assimilation.¹⁸⁵

Government enforcement of equal opportunity in all housing, or in all housing connected with the various federal programs discussed in this note, would virtually eliminate the present fear among many whites that the presence of Negroes in the community hurts property values. Even if there were any basis to such a fear,¹⁸⁶ the fact that Negroes had an easily enforceable right to purchase property in all neighborhoods would tend to prevent such price devaluation since the actual presence of Negroes in more and more areas would eventually make all white neighborhoods non-existent. Moreover, the fact that all, or the vast majority of, mortgage-lending institutions, builders and homeowners would be compelled to observe nondiscrimination in housing would foreclose any possible loss of business to the individual institutions, builders, and home owners since there would be no alternative source of supply. Now, before the adoption of these nondiscrimination requirements, the imposition of such requirements may well seem a frightening and dangerous exercise of governmental power in derogation of individual rights. But, as was the case with the accommodations and employment sections of the Civil Rights Act of 1964, after passage, people will look back and realize that the fears were exaggerated and that the overall effect of the legislation is highly beneficial to the country's welfare.

JEROME BILL ULLMAN

185. See McENTIRE, RESIDENCE AND RACE (1960).

186. See LAURENTI, PROPERTY VALUES AND RACE (1960).

Appendix I

The following is an excerpt from President Johnson's April 28, 1966 message to Congress urging Civil Rights legislation banning racial discrimination in the sale or rental of all housing:

Last year I came before the Congress in an hour of crisis to recommend new and powerful guarantees of the right to vote.

Americans faced again the ancient questions:

Who shall take part in the process of democracy?

Shall it be only those born with white skins?

. . . .

One-half of nonwhite Americans live in poverty.

One-fifth of the entire population lives in poverty.

. . . .

It is self-evident that the problems we are struggling with form a complicated chain of discrimination and lost opportunities. Employment is often dependent on education, education on neighborhood schools and housing, housing on income, and income on employment. We have learned by now the folly of looking for any single crucial link in the chain that binds the ghetto.

All the links—poverty, lack of education, underemployment and now discrimination in housing—must be attacked together. If we are to include the Negro in our society, we must do more than give him the education he needs to obtain a job and a fair chance for useful work.

We must give the Negro the right to live in freedom among his fellow Americans.

I ask the Congress to enact the first effective Federal law against the discrimination in the sale and rental of housing.

The time has come for the Congress to declare resoundingly that discrimination in housing and all the evils it breeds are a denial of justice and a threat to the development of our growing urban areas.

The time has come to combat unreasoning restrictions on any family's freedom to live in the home and the neighborhood of its choice.

This year marks the hundredth anniversary of the first statute enacted by the Congress in an attempt to deal with discrimination in housing. It reads:

'All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.'

For 100 years this law has reflected an ideal favoring equality of housing opportunity. Acting under this statute and the 14th Amendment, the Supreme Court has invalidated state and local laws prohibiting the sale of houses to Negroes. It has prohibited the enforcement of racially restrictive covenants. It has struck down state legislation imposing undue burdens upon minority groups with respect to real estate transactions.

There is nothing novel about the Congressional concern with housing that I now ask you to expand. Programs enacted by Congress have, for more than three decades, stimulated the development of private housing, and directly financed hundreds of thousands of public housing units.

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

The great boom in housing construction since the Second World War is, in large part, attributable to Congressional action to carry out this objective.

Yet not enough has been done to guarantee that all Americans shall benefit from the expanding housing market Congress has made possible.

Executive Order No. 11063, signed by President Kennedy on Nov. 20, 1962, prohibited housing discrimination where Federal Housing Administration and Veterans Administration Insurance programs are involved. That executive order clearly expressed the commitment of the executive branch to the battle against housing discrimination.

But that order, and all the amendments that could validly be added to it, are inevitably restricted to those elements of the housing problem which are under direct executive authority.

Our responsibility is to deal with discrimination directly at the point of sale or

refusal, as well as indirectly through financing. Our need is to reach discrimination practiced by financial institutions operating outside the F.H.A. and V.A. insurance programs, and not otherwise regulated by the government.

Our task is to end discrimination in all housing, old and new—not simply in the new housing covered by the executive order.

I propose legislation that is constitutional in design, comprehensive in scope and firm in enforcement. It will cover the sale, rental and financing of all dwelling units. It will prohibit discrimination, on either racial or religious grounds by owners, brokers and lending corporations in their housing commitments.

Under this legislation, private individuals could sue in either state or federal courts to block discrimination.

The Attorney General would be empowered to sue directly for appropriate relief, wherever he has reasonable cause to believe a pattern of discrimination exists.

The legislation would direct the Secretary of Housing and Urban Development to make factual studies, and to give technical assistance to the Community Relations Service and all other public and private organizations working to eliminate discriminatory housing patterns.

The bill I am submitting to the Congress this year would leave in effect the many state laws that have preceded the federal government in the field of fair housing. We would hope to enact a law that will not only open the fight against discrimination where there are state laws against it, but also strengthen the enforcement efforts of states which have fair housing programs now.

The ghettos of our major cities—North and South, from coast to coast—represent fully as severe a denial of freedom and the fruits of American citizenship as more obvious injustices. As long as the color of a man's skin determines his choice of housing no investment in the physical rebuilding of our cities will free the men and women living there.

The Fair Housing Law I propose this year is an essential part of our attempt to rejuvenate and liberate America's growing urban areas—and more importantly, to expand the liberty of all the people living in them.

A nation that aspires to greatness cannot be a divided nation—with whites and Negroes entrenched behind barriers of mutual suspicion and fear.

It cannot tolerate:

¶Overcrowded ghetto schools, producing new thousands of ill-trained citizens for whom the whole community must be responsible.

¶Rising health hazards and crime rates in the ghettos' ugly streets and homes.

¶The failure of expensive social programs, such as urban renewal, where there is no way out and up for Negro residents.

The truly insufferable cost of imprisoning the Negro in the slums is borne by our national conscience.

When we restrict the Negro's freedom, inescapably we restrict a part of our own.

Negro Americans comprise 22 per cent of the enlisted men in our army combat units in Vietnam—and 22 per cent of those who have lost their lives in battle there. We fall victim to a profound hypocrisy when we say that they cannot buy or rent dwellings among citizens they fight to save.

No civil rights act, however, will be final. We should look in vain for one definitive solution to an injustice as old as the nation itself—an injustice that leaves no section of the country and no level of American life unstained. This administration has pledged that as long as racial discrimination denies opportunity and equal rights in America, we will honor our constitutional and moral responsibility to restore the balance of justice.

Yet no amount of legislation, no degree of commitment on the part of the national government, can by itself bring equal opportunity and achievement to Negro Americans. It must be joined by a massive effort on the part of the states and local governments, of industry, and of all citizens, white and Negro.

Hundreds of thousands of Negro Americans in every part of the country are making that effort now. They know that the responsibilities of citizenship follow inevitably from the achievement of civil rights and economic opportunity.

They know that an obligation lies before them, to take full advantage of the improved education and training that is now becoming available to them—in the public schools, in vocational training, in the universities.

They know that it is their task to lead others in the quest for achievement and social justice—to inspire them with confidence, with preserverance, with the mutual forbearance on which our democracy depends.

We are engaged in a great adventure—as great as that of the last century, when our fathers marched to the Western frontier. Our frontier today is of human beings, not of land.

If we are able to open that frontier, to free each child to become the best that is in him to become, our reward—both spiritual and material—will exceed any that we gained a century ago through territorial expansion.

Whether we shall succeed is an issue that rests in the heart of every American. It rests in the determination of Negro Americans to use the opportunities for orderly progress that are now becoming—at last—a reality in their lives. It rests in our common willingness to expand those opportunities in the years ahead.

That issue can and will be decided in only one way. For we have not come this far to fail within sight of our goal.¹⁸⁷

Appendix II

The following is the section of the proposed "Civil Rights Act of 1966" dealing with nondiscrimination in housing.

TITLE IV

POLICY

SEC. 401. It is the policy of the United States to prevent, and the right of every person to be protected against, discrimination on account of race, color, religion, or national origin in the purchase, rental, lease, financing, use and occupancy of housing throughout the Nation.

DEFINITIONS

SEC. 402. For purposes of this title—

(a) "person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries.

(b) "dwelling" includes (1) any building or structure, or portion thereof, whether in existence or under construction, which is in, or is designed, intended, or arranged for, residential use by one or more individuals or families and (2) any vacant land that is offered for sale or lease for the construction or location of any such building, structure or portion thereof.

(c) "discriminatory housing practice" means an act that is unlawful under section 403 or 404.

PREVENTION OF DISCRIMINATION IN THE SALE OR RENTAL OF HOUSING

SEC. 403. It shall be unlawful for the owner, lessee, sub-lessee, assignee, or manager of, or other person having the authority to sell, rent, lease, or manage, a dwelling, or for any person who is a real estate broker or salesman, or employee or agent of a real estate broker or salesman—

(a) To refuse to sell, rent, or lease, refuse to negotiate for the sale, rental, or lease of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale, rental, or lease of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin.

(c) To print or publish or cause to be printed or published any notice, statement, or advertisement, with respect to the sale, rental, or lease of a dwelling that indicates

187. N.Y. Times, April 29, 1966, p. 22.

any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, rental, or lease when such dwelling is in fact so available.

(e) To deny to any person because of race, color, religion, or national origin of the person he represents or may represent, access to or participation in any multiple-listing service or other service or facilities related to the business of selling or renting dwellings.

PREVENTION OF DISCRIMINATION IN THE FINANCING OF HOUSING

SEC. 404. It shall be unlawful for any bank, savings and loan institution, credit union, insurance company, or other person that makes mortgage or other loans for the purchase, construction, improvement, or repair or maintenance of dwellings to deny such a loan to a person applying therefor, or discriminate against him in the fixing of the down payment, interest rate, duration, or other terms or conditions of such a loan, because of the race, color, religion, or national origin of such person, or of any member, stockholder, director, officer, or employee of such person, or of the prospective occupants, lessees, or tenants of the dwelling or dwellings in relation to which the application for a loan is made.

INTERFERENCE, COERCION, OR INTIMIDATION

SEC. 405. No person shall intimidate, threaten, coerce, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of any right granted by section 403 or 404.

ENFORCEMENT BY PRIVATE PERSONS

SEC. 406. (a) The rights granted by sections 403, 404, and 405 may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within six months after the alleged discriminatory housing practice or violation of section 405 occurred.

(b) Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of a civil action without the payment of fees, costs, or security. A court of a State or subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision.

(c) The court may grant such relief as it deems appropriate, including a permanent or temporary injunction, restraining order, or other order, and may award damages to the plaintiff, including damages for humiliation and mental pain and suffering, and up to \$500 punitive damages.

(d) The court may allow a prevailing plaintiff a reasonable attorney's fee as part of the costs.

ENFORCEMENT BY THE ATTORNEY GENERAL

SEC. 407. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this title he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts pertaining to such pattern or practice and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights granted by this title.

(b) Whenever an action under section 406 has been commenced in any court of the United States, the Attorney General may intervene for or in the name of the United States if he certifies that the action is of general public importance. In such action the United States shall be entitled to the same relief as if it had instituted the action.

ASSISTANCE BY THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT

SEC. 408. The Secretary of Housing and Urban Development shall—

(a) make studies with respect to the nature and extent of discriminatory housing practices in representative communities, urban, suburban, and rural, throughout the United States;

(b) publish and disseminate reports, recommendations, and information derived from such studies;

(c) cooperate with and render technical assistance to Federal, State, local, and other public or private agencies, organizations, and institutions which are formulating or carrying on programs to prevent or eliminate discriminatory housing practices;

(d) cooperate with and render such technical and other assistance to the Community Relations Service as may be appropriate to further its activities in preventing or eliminating discriminatory housing practices; and

(e) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this title.

EFFECT ON STATE LAWS

SEC. 409. Nothing in this title shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this title shall be effective, that grants, guarantees, or protects the same rights as are granted by this title; but any law that purports to require or permit any action that would be a discriminatory housing practice under this title shall to that extent be invalid.

CONTEMPT OF COURT

SEC. 410. All cases of criminal contempt arising under the provisions of this title shall be governed by section 151 of the Civil Rights Act of 1957 (42 U.S.C. 1995).

EXISTING AUTHORITY

SEC. 411. Nothing in this title shall be construed to deny, impair, or otherwise affect any right or authority of the United States or any agency or officer thereof under existing law to institute or intervene in any civil action or to bring any criminal prosecution.¹⁸⁸

Appendix III

The following is an excerpt from a statement by Attorney General Nicholas deB. Katzenbach made to Subcommittee No. 5, House Judiciary Committee on May 4, 1966 in support of the housing section of the proposed "Civil Rights Act of 1966."

TITLE IV—HOUSING

In the Civil Rights Act of 1866 Congress declared:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. (42 U.S.C. 1982)

Again, in the National Housing Act of 1949, Congress made an even broader commitment by pledging the Nation to the goal of a decent home and a suitable living environment for every American family.

Yet today, one hundred years after the Civil Rights Act and seventeen years after the Housing Act, we find, in the words of the United States Commission on Civil Rights, that "housing . . . seems to be the one commodity in the American market that is not freely available on equal terms to everyone who can afford to pay."

Title IV of the President's bill is designed to help achieve equality in the market place.

The past twenty years have provided the country with millions upon millions of new dwelling units and have vastly changed the character of our urban residential

188. H.R. Doc. No. 14765, 89th Cong., 2d Sess. 25 (1966). The bill was introduced by Congressman Celler on May 2, 1966.

areas. Suburbia has come into being around the boundaries of our cities and continues to spread.

Except for our Negro citizens, virtually all Americans have had an equal opportunity to share in these developments in our national life. The Negro's choice in housing, unlike that of his fellow citizens, is not limited merely by his means. It is limited by his color. By and large, desirable new housing in our cities and suburbs is foreclosed to him, and, ironically, because of its scarcity, what housing is left available to him frequently costs him more, judged by any fair standard, than comparable housing open to whites.

The result is apparent to all: impacted Negro ghettos that are surrounded and contained by white suburbia. The problem has arisen in metropolitan communities everywhere in the country.

Segregated housing is deeply corrosive both for the individual and for his community. It isolates racial minorities from the public life of the community. It means inferior public education, recreation, health, sanitation and transportation services and facilities. It means denial of access to training and employment and business opportunities. It prevents the inhabitants of the ghettos from liberating themselves, and it prevents the federal, state, and local governments and private groups and institutions from fulfilling their responsibility and desire to help in this liberation.

Through the years, there has been considerable state and private response to discrimination in housing. Seventeen states, the District of Columbia, Puerto Rico, the Virgin Islands, and a large number of municipalities have enacted a variety of fair housing laws.

Volunteer efforts by private citizens also have been organized in many communities, such as Neighbors, Inc., here in the District of Columbia.

In addition, there has been a series of actions by the federal government.

In the judicial branch, the Supreme Court acted decisively as early as 1948 when it held racially restrictive covenants to be unenforceable in either the state or federal courts.

In the executive branch, President Kennedy's Executive Order 11063 of November 20, 1962, established the President's Committee on Equal Housing Opportunity and forbade discrimination in new FHA or VA-insured housing.

By now it should be plain that a patchwork of state and local laws is not enough. The work of private volunteer groups is not enough. Court decisions are not enough. The limited authority now available to the executive branch is not enough.

The time has now surely come for decisive action by the legislative branch of the federal government. Durable remedies for so endemic and deep-seated a condition as housing segregation should be based on the prescription and sanction of Congress. This is all the more so as the issue is national in scope and as it penetrates into so many other sectors of public policy such as the rebuilding and physical improvement of our cities.

The extent to which the decisions of individual homeowners reduce the availability of housing to racial minorities is hard to estimate. But I believe it is accurate to say that individual homeowners do not control the pattern of housing in communities of any size. The main components of the housing industry are builders, landlords, real estate brokers and those who provide mortgage money. These are the groups which maintain housing patterns based on race.

I do not mean to suggest that the enforcement of segregation in housing is necessarily motivated by racial bias. More often the conduct of those in the housing business reflects the misconception that neighborhoods must remain racially separate to maintain real estate values. While there exist studies which indicate that integrated housing does not depress real estate values, many in the real estate business fear to take the chance. I have no doubt that they simply feel trapped by custom and the possibility of competitive loss. The fact is, however, that their policies and practices are what perpetuate segregated housing.

At present a particular builder or landlord who resists selling or renting to a Negro most often does so not out of personal bigotry but out of fear that his prospective white tenants or purchasers will move to housing limited to whites and that, because similar housing is unavailable to Negroes, what he has to offer will attract only Negroes. If

all those in the housing industry are bound by a universal law against discrimination, there will be no economic peril to any one of them. All would be in a position to sell without discrimination. Indeed, experienced developers have stated that they would welcome such a law.

Therefore, I think it would be a mistake to regard the most significant aspect of a federal fair housing measure as its sanctions *against* builders, landlords, lenders, or brokers. What is more significant, rather, is that they can utilize this law as a *shield* to protect them when they do what is right.

The same protection would be given an individual homeowner who privately has no reservation about selling his home to a Negro but who may be inhibited by the fears he could generate among the neighbors he is leaving. A uniform statute would outlaw segregation in all neighborhoods.

There is a close parallel here with the impact of the Public Accommodations Title of the Civil Rights Act of 1964. Restaurant or motel owners, willing to desegregate, failed to do so because of economic fears. Once the Act was passed—and all of their competitors had to serve Negroes—many quickly complied.

Title IV applies to all housing and prohibits discrimination on account of race, color, religion or national origin by property owners, tract developers, real estate brokers, lending institutions and all others engaged in the sale, rental or financing of housing.

It also prohibits coercion or intimidation intended to interfere with the right of a person to obtain housing without discrimination—for example, the coercion of a mob attempting to prevent a Negro family from moving into a neighborhood.

And it prohibits retaliatory action by real estate boards or associations against real estate agents who have refused to discriminate against Negroes or other persons of minority groups.

Title IV provides a judicial remedy. An individual aggrieved by a discriminatory housing practice would be enabled to bring an action in either a federal district court or a state or local court for injunctive relief and for any damages he may have sustained. In the court's discretion, he could also be awarded up to \$500 exemplary damages.

The title empowers the Attorney General to initiate suits in federal courts to eliminate a "pattern or practice" of discrimination, and to intervene in private suits brought in federal courts.

Title IV is based primarily on the commerce clause of the Constitution and on the fourteenth amendment. I have no doubts whatsoever as to its constitutionality.

As one of the Justices of the Supreme Court said in the very recent *Guest* case—to which I shall return shortly—the fourteenth amendment includes "a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens."

I have pointed out already how segregated living is both a source and an enforcer of involuntary second-class citizenship. To the extent that this blight on our democracy impedes states and localities from carrying out their obligations under the fourteenth amendment to promote equal access and equal opportunity in all public aspects of community life, the fourteenth amendment authorizes removal of this impediment.

That there is official and governmental involvement in the real estate and construction industries needs little demonstration. Apart from zoning and building codes, there are the obvious facts of regulations covering credit, mortgages, interest rates, and banking practices, and there is the universal licensing of real estate agents.

But there are more basic considerations.

Are we to tell our Negro citizens that the Congress which has guaranteed them access to desegregated public schools and to swimming pools and to golf courses is powerless to guarantee them the basic right to choose a place to live? I would find this hard to explain, for I would not be able to understand it myself.

To me it is clear that the fourteenth amendment gives Congress the power to address itself to the vindication of what is, in substance, the freedom to live.

Congress can and must make the legislative judgment that without equal housing opportunity there cannot be full equality under law. Congress can and must determine

that the enforcement of involuntary segregation through discriminatory housing practices is inconsistent with the words, spirit and purpose of the fourteenth amendment.

These are the human terms in which the Constitution speaks and cries out for quick response. There are also economic terms. The Congress is charged with the protection and promotion of interstate commerce in all its forms.

I cannot doubt that housing is embraced under this Congressional power. The construction of homes and apartment buildings, the production and sale of building materials and home furnishings, the financing of construction and purchases all take place in or through the channels of interstate commerce.

When the total problem is considered, it requires no great leap of the imagination to conclude that interstate commerce is significantly affected by the sale even of single dwellings, multiplied many times in each community.

It was almost thirty years ago that the Supreme Court faced and resolved this problem in *Wickard v. Filburn*. In that case the court held that the Agricultural Adjustment Act could validly apply to a farmer who sowed only 23 acres of wheat, almost all of which was consumed on his farm.

The housing industry last year represented \$27.6 billion of new private investment. This expenditure on residential housing is considerably more than the \$22.9 billion which all American agriculture contributed to the Gross National Product in 1965.

Simply consider in practical terms how housing is financed, built, and sold.

Take the case of a real estate developer in California who wants to construct a subdivision on land in Arizona. He and a group of associates raise money from banks in New York, from insurance companies in Connecticut, from pension funds in Chicago. They go to Arizona to purchase the land; hire a contractor from Texas to build the homes; he leases construction equipment in Colorado, orders lumber from Oregon, millwork from Michigan, steel products from Pennsylvania, appliances from Ohio, furnishings from North Carolina. Meanwhile the developer is advertising for buyers from all over the nation in national magazines and in newspapers from coast to coast. Buyers are found; they in turn secure mortgages from banks and insurance companies throughout the country. One might almost say that *everything* in each of those homes—from the land to the homeowner—“moved” in interstate commerce; but certainly the “housing” as a marketable commodity, was created, financed, and sold in and through the channels of interstate commerce.

Of course, like Mr. Filburn's wheat, not every home has all of these connections with interstate commerce. But *most* housing has *some* of these. For example, of the total of almost 15 million single-family occupant-owned dwellings that carried mortgages in 1960, two and a half million were mortgaged to out-of-state lenders. More than half the home mortgages held by insurance companies outside the homeowner's state. What is more, in many of our largest cities with the most serious housing problems, the local real estate markets are themselves in interstate commerce, seeking owners and tenants from multistate metropolitan areas or through national listings. Such cities as Kansas City, New York, Chicago, St. Louis, Cincinnati, Omaha, Philadelphia, have “hedroom areas” crossing into other states.

There thus can be no doubt that anything which significantly affects the housing industry also affects interstate commerce. Discriminatory housing practices produce such an effect. They restrict the amount and type of new housing; discourage the repair and rehabilitation of existing housing; remove incentives to the purchase of new furniture and appliances, and frustrate the efforts of people to move from job to job and from state to state.

Clearly the people, the money, the materials, the entrepreneurial talent which move in and to the housing market are not confined within single states. Rather they are well within the range of Congressional regulation, and within this range Congress' judgment as to what problems need solving and how they should be solved is necessarily broad. Title IV identifies a national problem. It suggests an effective solution.

Appendix IV

In 1960, 9.7% of the households in the United States were headed by nonwhites.¹⁸⁹ Since 1890, there has been a more or less steady trend among both whites and nonwhites towards owner occupancy rather than renter occupancy. In 1960, 51.1% of the white households and 19% of the nonwhite households were owner occupied. By 1960, 64.4% of the white households and 38.4% of the nonwhite households were owner occupied.¹⁹⁰ Thus a far greater per cent of the white households are owner occupied.

In 1960, among the combined total of white owner occupied and renter occupied households approximately 83% were "sound," 13% "deteriorating" and 4% "dilapidated" by the U.S. Census Bureau standards. This compares with only 56%, 28%, and 16% for the respective, nonwhite households.¹⁹¹ Among nonwhite households, the quality of the owner occupied households was somewhat better than the quality of the renter occupied households; the figures being 63% sound, 24% deteriorating and 13% dilapidated, for the nonwhite owner occupied households and 50% sound, 30% deteriorating and 20% dilapidated for nonwhite renter occupied households.¹⁹² White owner occupied households also tended to be of a higher quality than white renter occupied households, the figures being 90% versus 80% sound, 7% versus 17% deteriorating and 3% for both owner and renter occupied white households.¹⁹³

The quality of nonwhite housing in the South tended to be considerably worse than nonwhite housing in the rest of the United States. In the North Central states in 1960, for example, among the combined total of owner occupied and renter occupied households approximately 62% were sound, 26% deteriorating and 12% dilapidated, whereas in the South the respective figures were 47% sound, 32% deteriorating and 21% dilapidated.¹⁹⁴ The quality of housing for white households showed much less regional disparity. In the North Central states approximately 85% of the white households were sound, 12% deteriorating and 3% dilapidated, and in the South the comparable figures were 81% sound, 14% deteriorating and 5% dilapidated.¹⁹⁵

While the income level of nonwhite households remains far below that of white households, it is showing steady improvement. From 1947 to 1963, the median income of nonwhite families rose from \$1,614 to \$3,465 (the comparable figures for white households were \$3,157 to \$6,548).¹⁹⁶ In 1963, 31.40% of the money spent by nonwhite families was spent on housing whereas the comparable figure for white families was only 29.3%.¹⁹⁷ Further, in 1963 approximately 24% of the Negro families earned \$6,000 or more.¹⁹⁸ There are thus a large and growing number of Negro families who can afford to move into decent white middle class neighborhoods.

189. 1960 U.S. Census of Housing, Vol. I, p. 1-1. The U.S. Census Bureau includes such groups of Japanese and Chinese in the "nonwhite" classification, but at least 95% of the "nonwhite" group is Negro.

190. 1965 Statistical Abstract of the United States 758.

191. Based on data from 1960 U.S. Census of Housing, Vol. I, pp. 1-1, 1-213 and the author's approximate calculations.

192. *Ibid.*

193. *Ibid.*

194. *Ibid.*

195. *Ibid.*

196. 1965 Statistical Abstract of the United States 342. It is interesting to note that in the median income of white households headed by a person with 4 or more years of college was \$9,857 whereas the comparable figures for Negro households was \$7,295. *Id.* at 345.

197. 1965 Statistical Abstract of the United States 340.

198. *Id.* at 342.