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HOUSING DISCRIMINATION—THE RESPONSE OF LAW

MARTIN E. SLOANE*

I. INTRODUCTION

A. Housing Discrimination North and South

It has been understood for many years that housing discrimination is actively practiced in the North.¹ Since the end of World War I, when the emigration of Negroes from the rural South to northern urban centers noticeably accelerated, Negroes have been increasingly ghettoized and shut off from the main stream of northern city life. The growth in the post-World War II years of all-white northern suburbs, from which Negroes have been almost entirely excluded, did not represent a new trend, but rather an intensification of long-standing patterns and practices.² These patterns and practices did not go unobserved by civil rights commentators.³ To the extent that the Nation was concerned with matters of civil rights in past years, it was clearly demonstrated that housing discrimination was a problem both North and South.

In recent years, however, with the great surge of national attention on civil rights generally, housing discrimination has been discussed largely in a northern context.⁴ In fact, it has come popularly to be viewed almost exclusively as a northern problem—one which the South, despite all its other civil rights problems, has

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¹ See, e.g., MYRDAL, AN AMERICAN DILEMMA 348-53, 618-27 (1944); WEAVER, THE NEGRO Ghetto (1948); Groner & Helfield, Race Discrimination in Housing, 57 Yale L.J. 426 (1948).


³ Mayor Richardson Dilworth of Philadelphia, for example, coined the phrase, “white noose,” to characterize the ring of virtually all-white suburbs surrounding the central city.

⁴ See, e.g., Robison, Housing—The Northern Civil Rights Frontier, 13 W. Res. L. Rev. 101 (1961), where the author accounts for this phenomenon on grounds that housing has become the chief civil rights issue outside the South.
fortuitously managed to avoid. Incidents such as the disturbance in Folcroft, Pennsylvania, when a Negro family moved into a previously all-white community; the sit-in demonstrations at William Levitt's Belair housing development in the Maryland suburbs of Washington, D.C., and the overall attack in the North on neighborhood school districting, have been widely publicized. In the deep South, however, where Negroes are now militantly protesting against the deprivations of centuries, little is heard concerning the denial of housing opportunities. But the lack of publicity does not mean that the problem is nonexistent. Housing discrimination is not alien to the southern portion of the United States.

Although racial zoning ordinances have long been held unconstitutional, they are, nonetheless, still maintained by some southern communities as an effective control on individual housing choice. Even in a city like Atlanta, renowned for having successfully maintained a racial modus vivendi, it will be recalled that quite recently a wall was erected between Negro and white sections of the city. Also, southern home builders, when polled by their trade organization, exhibited a markedly greater reluctance to sell on a non-discriminatory basis than their northern counterparts. In short, the problem is not one uniquely indigenous to the North. In both 1959 and 1961 the basic finding of the United States Commission on Civil Rights—"Housing . . . seems to be the one commodity in the American market that is not freely available on equal terms to

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6 Buchanan v. Warley, 245 U.S. 60 (1917).
7 As recently as 1951, a racial zoning ordinance enacted by the city of Birmingham, Alabama, was tested in the courts and found to be unconstitutional. City of Birmingham v. Monk, 185 F.2d 859 (5th Cir. 1951), cert. denied, 341 U.S. 940 (1951). In Jimerson v. City of Bessemer, Civil No. 10054, N.D. Ala., August, 1962, a federal district court noted as late as August 1962 that the city of Bessemer had repealed its racial zoning ordinances "several years ago."
8 See U.S. Comm'n on Civil Rights, Report 1959, at 419 (1959) [hereinafter cited as 1959 Comm'n Report], where the United States Commission on Civil Rights generally praised the housing conditions that prevailed in Atlanta, although noting that opportunities existed largely on a segregated basis.
9 In a poll of 15,000 member builders by the National Association of Home Builders in July, 1962, concerning the economic effect a housing order would have, less than 6,000 replies were received, 2,100 of which were from southern builders, who were more firmly convinced that dire consequences would follow an order's issuance than their northern counterparts. More than one half of the responses indicating a decrease in building activity following issuance of an order were from the South.
everyone who can afford to pay”---was made on the basis of investigations and hearings conducted throughout the country. No section of the country was found to be immune.

B. Housing and Government

The elements that make up the housing industry---both North and South---are largely private and, in theory, it is private entrepreneurs who make the key decisions that determine where housing will be built and to whom it will be sold. But pervading every aspect of the housing industry and, indeed, controlling virtually all of its activities, and supporting the entire structure, is government---local, state, and federal. For example, the home builder may build only in accordance with zoning laws, building codes, and other appropriate local ordinances. The federal government offers him the inestimable benefit of its mortgage insurance and loan guarantee programs, while holding him to a high professional standard of performance. The real estate broker is licensed by the state and held to an ethical standard in his dealings with the public. In addition, the federal government, through trademark laws, protects his exclusive right to use the term, “Realtor,” as against those brokers not affiliated with the National Association of Real Estate Boards.

10 The Commission has held hearings and conferences relating to housing in the following cities: New York, Atlanta, Chicago, Los Angeles, San Francisco, Detroit, Little Rock, Cleveland, Newark, Memphis, Phoenix and Indianapolis.
11 These are administered by the Federal Housing Administration, a constituent agency of the Housing and Home Finance Agency, and the Veterans Administration. The benefit to builders has been described by one court as follows: “[FHA provides] a ready means by which they can market their respective products. ... [The builder] can count on his market, rather than simply invest his time, labor and money in developing property and then hope for buyers who can persuade a lender to advance enough to enable them to purchase with no security other than the property itself.” Ming v. Horgan, 3 Race Rel. L. Rep. 693, 695 (Super. Ct., Sacramento, Calif. June 23, 1958). William Levitt, one of the country’s largest builders, testified before Congress on the importance to builders of the mortgage insurance program: “[W]e are 100 percent dependent on the Government. Whether this is right or wrong it is a fact.” Hearings on H.R. 5611, Before a Subcommittee on Housing of the House Committee on Banking and Currency, 81st Cong., 1st Sess. 566 (1957).
12 Largely because of the exclusion of Negro brokers by many local real estate boards associated with the national organization, a separate real estate brokers association was established—The National Association of Real Estate Brokers. Brokers affiliated with this organization are styled “Realtists.” See Hearings Before the U.S. Comm’n on Civil Rights on
Further, the mortgage lending institution is regulated by one or more state or federal agencies and is typically benefited by federal insurance of its accounts or deposits.\(^\text{18}\)

This partial catalog gives some indication of the extent of governmental involvement in housing and of the basic fact that housing is a matter of governmental concern. The remainder of this article will be devoted to an evaluation of the impact of government on the various aspects of housing discrimination—the constitutional duty imposed upon government to prevent such discrimination and the response of state and federal government to the problem in terms of the exercise of governmental power.

II. THE PROTECTION OF THE CONSTITUTION

The equal protection clause of the fourteenth amendment guarantees to the American people equal treatment at the hands of the state or any of its agencies or instrumentalities.\(^\text{14}\) This same guarantee applies with equal force to the federal government.\(^\text{15}\) Moreover, the right to acquire, enjoy, own and dispose of housing and land holds a place of particular importance within the ambit of protection under the Constitution. As the Supreme Court of the United States has noted: "Equality in the enjoyment of property rights was regarded by the framers of that [Fourteenth] Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee."\(^\text{16}\)

It is equally clear, however, that the Constitution offers no protection against private discriminatory conduct.\(^\text{17}\) This principle, first enunciated in the Civil Rights Cases\(^\text{18}\) in 1883, has been consistently adhered to by the Supreme Court in the eighty years that have followed. "[T]he action inhibited by the first section [Equal Protection Clause] of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amend-
The two critical issues, then, for purposes of defining the scope of protection under the equal protection clause, are: equality and government responsibility. In housing, as in many other areas where government and private enterprise are complexly intertwined, the issue of government responsibility has thus far proven troublesome to the courts. The issue of equality, on the other hand, is much further along toward settlement, at least in terms of basic ground rules. After nine years, it is clear that on this issue the School Segregation Cases represent a pivotal point in the development of constitutional law. There, the court rejected once and for all the inhumanity of governmentally enforced segregation by race, as "inherently unequal." It would appear that at least for this purpose, the dictum of Mr. Justice Harlan (the elder) has become law: "Our Constitution is color-blind."

In terms of assessing government responsibility, we may already have reached a similar turning point in Burton v. Wilmington Parking Authority, where the Supreme Court indicated that the constitutional obligation of the state may not be satisfied through mere passive acquiescence to discriminatory conduct by private parties with whom it is involved. It has been only two years since Burton, but there are already signs that it is a landmark case of sizeable proportions. In 1959, the United States Commission on Civil Rights concluded that "Federal decisional law in the field of discrimination in housing is in a state of flux." While this is still largely true, there are some settled areas, and Burton and its immediate descendants are in the process of clarifying still others.

A. Racial Zoning

One area of law in the field of housing discrimination that has long been settled involves racial zoning ordinances. As early as

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19 Shelley v. Kraemer, 334 U.S. 1, 13 (1948).
21 Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (dissenting opinion).
1917, the Supreme Court in *Buchanan v. Warley*, held such ordinances to be in violation of the fourteenth amendment.

There are several noteworthy aspects to the *Buchanan* case. There, the city of Louisville maintained an ordinance prohibiting non-Caucasians from occupying residences in any block upon which a greater number of houses were occupied by Caucasians. By the same token, the ordinance prohibited Caucasians from occupying houses on blocks where the greater number of houses were occupied by non-Caucasians. Buchanan, a Caucasian who owned land on a predominantly Caucasian block, signed a contract to sell the land to Warley, a Negro, the land to be used for purposes of Warley's personal residence. Warley then refused to go through with the sale on the ground that he would be in violation of the Louisville ordinance. Buchanan brought an action for specific performance, the issue being the constitutionality of the racial ordinance.

In 1917, when the case came before the Supreme Court of the United States, the doctrine of "separate but equal," expressed in *Plessy v. Ferguson*, had been accepted in the fields of public transportation and education as satisfying the constitutional requirements of the fourteenth amendment. This doctrine was expressly rejected in the *Buchanan* case and *Plessy* was distinguished not on grounds of a denial of equal protection, but on due process grounds. A unanimous court held that the Louisville ordinance violated due process of law in that it interfered with "the civil right of a white man to dispose of his property if he saw fit to do so to a person of color." It is interesting to contemplate whether the Court would have reached the same decision at that time if it had been Buchanan, the owner, who had reneged on the contract of sale and Warley, the purchaser, who sought specific performance, rather than the other way around. In any case and for whatever reason, the *Buchanan* decision, by outlawing racial zoning ordinances at this comparatively early date, spared the Nation at least some of the agony that is our inheritance from *Plessy v. Ferguson*.

**B. Restrictive Covenants**

The Supreme Court's decision in *Buchanan* had a peculiar side effect. What the Court had declared unconstitutional when at-

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25 U.S. 60 (1917).
26 163 U.S. 537 (1896).
27 245 U.S. at 81.
tempted through municipal ordinances now began to be effected through private agreement—the restrictive covenant. Through this device, property owners could be assured that only persons of an acceptable race, color, creed, or national origin would live in their midst.

In 1926, the validity of these covenants was tested for the first time in the Supreme Court. *Corrigan v. Buckley* involved a suit to enjoin the violation of a covenant limiting the occupancy of houses in an area in the District of Columbia to Caucasians. The covenant was upheld, but the Court did not find it necessary to reach the question of their judicial enforceability.

In the years following the *Corrigan* decision, the restrictive covenant came more and more into use. The creation of the Federal Housing Administration in 1934 act as a spur to the proliferation of these covenants. Finally, in 1948, in the celebrated case of *Shelley v. Kraemer*, the Supreme Court settled the important issue that *Corrigan* had left unresolved: Were racially restrictive covenants judicially enforceable?

The *Shelley* case arose in 1945 in St. Louis, where the Shelleys, who were Negroes, purchased property subject to a fifty-year restrictive covenant that had been agreed to in 1911. By 1961, Negroes and Orientals would have been eligible to own property there. The Supreme Court held that for the Missouri courts to enforce the covenant by way of injunction constituted state action in violation of the equal protection clause of the fourteenth amendment. In answer to the contention that since the state courts stood equally ready to enforce restrictive covenants excluding white persons there was no denial of equal protection, the Court made a

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28 271 U.S. 323 (1926).
30 FHA’s underwriting manual of 1938 stated: “If a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial groups.” FHA, UNDERWRITING MANUAL § 937 (1938). The manual further recommended the use of restrictive covenants to ensure against inharmonious racial groups and contained a model covenant. The inclusion of restrictive covenants in real estate sales contracts became almost a prerequisite to FHA mortgage insurance. See 1961 COMM’N REPORT 16. FHA, in its early years, has been characterized as “a sort of ‘Typhoid Mary’ for racial covenants.” Id. at 62.
31 334 U.S. 1 (1948).
32 As the Civil Rights Commission has wryly observed: “The Shelleys were 16 years early.” 1961 COMM’N REPORT 24.
noteworthy and conclusive response: "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."33

In a companion case, *Hurd v. Hodge,*34 involving the enforceability of restrictive covenants by federal courts in the District of Columbia, the Court reached the same decision, but for different reasons. There were two grounds for the Court’s decision. Neither of them involved the Constitution. First, the Court cited the Civil Rights Act of 1866, which provides:

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.35

Enforcement of these covenants by federal courts, the Justices unanimously held, would constitute a denial of rights protected by this act. Secondly, the Court held that such enforcement would violate public policy.36

Although the *Shelley* and *Hurd* cases, in and of themselves, had a dramatic effect in discouraging the use of restrictive covenants,37 several unanswered questions remained in this regard. One was the matter of the enforceability of restrictive covenants by way of money damages. Another was the basic question of the continued viability of the holding in *Corrigan,* that restrictive covenants were valid. The first question was settled in 1953 in *Barrows v. Jackson,*38 where it was held that judicial enforcement by way of money damages was prohibited. The second question came up for decision the following year.

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33 334 U.S. at 22.
34 334 U.S. 24 (1948).
36 Although the fourteenth amendment applies, by its terms, only to the states, the argument was made that the due process clause of the fifth amendment, which applies to the federal government, embodies the same protection as the equal protection clause in the fourteenth. The Court did not find it necessary at this time to decide the point. Six years later, in *Bolling v. Sharpe,* 347 U.S. 497 (1954) (the District of Columbia school segregation case), the Court did rely on the fifth amendment for its decision, indicating that the due process clause of the fifth amendment and the equal protection clause of the fourteenth are coextensive with respect to racial discrimination.
37 In December 1949, FHA announced that it would not provide mortgage insurance on property on which restrictive covenants were recorded after Feb. 15, 1950. Thus, in virtually one step the policy of the FHA changed from one of insisting on restrictive covenants to prohibiting them. 1959 COMM’N REPORT 463-65.
38 346 U.S. 249 (1953).
John Rice, a Winnebago Indian, was killed in Korea in the service of his country. His body was returned home to Sioux City, Iowa, where his Caucasian widow made preparations to bury him in a cemetery plot she had purchased for that purpose. The cemetery management discovered at the graveside that Rice was an Indian and refused to permit his burial there. Mrs. Rice sued for money damages and the cemetery defended on the ground that a restrictive covenant prohibited the burial of Indians in the cemetery. The Iowa Supreme Court ruled that the covenant, although unenforceable, was not void and could be relied upon as a defense. It was in this posture that the case came to the Supreme Court of the United States via a writ of certiorari.

By an evenly divided vote, the Court affirmed the judgment of the Iowa Supreme Court. Shortly thereafter, it was brought to the Court’s attention that an Iowa statute had been enacted that prohibited any future discrimination such as was involved here. On a petition for rehearing, the Court set aside its order of affirmance and dismissed the writ of certiorari, as improvidently granted. Therefore, the validity of racially restrictive covenants remains questionable.

C. Federally Assisted Housing

The Supreme Court of the United States has not yet determined the constitutionality of discrimination or segregation in housing provided with the aid of any federal housing program. To this extent, then, the law is by no means settled. Indeed, there is a general paucity of decisions on this question by any federal court. To understand the situation one must first look at the programs.

The first is public housing. Pursuant to this program, the

30 Rice v. Sioux City Memorial Park Cemetery, Inc., 245 Iowa 147, 60 N.W.2d 110 (1953).
33 One related problem is the effect that a reverter clause has on the enforceability of restrictive covenants. In Charlotte Park & Recreation Comm’n v. Barringer, 242 N.C. 311, 88 S.E.2d 114 (1955), cert. denied, 350 U.S. 983 (1956), a covenant with a reverter clause was held judicially enforceable in that, according to the court, such a covenant creates a determinable fee which “automatically will cease and terminate by its own limitations.” Id. at 322, 88 S.E.2d at 123. Thus, its operation is not by judicial enforcement. In Capital Fed. Sav. & Loan Ass’n v. Smith, 136 Colo. 265, 316 P.2d 252 (1957), however, the rule regarding judicial unenforceability of racially restrictive covenants was held to apply despite the presence of a reverter clause.
Public Housing Administration provides financial assistance to local housing authorities in the development, financing, and construction of low-rent housing. In addition, this federal agency makes annual contributions which help to maintain the low-rent character of the projects. The projects are operated by local housing authorities, which are governmental bodies, and it is their responsibility to determine the sites and occupancy of the projects.

Next is urban renewal. Pursuant to this program, the Urban Renewal Administration provides financial assistance in the form of loans and grants to local public agencies, for the purpose of clearing away slums. The local public agencies, which are state governmental bodies, acquire designated land for clearance, and then typically dispose of it to private redevelopers who are required to build upon the land in accordance with a preordained plan. The decisions as to sites and plans are made by the local public agency, with the concurrence of the Urban Renewal Administration. This program, it should be noted, involves the federal government, state and local government, and private enterprise.

Finally there is FHA mortgage insurance. Pursuant to this program, the Federal Housing Administration provides assistance in the form of insurance of mortgages. These mortgages are typically long-term (up to 40 years), carry a low rate of interest, and permit a high loan-to-value ratio. The builder or developer who utilizes the FHA program must satisfy FHA standards with respect to plans and specifications. In the past, however, FHA has concerned itself little with matters of occupancy.

Despite the lack of any utterances by the Supreme Court having specifically to do with discrimination or segregation in any of these programs, it seems clear that at least in one (and possibly in the second and third of these programs) such discrimination or segregation is in violation of the Constitution.

1. Public Housing.—In connection with public housing, such discrimination or segregation as may exist is, by the very nature of the program, governmentally determined and governmentally enforced.\(^4\) There is no question here of the presence of state action.

\(^4\) In Cohen v. Public Housing Administration, 257 F.2d 73, 78 (5th Cir. 1958), \textit{cert. denied}, 358 U.S. 928 (1959), a distinction was made between "governmentally enforced segregation," which is forbidden, and "voluntary segregation for the common good," which, the court indicated was permissible. In view of the nature of the public housing program, where it is governmental authority that determines the selection of tenants for par-
It is the state that is acting (through the tenant selection practices of the local housing authority) and the responsibility is that of the state. Two courts of appeals have held that governmentally enforced segregation in public housing violates the equal protection clause of the fourteenth amendment.\textsuperscript{44} In addition, virtually every decision on this point since \textit{Brown} has similarly held such discrimination or segregation to be unlawful.\textsuperscript{45}

2. Urban Renewal.—Until just a few months ago, there had been no decision on the constitutionality of discrimination in urban renewal. In three earlier cases, the urban renewal programs in Eufaula,\textsuperscript{46} Gadsden,\textsuperscript{47} and Bessemer,\textsuperscript{48} Alabama had come under attack on the ground that, if consummated, they would result in residential segregation or the exclusion of the former Negro residents. All three suits were dismissed as premature. Judges in two of the three cases, however, felt compelled to deliver themselves of some pointed remarks on the substantive issues involved. In the Eufaula case, District Judge Johnson, in holding the suit premature, said:

\begin{quote}
This Court must now assume that these defendants [officials of the Eufaula urban redevelopment authority], their agents and successors in office, after receiving the federal assistance in this public project, will, upon a completion of this project (or any phase of it), recognize the law that is now so clear; this law being to the effect that there can be no governmentally enforced segregation solely because of race or color.\textsuperscript{49}
\end{quote}

\textsuperscript{44} Heyward v. Public Housing Administration, 238 F.2d 689 (5th Cir. 1956); Detroit Housing Comm'n v. Lewis, 226 F.2d 180 (6th Cir. 1955).
\textsuperscript{46} Tate v. City of Eufaula, 165 F. Supp. 303 (M.D. Ala 1958).
\textsuperscript{47} Barnes v. City of Gadsden, 268 F.2d 593 (5th Cir.), \textit{cert. denied}, 361 U.S. 915 (1959).
\textsuperscript{49} 165 F. Supp. at 306.
Judge Johnson's dictum seemed to beg the true substantive question: Granting that governmentally enforced segregation is prohibited, would segregation by the ultimate redeveloper after he acquired the urban renewal land from the local governmental body be attributed to, and deemed to be, governmentally enforced segregation? If Judge Johnson was assuming such attribution, it was quite an assumption. No rationale was offered to justify holding the governmental body responsible for discrimination practiced by the private redeveloper.

In the Gadsden case, Circuit Judge Rives helped to clarify this point. While concurring with the view of his brethren that the suit was premature, Judge Rives dissented in part, regarding the future possibility of discrimination by the private redeveloper. In his view, the redeveloper would be constitutionally prohibited from discriminating in that he was carrying out the plan of the local governmental body. Judge Rives said:

In my opinion, the plan has not been completed until the property passes out of the control of the redeveloper, and hence in disposing of property within either of the areas the redeveloper may not discriminate between purchasers on the basis of race or color. We should, I think, follow the course so well outlined by Judge Johnson... in Tate v. City of Eufaula...⁵⁰

Here was a viable rationale for Judge Johnson's unequivocal dictum. It remained to be seen whether this rationale, also offered by way of dictum—and in a dissent, to boot—would be accepted when the substantive issue of government responsibility for discrimination by a private urban renewal redeveloper was actually presented. On April 17, 1961, the Supreme Court of the United States decided Burton v. Wilmington Parking Authority.⁵¹

If the Brown case served to resolve doubt as to the meaning of "equality" in fourteenth amendment terms, the Burton case provides at least a solid basis on which the second issue under that amendment—government responsibility—can be resolved.

The Wilmington Parking Authority, an agency of the State of Delaware, erected a parking facility in downtown Wilmington. In order to secure additional revenue, the Authority leased some of the premises to private tenants. One such lease was entered into with Eagle Coffee Shoppe, Inc., for purposes of a restaurant. The

⁵⁰ 268 F.2d at 598.
Authority obligated itself to install such items as utility connections, toilets, railings, and connecting stairs, and further agreed to furnish heat. Eagle spent some $220,000 of its own to make the premises suitable for a restaurant. Some time after the restaurant opened for business, Burton, a Negro, having parked his car in the Authority's parking facility, entered the restaurant and was denied service.

The case reached the U.S. Supreme Court after the Delaware Supreme Court had held that Eagle "in the conduct of its business, is acting in a purely private capacity" and is thus insulated from the force and effect of the fourteenth amendment. The Supreme Court of the United States reversed, holding specifically that "when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself."

The Court, citing the Civil Rights Cases, stated as a basic principle, "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it." It then noted the "benefits mutually conferred" through the operation of the restaurant in a public building and observed that the Authority could have required nondiscrimination in its lease with Eagle. The Court went on:

But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be: . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

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64 365 U.S. at 726.
65 Id at 722. (Emphasis added.)
66 Id. at 723.
Mr. Justice Clark, speaking for the Court, was careful to limit his holding to the specific facts of the case presented, thus placing some doubt on the precedent value of Burton. The thrust of Burton, however, has not been so limited.

In Hampton v. City of Jacksonville, the city, after having been enjoined by a court from operating its two golf courses on a racially segregated basis, sold the courses to private parties. Both conveyances contained a reversionary clause assuring that the properties would be maintained as golf courses. In a suit to enjoin the private owners from restricting the use of the golf courses to white patrons, the court held that in view of the continuing control by the city (by means of the reversionary clause) over the use of the property, "the purchasers of the two golf courses [are] state agents, within the purview of the Fourteenth Amendment."57

Chief Judge Tuttle, writing for the Fifth Circuit, took pains to distinguish two prior decisions by the Fourth Circuit in apparent conflict with Hampton. In one, Tonkins v. City of Greensboro, he pointed out, "there was an outright sale of a swimming pool without any restriction or reversionary clause of any kind."58 In the other, Eaton v. Board of James Walker Memorial Hosp.,60 the distinguishing factor was that Burton had intervened. Judge Tuttle said, "we doubt whether the Court of Appeals for the Fourth Circuit would have decided the Hospital case as it did had it followed the Supreme Court decision [in Burton]."61

The implications of Burton and its direct descendant, Hampton, in terms of the urban renewal program, appear conclusive. In urban renewal, where the entire plan carries a public purpose and where the uses to which the private redeveloper shall put the land are dictated by the local governmental body—usually in the form of covenants running with the land—the involvement of the state and its continuing control over the land would appear to bring the redeveloper within the proscriptions of the fourteenth amendment, as it did Eagle, in Burton, and the private golf course owners, in Hampton.

56 304 F.2d 320 (5th Cir.), cert. denied, 371 U.S. 911 (1962).
57 Id. at 323.
58 276 F.2d 890 (4th Cir. 1960).
59 304 F.2d at 323.
60 261 F.2d 521 (4th Cir. 1958).
61 304 F.2d at 323.
In Smith v. Holiday Inns of America, Inc., decided on July 31, 1963, the substantive issue of the constitutionality of discrimination by private parties on urban renewal land, was tested for the first time. Plaintiff, a Negro dentist from Memphis, attempted to obtain a room in a Holiday Inn Motel, located in an urban renewal area in Nashville. He was refused a room on the ground that "it was the management's policy not to serve Negroes." In an action for a declaratory judgment and an injunction, Federal District Judge Miller held for the plaintiff. Judge Miller stated the issue in terms reminiscent of Burton and Hampton:

In view of the numerous and pervasive forms of governmental participation prior to the execution of the deeds, and the continuing governmental controls over future uses of the property which the Housing Authority has reserved in order to fulfill the public purposes for which the Project was designed and brought into being, the controlling issue is whether the State or its agencies have become, and continue to be, involved to such a significant extent and degree that in the use of the property the defendants [Holiday Inn] are bound by the Equal Protection Clause prohibiting discrimination on the grounds of race or color.

Judge Miller further detailed the extent of governmental control over the use of the property (including covenants running with the land to assure compliance with the governmental plan) and said, in summary: "Extensive involvement by the state, in many and varied forms and through various agencies, is evident not only in the conception, formulation, development, and carrying out of the overall public plan and project, but also in its continuation and perpetuation." Relying on Burton, the Court held that Holiday Inn was bound by the constitutional prohibition against discrimination.

The case is to be appealed to the United States Court of Appeals for the Sixth Circuit.

As noted above, the Holiday Inns case is the first decision on

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63 Id. at 2.
64 Id. at 7.
65 Id. at 8.
66 Two prior cases cited by defendants, Barnes v. City of Gadsden, 268 F.2d 593 (5th Cir.), cert. denied, 361 U.S. 915 (1959) and Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949), cert. denied, 339 U.S. 981 (1950), were summarily dismissed. The Court held that the authority of the two cases had been displaced by the ruling of the Supreme Court in Burton.
the substantive merits concerning the application of the fourteenth amendment to a private urban renewal redeveloper. To this observer, Judge Miller's decision appears well-founded, and in view of the decisions in Burton and Hampton, it carries a sense of inevitability. The results of the appeal to the Sixth Circuit will be eagerly awaited.

3. FHA Mortgage Insurance.—In view of the tremendous importance of the FHA mortgage insurance program to the Nation's housing supply, and particularly in view of FHA's past policy of encouraging (and later, acquiescing in) private discrimination, it is surprising that there have been only a few scattered cases challenging the constitutionality of such discrimination. In Johnson v. Levitt & Sons, Inc., 67 the only federal court decision on this question, a federal district court, in deciding that the plaintiff Negroes had no standing to sue in a federal court, refused to hold that FHA and VA (which operates a loan guarantee program substantially similar to the FHA mortgage insurance program) were under a constitutional duty to prevent discrimination in the sale of housing project properties covered by federal mortgage insurance or guarantees. The court said, however, that FHA and VA "probably" had the power to prevent such discrimination if they chose to do so, and that Congress certainly had the power. 68 In Ming v. Horgan, 69 on the other hand, a California court held that in view of the degree of governmental involvement through FHA and VA programs, the Negro plaintiff had a constitutional right not to be discriminated against in the sale by a private builder of houses aided under the FHA and VA programs. To the argument that Congress had not required nondiscrimination in the governing statutes the court replied: "If it be objected that Congress refused to . . . ordain [nondiscrimination], it must be replied that Congress could not ordain otherwise . . . ." 70 The court added epigrammatically,

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68 Id. at 116.
70 Id. at 699. In another case involving FHA and a private developer, Novick v. Levitt & Sons, Inc., 108 N.Y.S.2d 615 (Sup. Ct.), aff'd mem., 107 N.Y.S.2d 1016 (App. Div. 1951), the plaintiffs (Caucasians) sought to restrain the developer from using the state courts to evict them at the termination of their lease, because they had invited Negro children on the premises. The suit was dismissed in that although the facilities of FHA had been used, the connection with the federal government was not such that would transform Levittown from a private to a public utility. As a private enterprise,
"when one dips one's hand into the Federal Treasury, a little democracy necessarily clings to whatever is withdrawn."71

Both Johnson and Ming were pre-Burton decisions. Read in the context of their time it would appear that the Johnson decision rested on more solid ground than Ming. But Ming may well be the law today. The plaintiffs in Johnson argued that:

[T]he regulation and control exercised by the federal agencies in Levittown is so extensive, the relationship between the federal agencies and Levitt so intimate, the federal aid given in this instance so crucial to the development of a community like Levittown, and federal involvement in Levitt's determinations so great that the actions of Levitt must be deemed the acts of the federal agencies.72

The court answered this contention in conclusive terms:

All these do not, . . . in my opinion, result in making Levitt and Sons, Inc. of New York, 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 or developer of the Levittown project.73

Thus, according to the court, the burden of the Johnson plaintiffs was an extremely heavy one—to demonstrate 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. Clearly, however, that burden no longer obtains. According to the Supreme Court in Burton, the burden is to demonstrate that "to some significant extent, the State [or federal government] in any of its manifestations has been found to have become involved."74

While governmental involvement under the FHA and VA programs is different in nature, and, perhaps, lesser in degree, than that under

the court indicated, the developer was free to choose to whom he would rent his houses. But see Abstract Inv. Co. v. Hutchinson, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (Dist. Ct. App. 1962), where it was held that a purely private landlord, having no connection whatsoever with FHA or any other branch of the federal government, could not use the courts to evict a Negro month-to-month tenant after due notice of termination of such tenancy, if the reason for such eviction was the tenant's race.

71 3 RACE REL. L. REP. at 697.
73 Ibid.
74 365 U.S. at 722. See also Cooper v. Aaron, 358 U.S. 1, 4 (1958), where the Supreme Court interpreted state responsibility as necessarily following upon "state participation through any arrangement, management, funds, or property."
the urban renewal program, it may well be of sufficient significance (in post-Burton terms) to bring the federally aided builder within the constitutional proscription against discrimination.

From the above discussion of the relevant decisions, it can be seen that the law concerning the constitutional protection against housing discrimination is still largely in a state of development. In several critical areas the synthesis is far from complete. Thus, the constitutional duty of government—state and federal—to take appropriate action to assure equal housing opportunity is correspondingly uncertain. The power of government to take such action, however, even in the absence of a constitutional duty to do so, is a separate matter. Many states have responded to the problems of housing discrimination within their borders through fair housing legislation. In addition, the President, through the Executive Order on Equal Opportunity in Housing, has undertaken to meet the problem on a national basis. The remainder of this article will be devoted to an evaluation of the measures taken—their validity and their limitations—and a brief discussion of possible further action in this regard.

III. THE STATE RESPONSE

One of the most significant political phenomena of the post-World War II years has been the series of enactments of state legislation dealing with housing discrimination. Beginning in the early 1950's, the pace of such legislation has accelerated to the point where nineteen states and the Virgin Islands now maintain some form of fair housing law. These laws can be conveniently divided into two groups: Those limited to public housing, urban renewal, or both; and those which extend to the private (non-publicly assisted) market. In the first group are Idaho, Illinois, Indiana, Michigan, Montana, Rhode Island, Washington, and Wisconsin. In the second group are Alaska, California, Colorado, Connecticut, Massachusetts, Minnesota, New Hampshire, New Jersey, New
York, Oregon, Pennsylvania, and the Virgin Islands. It is noteworthy that all twelve jurisdictions that maintain broad fair housing laws extending to the private housing market have enacted them within the last six years.

A. Constitutionality of Fair Housing Laws

State fair housing laws have been the subject of considerable litigation testing their constitutionality. The laws of New York, New Jersey, Washington, and California were challenged at a time when they applied only to publicly assisted (FHA and VA) housing. In addition, the laws of Connecticut, Colorado, and Massachusetts, as applied to private (non-publicly assisted) housing, have received similar court tests. The only state fair housing law that has failed the test of constitutionality has been that of the state of Washington.

In O'Meara v. Washington State Bd. Against Discrimination, the Washington Supreme Court, in a five to four decision, held that the state law, limited to publicly assisted housing (including FHA and VA assisted housing), violated both the state and federal constitutions, as applied to the discriminatory sale of a single-family
home previously aided through FHA mortgage insurance. There were two grounds for the majority's decision. First, the court reasoned that since the defendant had purchased his house with FHA aid prior to the enactment of the state law, "it can hardly be argued that he voluntarily assumed any limitations at the time he obtained the loan." Secondly, the court ruled that a law limited to publicly assisted housing, and excluding private housing, constitutes an unreasonable classification in violation of (among other things) the equal protection clause of the Fourteenth Amendment.

Two of the five judges voting against validity wrote a concurring opinion, arguing that there were more basic objections to the law. It is significant that the four dissenters and three of the five majority judges appeared to be in accord on at least one point: A fair housing law applying equally to all housing—publicly assisted and private—would survive the test of constitutionality. Neither the O'Meara decision nor its reasoning has been followed in other jurisdictions.

B. Coverage and Enforcement

As indicated above, the various states that have seen fit to enact some form of fair housing law have differed widely in terms of coverage. Some have limited their laws to assure non-discrimination only in public housing. The courts have already given strong indication that anything less is in violation of the Constitution. Others have extended their laws to include urban renewal activities. Twelve jurisdictions, however, have attempted to cover the private housing market.

Even within the latter group there is a considerable divergence in terms of the statutory approach and the means provided for implementation. New Hampshire and the Virgin Islands take

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88 Id. at 799, 365 P.2d at 4.
89 The court said: "There is no reason to suppose that persons with FHA mortgages on their homes are more likely to discriminate against minority groups than those who have conventional mortgages or no mortgages, or those who are purchasing upon contract . . . . The classification is arbitrary and capricious and bears no reasonable relation to the evil which is sought to be eliminated." Id. at 799, 365 P.2d at 5.
90 Id. at 799-806, 365 P.2d at 6-9.
92 Idaho, Michigan, and Rhode Island.
93 See notes 44-45 supra.
94 Illinois, Indiana, Montana, Wisconsin.
the blanket approach of outlawing discrimination in wholesale terms. Little consideration, however, is given in these laws to matters of enforcement, nor do they spell out the kinds of transactions covered. Oregon takes the interesting approach of prohibiting housing discrimination by any "person engaged in the business of selling [or leasing] real property." Thus, the problem is attacked not in terms of housing units covered, but in terms of members of the housing industry. States such as New York and Massachusetts have attempted to spell out coverage in detail, in terms of the parties, kinds of transactions, and housing units covered.

All jurisdictions except New Hampshire and the Virgin Islands provide for administrative enforcement of their fair housing laws. In addition, Massachusetts has provided for court injunctions designed to keep the housing unit which is the subject of a complaint available pending a disposition of the matter.

C. Effect

Fair housing laws have had no apparent revolutionary effect, either in terms of hampering the housing industry or in bringing about truly integrated housing. The dire predictions that greeted the enactment of some of these laws have not come true, nor has the millennium of universal open occupancy been achieved. Perhaps the most significant impact thus far has resulted from the simple fact that these laws constitute an official posture against housing discrimination. As the United States Commission on Civil Rights was told, concerning the short-range effect of the New York City law, "outright discrimination has gone underground in New York City because the law and the positive declarations of our municipal

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96 For a detailed discussion of the scope and effect of the various fair housing laws see Robison, supra note 4. See also HHFA, op. cit. supra note 76.
97 For example, when the New York City law was pending, the Real Estate Board of New York ran an advertisement in the New York Times, contending: "This proposed law, we genuinely believe will do more harm to racial relationships than anything else conceivably could. The proposed law would cause many more families to leave the city. Would depress real estate values. Would affect the basis of the City's taxation and its credit. Would undo much of the success we've had in amicable living." N.Y. Times, July 29, 1957, p. 8, col. 5.
98 Washington Hearings 222, 224.
policy have taught our citizens that discrimination can have no acceptance in our daily affairs.\textsuperscript{99}

These laws are comparatively new and many have already undergone considerable amendment\textsuperscript{100} for purposes of making them more effective. Their full impact undoubtedly lies in the future, as experience is gained and the educational process of which they are a part bears fruit.

D. Grass Roots Activities

Accompanying the accelerated pace of state fair housing laws has been the rapid development of direct action groups by private citizens on the local level, to aid in the struggle for equal rights. In 1960, the National Committee Against Discrimination in Housing identified eighteen independent local groups throughout the country working to stabilize old neighborhoods or to open new ones. By early 1963, 250 such groups were identified. These fair housing groups follow no set pattern, nor are they typically tied to any national or "outside" organization. As one observer explained it: "These committees are a classic example of grassroots initiative, formed entirely by individual residents of the localities in which they operate."\textsuperscript{101}

Their activities include "Welcome Neighbor" pledge-signing campaigns to assure acceptance in the neighborhood of minority home-seekers, the operation of listing services for open housing, and neighborhood stabilization efforts to maintain existing integrated patterns. The geographic spread of these groups is impressive. They are active in such cities across the country as Boston, San Francisco, Chicago, Los Angeles, Baltimore, Cleveland, Washington, D.C., Seattle and Philadelphia. In the Greater New York City area alone more than seventy-five such groups have been identified. There has been no indication as to the existence of any fair housing group in the South.

Nineteen states have enacted fair housing laws. They are, by and large, heavily populated states in which a large percentage of the Nation's minority group members live. They are generally

\textsuperscript{99} 1959 Comm'N Report 401.

\textsuperscript{100} For example, in 1963 alone, New York, Massachusetts, New Jersey, Connecticut, California, and Alaska strengthened their fair housing laws by amendment.

\textsuperscript{101} Address by Francis Levenson, National Comm. Against Discrimination in Housing, Nationwide Conference, April 25-26, 1963.
industrial states containing many of our great urban centers. They are all in the North. It is quite apparent, therefore, at least under present conditions, that these fair housing laws, even if they prove entirely successful, are inadequate to meet the national problem of housing discrimination. The problem is not sectional in scope; it exists in virtually all of the fifty states. The response of the states has been a northern response. In not a single instance has the official response of a southern state to the existence of housing discrimination within its borders risen above the level of neutrality. Is it entirely fanciful to expect a more affirmative state response from that section of the Nation than opposition or neutrality?

To a national problem, there must be a national response. The approach through state legislation and local grassroots activities, both of which continue to flourish at least in the northern part of the country, may ultimately prove to be the most salutary. But the federal government, which for many years has supported the nation's housing structure and ignored the discriminatory use of its housing programs, has at last bestirred itself to action.

IV. THE FEDERAL RESPONSE

A. Federal Impact on Housing

In the last thirty years, housing has become a matter of primary national concern and the federal government, responding to this concern, has become increasingly involved in it by way of subsidy and overall support of the housing industry. During the early years of the New Deal, federal housing programs had as their chief objectives the alleviation of unemployment conditions and the revitalization of the Nation's credit machinery. The tools that were forged for these purposes during those early days have remained largely unchanged, but they have been put to a new purpose. Congress, in 1949, proclaimed a national housing objective: "a decent home and a suitable living environment for every American family." The agencies and programs already at hand geared themselves to accomplish this objective. President Kennedy observed several months after taking office that the achievement of this objective is a pledge to the American people. As he further observed, "we must still

102 For a concise history of federal housing programs and of the development of federal policy concerning discrimination in housing see 1961 COMM'N REPORT 9-26.

redeem this pledge." He added more pointedly a year later: "It is clear now, as it was then [in 1949] that this objective cannot be fulfilled as long as some Americans are denied equal access to the housing market because of their race or religion."

Federal housing programs are almost exclusively concerned with supplying or facilitating housing credit. Only rarely does the federal government become involved in the actual construction or sale of houses. Typically, it operates through the private housing industry or through local housing authorities to accomplish the purpose of filling the housing needs of the American people.

In addition to the programs previously discussed, the federal government also provide assistance to the Nation's home financing institutions (savings and loan institutions and commercial and mutual savings banks) in three additional ways: chartering, insurance of accounts, and maintenance of nationwide systems of low-interest credit available to these institutions.

In terms of assuring equal access to housing provided with the aid of its programs, the federal impact on housing, until recently, was hardly profound. By 1962, however, it had progressed to the point where the official policy of the federal government was to encourage (if not insist upon) open occupancy in the use of its programs. On November 20, 1962, the President issued his Executive Order on Equal Opportunity in Housing and the policy of equal housing opportunity toward which the federal government had been slowly moving, became firmly established.

B. The Executive Order on Housing

1. Validity.—The Constitution vests in the President "the executive Power." It further commands that the President "shall take care that the laws be faithfully executed." It has been observed that "the President is entitled to claim broad powers under his duty to 'take care that the laws be faithfully executed.'" Nonetheless, there are limits on his exercise of these "broad powers." Foremost

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105 Washington Hearings 12.
106 See pp. 114-15 supra.
107 For a detailed analysis of the relationship between the federal government and these lending institutions, see 1961 Comm'n Report 27-53.
among them is “the well-settled rule that an Executive order, or any other Executive action, whether by formal order or by regulation, cannot contravene an Act of Congress that is constitutional.”110

As Mr. Justice Jackson put it in his celebrated concurring opinion in the Steel Seizure case,111 the President’s “power is at its lowest ebb” when he “takes measures incompatible with the expressed or implied will of Congress.”112 By the same token, the Justice pointed out that “when the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum for it includes all that he possesses in his own right plus all that Congress can delegate.”113 There is also a middle area—“a zone of twilight”—where, according to Justice Jackson’s formulation, the absence of Congressional legislation may “enable, if not invite” independent executive action.114

In recent years, Congress has been legislatively silent on matters of nondiscrimination in housing.115 The various enactments relating to federal housing programs have contained no specific nondiscrimination requirements. There is, as previously noted, however, an overall legislative policy incorporated by Congress as our national housing objective—“a decent home and a suitable living environment for every American family.” There is no place in this language for restrictions based upon race. In addition, Congress, in a statute first enacted almost one hundred years ago, has

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112 Id. at 637.
113 Id. at 635.
114 Id. at 637.
115 It has been suggested by some that the failure of Congress to adopt proposed nondiscrimination amendments to housing legislation speaks against such action being taken by the Executive. See, e.g., Palmer, An Analysis of the Authority of the President to Issue an Executive Order Concerning Racial Integration in Federal Housing Programs, 108 Cong. Rec. 21684 (1962) (daily ed. Oct. 9, 1962). This suggestion, however, fails to appreciate the well established principle that the “rejection of legislation by Congress cannot be viewed as equivalent to the enactment of legislation of an opposite tenor.” Taylor, Actions in Equity by the U.S. to Enforce School Desegregation, 29 Geo. Wash. L. Rev. 539, 542 (1961). See Gemsco, Inc. v. Walling, 324 U.S. 244, 265 (1945); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944). In Ming v. Horgan, 3 RACE REL. L. REP. 693, 699 (Super. Ct., Sacramento County, Calif. June 23, 1958), the court stated: “If it be objected that Congress refused to . . . ordain [nondiscrimination], it must be replied that Congress could not ordain otherwise . . . .”
legislated a national policy specifically relating to equal housing opportunity.\textsuperscript{118} Thus, Congress has not been silent on this matter. Its expressions in this regard would appear to constitute at least "implied authorization" (to use Justice Jackson's term) for the President to act.

Nor does such authority derive from policies expressed by Congress alone. The Supreme Court of the United States has stated that housing discrimination is "contrary to the public policy of the United States."\textsuperscript{117} This public policy is of such force that in \textit{Hurd v. Hodge},\textsuperscript{118} the Court prohibited a lower federal court from enforcing a private discriminatory agreement on the ground, \textit{inter alia}, that such enforcement "would be violative of that policy."

The authority—if not the duty—of the President to carry out this policy, expressed both by the legislative and judicial branches of government, appears manifest. The true question, I submit, is not whether the President has sufficient legal authority to direct his executive departments and agencies to assure nondiscriminatory access to housing provided with their aid, but rather, the extent and manner in which he should, as a matter of policy, utilize the authority that is clearly his.

2. \textit{Scope and Limitations}.—The President's Executive order is a limited one. This is true in at least two senses. For one thing the principal thrust of the order, as set forth in section 101, relates almost entirely to housing and related facilities that are \textit{hereafter} (after November 20, 1962) provided with federal financial assistance.\textsuperscript{120} Thus, federally-assisted housing already built and occupied

\begin{itemize}
\item \textsuperscript{118} See note 35 \textit{supra} and accompanying text.
\item \textsuperscript{117} \textit{Hurd v. Hodge}, 334 U.S. 24, 34 (1948).
\item \textsuperscript{118} 334 U.S. 24 (1948).
\item \textsuperscript{119} Id. at 34.
\item \textsuperscript{120} Exec. Order No. 11063, 27 Fed. Reg. 11527, § 101 (1962), directs that "all action necessary and appropriate" be taken to prevent discrimination with respect to housing and related facilities that are \textit{hereafter} (after November 20, 1962) provided with federal financial assistance: \textit{"(i) owned or operated by the Federal Government" or are assisted by the federal government in any of the following ways: \"(ii) provided in whole or in part with the aid of loans, advances, grants, or contributions \textit{hereafter agreed to be made} by the Federal Government, or (iii) provided in whole or in part by loans \textit{hereafter insured, guaranteed, or otherwise secured} by the credit of the Federal Government, or (iv) provided by the development or the redevelopment of real property purchased, leased, or otherwise obtained from a State or local public agency receiving Federal financial assistance for slum clearance or urban renewal with respect to such real property under a loan or grant contract \textit{hereafter entered into} . . . ."} (Emphasis added.)
\end{itemize}
before the date of the order's issuance is outside the scope of section 101. Moreover, it is to be noted that in connection with several federal housing programs (notably public housing and urban renewal) there is a considerable time lag between the granting of federal financial aid and the ultimate construction and occupancy of the housing so aided. The critical cut-off date for purposes of section 101, however, is the date on which the financial assistance is agreed to be made, not the date on which the housing is constructed or occupied, nor even the date on which money changes hands. In the case of public housing, the cut-off point is the date on which the Annual Contributions Contract (providing for future federal subsidies to the public housing project) is executed. In the case of urban renewal, it is the date on which the Loan and Capital Grant Contract (providing for future slum clearance assistance) is executed. In both cases years will usually elapse before the housing is actually constructed and occupied. Thus, if an Annual Contributions Contract or Loan and Capital Grant Contract had been executed on November 19, 1962 (one day before issuance of the Executive order), the command of nondiscrimination would be inapplicable with respect to the housing built well after that date pursuant to the contract. Consequently, for several years to come, we may well witness the continued discriminatory sale or occupancy, not only of existing housing built or sold with pre-Executive order federal aid, but also of housing yet to be constructed.

The order, however, may prove to be sufficiently flexible to offset this disappointing prospect. Section 102, which addresses itself to housing and related facilities heretofore provided with federal financial assistance, directs the relevant departments and agencies “to use their good offices and to take other appropriate action permitted by law, including the institution of appropriate litigation, if required, to promote the abandonment of discriminatory prac-

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121 Except, of course, for housing that is federally owned or operated.
122 The Public Housing Administration requires that a nondiscrimination provision be inserted in all contracts for annual contributions which initially cover a public housing project or projects after Nov. 20, 1962. See Circular from Public Housing Commissioner Marie C. McGuire to Central Office Division and Branch Heads, Regional Directors, Local Authorities, and Housing Managers, Nov. 28, 1962.
Accompanying the olive branch of "good offices," then, is the more formidable instrument—"other appropriate action." Litigation is offered as an example of appropriateness. Thus far, it has been the olive branch aspect of the "good offices" section that has been utilized, but the "other appropriate action" instrument remains available.

In addition, the decisional law concerning the constitutionality of discrimination in federally assisted housing appears to be developing in such a way that virtually all federally aided housing, regardless of when it was built or aided, may soon come under the constitutional prohibition against discrimination. In public housing, this constitutional prohibition appears to exist already. In urban renewal, the first decision by a federal court has come down, and it has found the prohibition to apply. Furthermore, the constitutionality of discrimination by FHA or VA-aided builders and developers, after the Burton, Hampton, and Holiday Inns decisions, is in serious doubt. Thus, the Constitution may well render sections 101 and 102 indistinguishable in terms of the command of nondiscrimination.

The second shortcoming of the Executive order—one which cannot, in all probability, be cured except by amendment—relates to the limited kinds of federal assistance made subject to its provisions. While the order is addressed generally to "all departments and agencies in the executive branch of the Federal Government," its command of nondiscrimination affects only a fraction of the home financing in which federal agencies play a part. The major inadequacy is that federally supervised mortgage lending institutions are affected only to the extent that they engage in FHA and VA loans. The bulk of their home financing activities is outside the scope of the Executive order. The institutions concerned are commercial banks, mutual savings banks, and savings and loan associa-

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125 See notes 44-45 supra.
128 Exec. Order No. 11063, 27 Fed. Reg. 11527, § 101(b) (1962) directs that action be taken to prevent discrimination "in the lending practices with respect to residential property and related facilities (including land to be developed for residential use) of lending institutions insofar as such practices relate to loans hereafter insured or guaranteed by the Federal Government."
tions. They command, in the aggregate, resources of more than $400 billion. They also represent the major source of the "conventional" (non-FHA or VA) mortgage market, and it is, in fact, through them that most of the Nation's home financing is done. Virtually all of these institutions receive substantial federal benefits and are subject to federal regulation and supervision. To the extent that these federally supervised institutions engage in home financing, the President would appear to have the power (as in the case of other federally aided housing activities) to direct the federal agencies that supervise and regulate the activities of these institutions to assure that they follow nondiscriminatory policies and practices in this regard.

Although it has not been judicially determined that a duty to require such nondiscrimination exists, the power to do so rests on a firm constitutional basis.

3. Effect—Present and Future.—Having noted the various limitations of the Executive order in terms of scope and coverage, it must nonetheless be said that it is a document of profound importance. For its true significance lies not so much in its coverage, nor in the number of housing units affected, but in the splendid fact that it was issued. For the first time, that branch of our government whose responsibility it is to execute the laws has assumed a firm and nationwide posture in favor of equal housing opportunity for all. Furthermore, it possesses the means to make a significant contribution to this end.

As in the case of state fair housing laws and the grassroots activities of private citizens on the local level, truly tangible results undoubtedly lie well in the future. Although law can affect behavior, changes in attitudes—indeed, in hearts and minds—require also time and a process of education. But law is necessary, for

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220 For a discussion of the importance of federally supervised lending institutions in home financing and the extent of their supervision and regulation by federal agencies, see Sloane & Freedman, The Executive Order on Housing: The Constitutional Basis for What it Fails to Do, 9 How. L.J. 1, 5-9 (1963).

221 In June 1961, the Federal Home Loan Bank Board, of its own accord, adopted a policy opposing discrimination by the institutions under its supervision (savings and loan associations). In addition, the Board expressed the intention of implementing this policy through examination. See 1961 COMM’N REPORT 36. No information has been made public as to the effect of the Board’s policy statements, nor the success of its implementation.

222 No cases have been brought to the author’s attention bearing on this issue.

223 See Sloane & Freedman, supra note 129.
it is an essential ingredient of this educational process. Thus, the Executive Order on Housing represents a national response to a nationwide problem. Through it and other actions taken in the overall civil rights area, there is reason to hope that the Nation—North and South—can cease expending its resources and its energies on an issue that, in all morality and conscience, should not be with us.