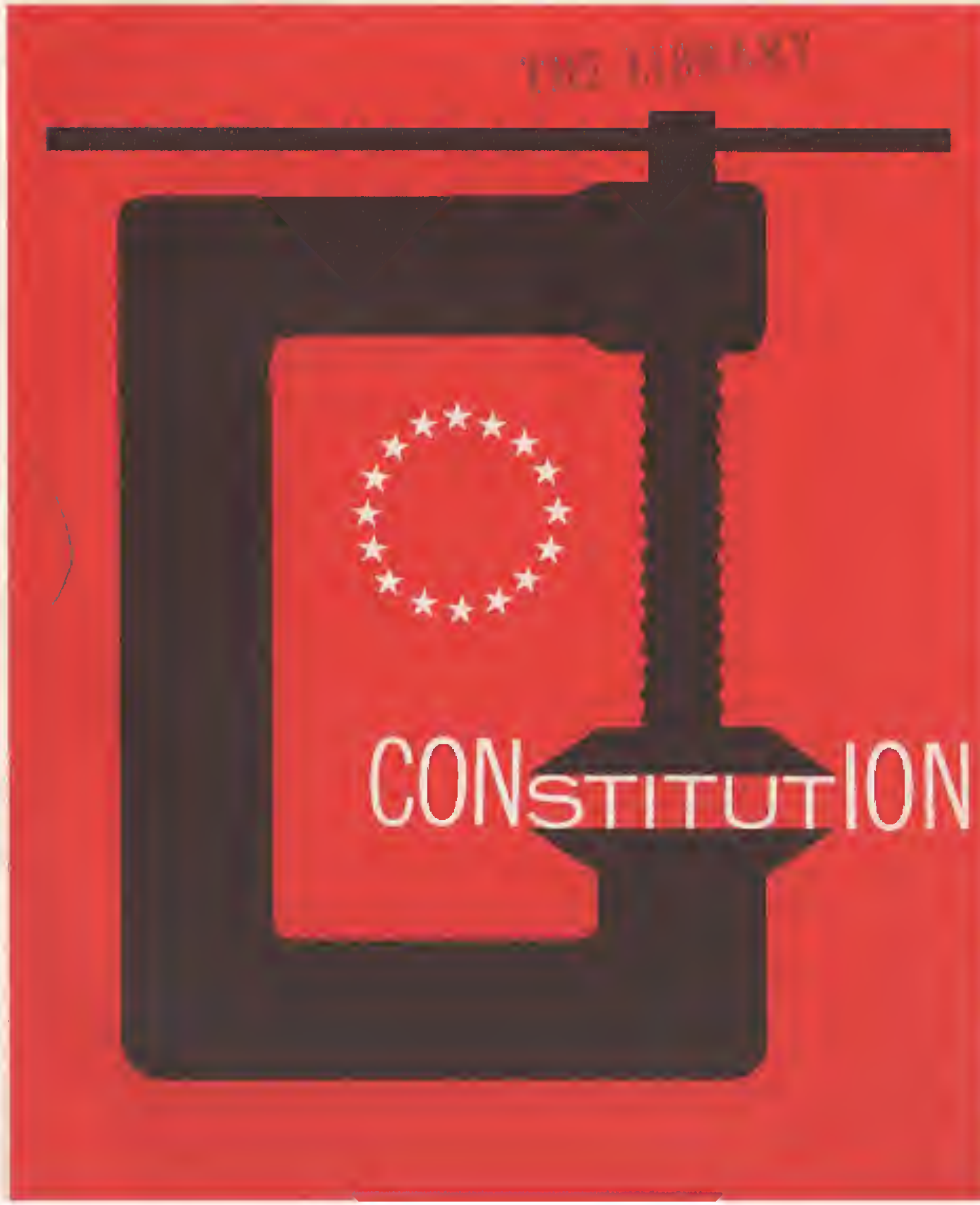
CIVIL RIGHTS AND FEDERAL POWERS

A further critical commentary upon the pending omnibus Civil Rights Bill, prepared and distributed by the Virginia Commission on Constitutional Government. ★★★★★★★★★★★★★★★★★★★★★★★★★★★★★★★★★



VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT
Travelers Building, Richmond, Virginia

PREFACE

Following the introduction in June of the Administration's omnibus Civil Rights Bill (S. 1731 and H.R. 7152), the Virginia Commission on Constitutional Government prepared and distributed a critical commentary on it, under the title of "Civil Rights and Legal Wrongs." We felt, then, and feel now, that the original bill would do grave violence to the Constitution of the United States.

On October 29, 1963, the House Judiciary Committee scrapped the original bill and reported a substitute measure instead. This substitute has been described publicly as a "watered down" or "moderate" version of the original bill. Such a description is far from the truth. The committee substitute differs so drastically from the Administration's proposals of June 20 that we have felt a further statement would be desirable.

This Commission is not concerned with race relations as such; this is not our function. We are gravely concerned, however, with State and Federal relations, and with the growing centralization of political powers in Federal hands. In offering this commentary, we have therefore not attempted to express a view on whether the bill is wise, or useful, or likely to have a salutary effect. We have asked only, "Is the bill constitutional?"

We are convinced it is not.

DAVID J. MAYS,
Chairman.

JAMES J. KILPATRICK,
Vice chairman.

THE BILL
[H.R. 7152]

Come now, and let us reason together . . .
ISAIAH 1:18.

Until the fatal moment of the President's assassination on November 22, there would have been small question in the minds of newspapermen on the "big story" of 1963. This was the Negro story, in all its many aspects: Demonstrations in New York, riots in Birmingham, troops in Alabama, marches in Washington, hoots and catcalls in Chicago. In one form or another, this story dominated the news. It dominated politics, too. As an acknowledged consequence of the spring demonstrations, President Kennedy abandoned his limited civil rights proposals of January, and in June asked for approval of the most far-reaching civil rights legislation ever proposed to the Congress.

Doubtless it was inevitable, in the highly charged atmosphere of the summer, that the bill should have lost its character as a proposed statute, and become instead a flaming symbol of reform in race relations. Critics of the bill, attempting to discuss particular sections, clauses, phrases, discovered that rational consideration was almost impossible. The bill had become, in another image, a football; the Administration's object was to lug it across a goal line; and in the passionate taking of sides that followed, few persons seemed to remember that this was *law* they were writing. With the President's death, an emotional appeal arose: The bill should be passed as a memorial to Mr. Kennedy.

We earnestly submit that this proposed statute should not be regarded as a symbol of anything; and surely history would regard it as a poor memorial to the late President for the Congress to violate the Constitution in his name. Laws ought not to be considered as symbols or as memorials; they ought to be considered as laws.

This civil rights bill, in the form in which it was reported by the House Judiciary Committee, would write into the United States Code one of the most drastic laws ever proposed in the

Congress. We suspect that relatively few persons fully understand the impact of this bill upon our federal system, or comprehend the bill's thrust into the private lives of Americans everywhere. The effect of the bill would be not to secure civil rights, but to extend Federal powers. We respectfully ask a half hour of your time, so we may sit and reason together.

TITLE I—VOTING RIGHTS

The substitute bill, following the pattern of the original, opens with a long section dealing with voting rights. It will be recalled that the Civil Rights Acts of 1957 and 1960 also were concerned with this problem. The Federal statutes thus adopted are now in effect. The Department of Justice has invoked them repeatedly in the past several years, and where Federal courts have found patterns of racial discrimination, remedial orders have been entered to good effect. To the extent that these acts of 1957 and 1960 are directed to the specific task of assuring that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," this Commission views them as valid enactments. The Constitution, through the Fifteenth Amendment, plainly vests in the Congress power to enforce this right by appropriate legislation. This Commission has no sympathy for the chicanery of local voting officials who would deny a citizen his constitutional rights by reason of race. We condemn such conduct absolutely, and note in passing that the Civil Rights Commission not only has never imputed such conduct to Virginia but has even singled out one Virginia county, the predominantly Negro Charles City County, as a model for the fair and full exercise of the franchise by Negro Americans.

At the outset of our argument, we should like to lay in place a great foundation stone: All the remainder of our argument rests upon it. It is simply this: *The Congress of the United States has no powers beyond the powers delegated to it by the Constitution of the United States.* If authority for a particular act cannot be found in the Constitution, it can be found nowhere else, for the Congress has no innate or inherent powers. And as

the Constitution explicitly tells us, all powers not delegated to the United States by the Constitution, nor prohibited by the Constitution to the States, are reserved to the States respectively, *or to the people.* This is the bedrock on which stands the whole of our federal system. In appraising this substitute civil rights bill (or any other bill in the Congress), the primary question to be determined is whether the Constitution has delegated to the Congress the power to pass such a bill. If the power is found to exist, further questions then may be directed to the merits of the pending proposal; but if the power is found not to exist, then under the oath taken by every member of Congress to support the Constitution, that is—or should be—the end of it.

In the area of voting rights, the powers delegated to the United States by the Constitution are quite limited. The Fifteenth Amendment, as we have said, delegates to the Congress a power to adopt appropriate legislation to protect the right to vote from abridgment by reason of race or color. The Nineteenth Amendment extends the same power to abridgments by reason of sex. The Twenty-third Amendment authorizes the Congress to arrange for the choice of presidential electors in the District of Columbia. In Article I of the Constitution, we find two sections that occupy attention at this point:

> The House of Representatives [and by extension, through the Seventeenth Amendment, the Senate of the United States] shall be composed of members chosen . . . by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.
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> * * *
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> The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

Attention also should be directed, in passing, to the language of Article II, dealing with the election of a President and Vice President:

> Each State shall appoint, *in such manner as the legislature thereof may direct,* a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress. [Emphasis supplied].

Now, turning back to the substitute civil rights bill, we find the first of the provisions that seem to this Commission in patent violation of the Constitution. Section 101(B) would declare that no person, acting under color of law, shall

> deny the right of any individual to vote in any Federal election because of an error or omission of such individual on any record or paper relating to any application, registration, payment of poll tax, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

The principle embodied in this murky language might well command support as appropriate *State* legislation: If a voter's error is immaterial in a State election, the same error surely ought to be regarded as immaterial in a Federal election. Under our federal system, it always has been the States' responsibility to say which errors are material and which are not; this is so, because the Constitution explicitly provides that the States are to decide which voters are qualified to vote for members of the State legislature, and these same voters thereafter qualify to vote in Federal elections. Here, in section 101(B) the Congress would assert a power to tell the States what is and what is not material information in determining the qualifications of voters.

Where in the Constitution does the Congress find the power to enact such a law? We submit that the power does not exist. Note that the section is not concerned with the rights of Negro citizens as such, or of women voters as such; if this were the case, authority might be found under the Fifteenth or Nineteenth Amendments. The thrust of this section reaches to "the right of *any individual.*" We are now moving beyond those areas of racial discrimination generally thought to be embraced in "civil rights." The bill proposes to fix voting qualifications that would

apply to everyone. And when it comes to determining whether individuals generally are qualified to vote under State law, the Congress has no power.

The next two paragraphs of the substitute civil rights bill are of even greater significance. Here the Congress would ride roughshod over the constitutional limitations earlier quoted. The first of these paragraphs would deny the States the power to employ a literacy test in fixing the qualifications for voting

> unless such test is administered to each individual wholly in writing, except where an individual requests and State law authorizes a test other than in writing, and a certified copy of the test, whether written or oral, and of the answers given by the individual is furnished to him within 25 days of the submission of his request . . .

The second paragraph has to do with civil proceedings that may be brought by the Attorney General under the Civil Rights Act of 1960 to prevent the denial of a right to vote. New language is here proposed, to say that—

> If in any such proceeding literacy is a relevant fact there shall be a rebuttable presumption that any person who has not been adjudged an incompetent and who has completed the sixth grade in a public school or in a private school accredited by any State or territory or the District of Columbia, where instruction is carried on predominantly in the English language, possesses sufficient literacy, comprehension, and intelligence to vote in any Federal election.

Here, it will be seen, the bill abandons any serious pretense of preserving the constitutional limitations imposed upon Congress by our federal system in the area of voting rights. Though these several paragraphs technically would be amendments to the Civil Rights Act of 1960, which carefully was restricted to abridgments based upon "race, color or previous condition of servitude," the new language leaves the Fifteenth Amendment far behind. No longer is the bill concerned with grievances of

the Negro in the South. The bill here thrusts toward the fixing of qualifications *for the franchise of all persons in all States.*

Notice that the bill refers to "Federal elections." The phrase is defined to include not only elections for the House and Senate, but also "for the office of President, Vice President and presidential elector." Yet as we have noted, the Constitution explicitly provides that "each State shall appoint [its presidential electors] in such manner as the legislature thereof may direct." The Congress has not one iota of power to interfere with the State legislatures in this regard. The congressional power to make or alter State regulations dealing with the "times, places, and manner of holding elections" is strictly limited, and never has been construed to affect the States' power to determine voter qualifications. Thus in *ex parte Yarbrough,* 110 U.S. 651, a unanimous court acknowledged in 1884 that the States

> define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualifications thus furnished as the qualifications of its own electors for members of Congress.

In *Guinn* v. *United States,* 238 U.S. 347, decided in 1915, the question was the validity of a combined literacy test and "grandfather clause" under the Fifteenth Amendment. In the course of its opinion, the Court said:

> No time need be spent on the question of the validity of the literacy test considered alone, since as we have seen its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision.

In *United States* v. *Classic,* 313 U.S. 299, in 1941, the Court held that primary elections are among the elections in which racial discrimination is prohibited by the Fifteenth Amendment. But in referring to the right of citizens to vote, the Court did not neglect to stipulate that the right belongs to *qualified* voters:

> The right of *qualified* voters to vote in the Congressional primary in Louisiana . . . is thus the right to participate in that choice [of a Congressman]. [Emphasis added.]

The power of the States to fix the right of franchise was reaffirmed by a unanimous Supreme Court as recently as June 8, 1959, in *Lassiter* v. *Northampton County,* 360 U.S. 45. In this case, a Negro woman challenged North Carolina's literacy test. The Court quoted with approval the language cited from the Guinn case, and went on to emphasize the "broad powers" of the States in prescribing qualifications for the franchise. There is a "wide scope" for State authority, said the Court, not only in the area of literacy tests but also in determining age, length of residence, and the like.

In the emotional name of "civil rights," the Congress must not be permitted to embark upon a bold venture into voting rights generally. The States must be left free to experiment, to respond to the expressed wishes of their people, and to exercise the powers reserved to each of them by the Constitution. This is a part of the meaning of our federal system. It is one of the safeguards by which our Constitution works.

But if the people of this nation have determined that the States must be stripped of the powers they have exercised since the Constitution came into being in 1788, then in the name of the Constitution let us proceed to make the change by amendment as in the case of the poll tax. If the time is ripe for change, let it be by law and not by desecration of the charter of our liberty.

TITLE II—INJUNCTIVE RELIEF AGAINST DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION

It is Title II of the pending civil rights bill that has aroused the greatest controversy and provoked the greatest interest across the country. This is the section that would attempt *through the force of Federal law* to desegregate every restaurant, soda fountain, lunch counter, and boarding house in the nation. Whether

such coercion truly would benefit the cause of good race relations is a question we leave to others. Our concern is the bill's attempt to reach an essentially social and political end through means that flagrantly violate the Constitution.

Let us touch again upon bedrock: *The Congress has no powers beyond the powers delegated to the United States by the Constitution.* If authority for this drastic portion of the bill may be found at all, it must be found in Article I of the Constitution, delegating a power to the Congress "to regulate commerce among the several States," or it must be found in the Fourteenth Amendment, delegating power to the Congress to adopt appropriate legislation intended to prohibit the States from depriving persons within their jurisdiction of the equal protection of the laws. No one pretends that authority can be found elsewhere.

Such authority cannot be found in either place. This section of the bill perverts both the commerce clause and the equal protection clause. It attempts falsely to regulate "commerce among the States" where there is no "commerce among the States," and it undertakes to contrive an unconstitutional "State action" out of the State's most basic protections of rights of private property. However strongly the friends of this bill may feel about a person's "right" to buy a meal here or to be lodged there, we submit that advocates of civil liberties have a higher duty to the great principle that good ends ought never to be sought by bad means. Respect for this principle, we would agree, demands some sacrifice; but it is worth the sacrifice. It is precisely the willingness to make such sacrifices that distinguishes a government of laws from a government of men.

The substitute bill reported upon October 29, 1963, strips from the Administration's original bill the wordy preambles by which some specious justification for Title II was attempted under the commerce clause and the Fourteenth Amendment. To this extent, the substitute might be thought an improvement, for the original draft of the bill contained some shameful fakery. That is gone now. But where the original bill sought to be artful, the substitute seeks rather to be arrogant. The former sought to explain and to justify; the latter proposes to bluff its way through by sheer assertion. We discern no real improvement.

Let us see what the Constitution says. The Constitution delegates to the United States the power (1) "to regulate commerce among the several States," and (2) to enact appropriate legislation intended to prohibit *the States* from denying to any person within their jurisdiction the "equal protection of the laws." These are the sections that concern us here. Title II purports to be predicated upon these two delegations of power.

Under the commerce clause, the Congress has exercised its power historically in three broad areas of regulation. It began (1) by regulating the carriers in which goods were carried among the several States. It moved then (2) to regulating the goods themselves that were moved in commerce among the several States. Finally, it got around (3) to regulating the conditions under which the goods were manufactured for commerce among the several States.

Every reader of this argument will be able to supply examples of legislation within the three established fields. The Congress (1) regulates railways, barge lines, television channels, and airlines; the Congress (2) regulates transportation of narcotics, stolen autos, obscene books, tainted meat, watered drugs, and fallen women; and the Congress (3) regulates mine safety, wages, hours, overtime, and labor relations. Though the arguments sometimes are tenuous, a plausible case may be made for Federal authority in each of these fields. This Commission does not accept all of these arguments, for many of them seem to us tortured and contrived, but we acknowledge a certain rationale behind them.

The pending Civil Rights Bill would open up an entirely new area for Federal intervention. For the first time, the Congress would undertake to impose, in the name of interstate commerce, a wholly local regulation prescribing *a requirement to serve*. This has never been attempted before. Only in the case of public service corporations, such as light and power companies, which are granted exclusive franchise and are treated separately as a matter of law, has the government undertaken to establish any presumptions of Federal law in terms of a requirement to serve.

This bill would provide that

> all persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advan-

> tages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin.

The bill would affect every place of "public accommodation" (1) "if its operations affect commerce," or (2) if discrimination or segregation therein is "supported" by State action. Specifically, the bill would apply to every inn, hotel, or other establishment which provides lodging to transient guests (with the exception of "Mrs. Murphy's" tourist home, to which we return in a moment); it would apply to every restaurant, cafeteria, lunch room, lunch counter, soda fountain or other facility principally engaged in selling food on premises; to every gasoline station; to every motion picture house, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment; and finally, to any establishment physically located within the premises of any other establishment covered by this section of the bill.

All that is required, under this title of the bill, is (1) that an establishment serves *or offers to serve* interstate travelers, or (2) that a substantial portion of the products it sells has moved in interstate commerce, or (3) that the entertainment offerings have moved in interstate commerce, or (4) that it is physically located within the premises of some other establishment "which affects commerce within the meaning of this subsection."

This Commission would urge upon Americans everywhere the most thoughtful reflection upon this section of the bill. Granted that "human rights" are involved, age-old property rights also are involved. It is easy to embrace the idea that any citizen should be free to buy; some hard discipline is required equally to defend the idea that any citizen should be free not to sell. The concept of "commerce among the States" is familiar to every student of constitutional government. We submit that this concept cannot validly embrace the Federal regulation of *the customers* in a "soda fountain" because a substantial portion of its chocolate syrup has moved in interstate commerce. Such a law would obliterate altogether the historic distinctions between interstate and intra-state commerce. These distinctions clearly are

contemplated by the Constitution of the United States. And the Constitution remains the supreme law of the land. We should obey it.

Title II of the bill does not rely upon the commerce clause alone. The requirement to serve would be imposed upon any covered establishment "if discrimination or segregation by it *is supported by State action*." Under the bill, "State action" would be defined to include discrimination or segregation

> (1) carried on under color of any law, statute, ordinance, regulation, *custom* or *usage*, or (2) required, fostered, or encouraged by action of a State or a political subdivision thereof. [Emphasis supplied.]

Oddly enough, as we shall have occasion to remark at greater length in a discussion of Title VII, neither "discrimination" nor "segregation" is defined; and as a matter of law, it does not do to say that "everyone knows" what is meant by these nouns. This is not the way in which sound law is drafted.

Now, let us attempt to get at what the bill is proposing in this section. There no longer is any question, at law, that State "laws, statutes, ordinances and regulations" requiring racial separation will be held in violation of the equal protection provisions of the Fourteenth Amendment. Our impression is that very few such statutory requirements exist anywhere: They have been repealed, or voided by court decree, or permitted to die for want of enforcement. In any event, our concern does not lie with State laws, statutes, ordinances, and regulations, purporting to require racial segregation. Such paper tigers no longer have teeth.

Of deep concern to us, however, is the pending bill's attempt to bring under its ban those acts of discrimination or segregation that are based merely upon "custom or usage." Here we move away from the historic construction of the Fourteenth Amendment, which has told us for nearly one hundred years that the Amendment does *not* apply to acts of private discrimination, however wrongful these may seem.

In the *Civil Rights Cases*, 109 U.S. 3, decided by the Supreme Court in 1883, just fifteen years after the Fourteenth Amendment became effective, the Court made this abundantly clear:

> It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the Amendment.

In the famous case of *Shelley* v. *Kraemer,* 334 U. S. 1, decided in 1948, the Court reiterated this view:

> [T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

The pending civil rights bill would uproot from our law these "firmly embedded" constructions of the Fourteenth Amendment. Under this bill, private acts of discrimination would be prohibited if they were (1) carried on under color of any custom or usage, or were (2) *"required, fostered,* or *encouraged* by action of a State or a political subdivision thereof." The three verbs, coupled with the earlier reference to discrimination "supported" by State action, demand the closest scrutiny. As we have conceded, racial discrimination no longer can be "required" by a State. But what exactly is meant by "fostered, encouraged, or supported"?

The framers of this bill know full well what these rubbery words are intended to embrace. They envision a situation in which the proprietor of a lunch counter or soda fountain refuses to serve potential customers by reason of their race. The unwanted customers refuse to leave. The proprietor summons police to arrest them for trespass. Under this bill, the action of the police and of the criminal courts *in preventing and punishing trespass upon essentially private property* is to be construed as State action "fostering, encouraging, or supporting" discrimination in an affected establishment.

In theory, this approach has a certain pretty appeal. To embrace this concept, it is necessary only that one discard 10,000 years of property rights and 150 years of government under a written Constitution. One must prepare his mind for the obliteration of freedoms that have ranked among our most cherished

rights. One must abandon the principle that governments are instituted among men to make men's rights secure, for no right is more ancient than man's right to hold, manage, and control the use of his property. If a citizen no longer may call upon the police and the courts to make that right secure, the whole concept of property rights is diminished. And we earnestly submit that no right is more important to every American citizen, regardless of race, than his right to property. None of the other familiar rights —the rights of free press, free speech, free religion, freedom to bear arms, the right of jury trial, the protection against excessive bail or cruel and unusual punishments—none of these cherished constitutional rights approaches, in terms of day-by-day living, the right to hold, manage, and control one's own property. The right is vital to poor man and rich man alike. It has surrounded the humblest citizen every hour of the day. There is no "human right" more precious. And this bill, in the name of a social objective for which many persons have sympathy, would fatefully undermine it.

It seems to us important to emphasize that the pending bill, in the end, would reach to the smallest neighborhood establishment, the most insignificant local inn. Law or no law, the large hotels and restaurants, genuinely engaged in serving interstate travelers, soon enough will react voluntarily to changing times. It is the hypothetical "Mrs. Murphy" that must be most directly affected. Yet perhaps the most glaring flaw in this bill may be discerned in its cynical and hypocritical attempt to exempt certain Mrs. Murphys from its reach. The act would not apply to *lodging* houses of five rooms or less, whether or not they served transient guests. But the act would apply to *boarding* houses no matter their size. This is preposterous. If the exemption is an attempt to get around the limitations of the commerce clause, on the theory that such small establishments do not really "affect commerce," the provision collapses under the bill's theory of the Fourteenth Amendment. If a landlady's custom of taking lodgers of one race only may be supported, fostered, or encouraged by the police and the courts, because she rents no more than five rooms, the concept of "State action" is reduced to absurdity. In this Wonderland view of the law, discrimination becomes moral and legal as to five rooms, but immoral and illegal as to six. At Mrs. Murphy's,

the landlady may decline those who sleep, but must accept all who would eat. Her rights begin at some point between the blankets and the tablecloths. Edmund Burke is authority for the maxim that men give up their liberties only under some delusion: We submit that seldom was a stranger delusion more solemnly propounded than this one.

In sum: Title II cannot be justified under the commerce clause, for it would extend the power vested in the Congress "to regulate commerce among the several States" into wholly new fields of purely local regulation. And it cannot be justified under the Fourteenth Amendment, without a fearful corruption of the most ancient principles upholding the sanctity of private property rights. The ends sought to be attained by this section of the bill must be sought, in a free society, within the structure of individual freedom. They cannot properly be sought through the machinery of Federal compulsion, supported by Federal injunctions, and in the end by the threat of Federal fines and imprisonment.

TITLE III—DESEGREGATION OF PUBLIC FACILITIES

TITLE IV—DESEGREGATION OF PUBLIC EDUCATION

Only in the interests of a decent brevity do we pass over these sections. Certain provisions of Title III give us grave concern. They would establish "public policies" that seem to us beyond the proper reach of the Congress, and they would vest in the Attorney General certain powers of ominous magnitude. Under Title IV, the Attorney General would be authorized to bring civil suits upon complaints "of the failure of a school board to achieve desegregation." The wording is opaque. As a matter of law, what is meant by "desegregation"? If the language is intended to sugggest that there is some positive requirement upon local school boards throughout the nation that they take steps to achieve racial balance in every school subject to their control, this provision of the bill could result in chaos in the field of public school administration. It ought to be kept constantly in mind that

the Supreme Court of the United States has not told local school officials what they must do; it has told them what they must not do. Under the Fourteenth Amendment, as construed by the Court, the States are under no compulsion "to achieve" anything in this field; the defendant officials are under orders merely to put an end to State-enforced segregation.

TITLE V—COMMISSION ON CIVIL RIGHTS

We pass briefly over this section also. It would establish the Commission on Civil Rights as a permanent agency of the United States Government, and it would vest in the Commission some of the familiar powers and trappings of Federal bureaucracy generally. A plausible case can be made that this section of the bill is "appropriate legislation" under the Fourteenth and more especially under the Fifteenth Amendment. Without enthusiasm, we yield the point.

TITLE VI—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

This section cannot possibly be passed over. On the surface, it purports to state a proposition so fair and reasonable that no person could raise his voice in protest against it. Under the surface, the provisions of this title would vest in the hands of a few Federal administrators unprecedented power to control the spending of billions of dollars in Federal tax funds.

Section 601 would provide that

> no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

It may be asked, What's wrong with that? As an abstract proposition, we would agree there is nothing wrong with that. But the next two sections of Title VI take this innocent abstract proposition and convert it into machinery of stunning political power.

Section 602 would apply to every Federal department or agency "which is empowered to extend Federal financial assistance to any program or activity, *by way of grant, contract or loan.*" The quoted clause is mere window dressing. The bill applies to every Federal department and agency, without exception, for every Federal agency is involved at the very least in some "contract." The language is intended to be all-embracing.

Section 602 would lay an immediate mandatory requirement upon these departments and agencies. They *shall* take action "to effectuate the provisions of Section 601." And notice the form this action may take:

> Such action may be taken by or pursuant to rule, regulation, or order of general applicability.

All that is required is that these rules, regulations and orders be "consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which action is taken." A looser rein upon bureaucratic power scarcely could be contrived.

None of the key words in this section is defined. No real limitations are placed upon the caprices of a Federal bureaucracy. There is no yardstick for measuring "discrimination." The nouns "program" and "activity" are not defined. A few moments' reflection will disclose, however, that the provisions of Title VI reach to the spending of untold billions of dollars in Federal tax revenues. In terms of military and Space contracts alone, we deal here with a life-or-death power over the economic existence of whole cities; we are talking of the survival of banks and savings and loan associations; of the well-being of farmers, laborers, homeowners, depositors, businessmen; of the livelihood of persons on relief, of disabled persons, blind persons, abandoned children. Millions of Americans unavoidably are bound up, in their daily lives, in Federal programs or activities based upon Federal grants, contracts, or loans.

This whole section of the bill is based upon an immense irrelevancy. The end that is sought has nothing to do with the means. When the Government contracts to buy a quantity of lumber, or to insure a loan on a house, its proper interest lies

simply in the lumber or the loan: How good is the lumber? How good is the loan? Integration of a sawmill, or integration of a sub-division, is a social objective unrelated to the governmental purposes sought to be served.

A careful scrutiny of this portion of the bill will reveal that no adequate safeguards are placed upon the drastic power that would be vested in Federal administrators to order "the termination of or refusal to grant or to continue assistance under such program or activity." This is the ultimate threat: To cut off a State's highway assistance, or a State's welfare funds, or a city's FHA insurance, or a region's military contracts for want of some degree of racial integration regarded as satisfactory.

All that would be required for such termination of Federal grants, loans and contracts would be that some Federal agency make "an express finding" of a failure to comply with some undefined requirement against discrimination. That suffices. No rules are laid down for due process of law, for the presentation of evidence, for hearings before impartial examiners, for any of the protections normally provided in matters of far less drastic importance. Each agency is here empowered to make "express findings," and under the feeble provisions for judicial review, such findings would be entitled to great weight in the appellate Federal courts. We do not believe that power over the disbursement of such vast sums, so intimately affecting the lives of so many families, businesses, and communities, should be so lightly reposed in non-responsible hands.

TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY

In some respects, the most drastic provisions of the pending civil rights bill are to be found in Title VII. This is a new section, not requested by President Kennedy, nor covered in hearings before the House Judiciary Committee. This portion of the bill was picked up bodily from a bill earlier reported by the House Labor Committee. We venture to suggest that over the country as a whole, not one person in ten thousand has read Title VII or pondered its enormous implications for business and labor alike.

This section opens with a declaration by the Congress of a "national policy to protect the right of the individual to be free from [racial and religious] discrimination in employment." The policy is said to rest, first, upon the commerce clause, and second, upon the power vested in the Congress to adopt necessary and proper laws "to insure the complete and full enjoyment by all persons of the rights, privileges and immunities secured and protected by the Constitution of the United States." In passing, we may cast a doubtful eye on the reference to "privileges and immunities," for in this context the words have no reference to any power delegated by the Constitution to the Congress. The phrase is mere makeweight.

In furtherance of this expressed policy, Title VII would make it an unlawful employment practice for any employer "engaged in an industry affecting commerce," provided he has 25 or more employees—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, or national origin.

The bill would extend similar provisions both to employment agencies and to labor unions. No employment agency could refer individuals for work by any racial designation. It would be made unlawful for any labor union

> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, or national origin.
>
> (2) to limit, segregate, or classify its membership in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, or national origin.

These provisions of the bill would become effective one year after the date of the bill's enactment. During the first year thereafter, the law would affect industries with 100 or more employees; during the second year, it would affect industries with 50 or more employees. The permanent effective level of 25 or more employees would be reached in the third year. The same limitations would apply to labor unions.

The bill would be administered primarily by a five-member Equal Opportunity Commission, empowered to employ "such officers, agents, attorneys, and employees as it deems necessary." The commission would be required to establish at least one office in each of the major geographical regions of the country. During its first year of operation, the commission would have an authorized appropriation of $2,500,000. Ten million dollars would be authorized for the second year. The commission's principal duties would be to investigate charges of racial discrimination in employment, to seek to alleviate discrimination by conference and conciliation, to bring civil proceedings in Federal District Courts against offending employers or unions, and to obtain injunctions against the defendants. Violation of such injunctions would be punishable as contempt of court, through fines and imprisonment.

This section of the bill bristles with other formidable provisions, authorizing agents of the Equal Employment Opportunity Commission to enter upon industrial property, have access to business and union records, question employees, and investigate "such facts, conditions, practices, or matters as may be appropriate." Employers and unions alike would be required to keep such records of their operations, in terms of race, as the commission might prescribe. Particular emphasis would be laid upon prohibiting discrimination in apprenticeship and training programs. Finally, the commission would be given authority, in conformity with provisions of the Administrative Procedure Act, to adopt regulations having the force and effect of law "to carry out the provisions of this title."

We submit that never in the history of the Congress has legislation been seriously proposed more drastic in its effects than Title VII of this bill. Once these provisions became fully operative, three years after enactment, every business or industry in the United States, having as many as 25 employees, would have to think racially in every aspect of its employment practices. It would be unlawful for them to discriminate among applicants for employment, unlawful to fail or to refuse to hire by reason of race, and unlawful to limit or to classify employees in any way that might "tend to deprive" any individual of an employment opportunity because of his race.

Consider, if you will, the impact of this bill upon a small manufacturing plant employing 25 or 30 persons totally. The payroll includes the proprietor, two secretarial workers, a bookkeeper, a shop foreman, a dozen production workers, several salesmen, a shipping clerk, and a couple of custodial employees. Roughly 188,000 such employers, having 20 to 49 workers, were known to the Social Security Administration five years ago (we draw the figure from Table 650 of the 1963 *Statistical Abstract*). Another 115,000 employers then reported more than 50 employees. Beyond question, the number of such employers is far greater now.

How are they to manage their business? What is to constitute evidence of "discrimination"? If such an employer does business in a community having 15 per cent Negro population, is a prima facie assumption to be established that he is discriminating if fewer than 15 per cent of his employees are Negro? If so, then 15 per cent of which employees? The production men? The salesmen? The janitors? In many fine restaurants in the South, the historic practice is to hire Negro waiters only. Such a practice would become "unlawful" under this bill.

We may ask what becomes of established seniority under this bill. We may wonder at the manifest difficulties involved in the subjective judgments that permeate employment practices everywhere: Which of two prospective cooks is the better cook? Which prospective salesmen are most likely to bring in sales? Which writers are the more creative? Not all the differences among men may be measured in standard aptitude tests. If the

Negro cook is hired instead of the white, or the white instead of the Negro, are the employer's tastebuds to be put on trial? And what becomes of business management during the incessant harassment of investigations, reports, hearings, lawsuits?

These observations barely touch upon the practical problems of administration that will fly from this Pandora's box. Unlike the Department of Labor, the proposed five-member commission would not be dealing with specific hours worked or specific wages paid. Some of the evidence presented in hearings before the National Labor Relations Board is tenuous and bizarre, but at least the "unfair labor practices" now condemned in interstate commerce are susceptible to familiar courtroom procedures. The problems of finding "discrimination," and the correction of "discrimination," carry the practice of law into a wild blue yonder.

The assertion by the Congress of a "national policy" against discrimination is in itself a meaningless statement. A national policy in favor of motherhood would carry about as much weight. What counts, of course, is the law enacted to support such a policy. Such law is subject to the same bedrock test we have talked about here: *Has the power been delegated to the Congress by the Constitution to enact such a law as Title VII?* We cannot perceive such authority. No "right to be free from discrimination" is anywhere enunciated in the Constitution, save in the provisions of the Fourteenth Amendment prohibiting the States, as States, from denying equal protection of the laws. Nothing in previous interpretations of the commerce clause would suggest that private employment practices in this regard "affect commerce" within the meaning of congressional regulation. This is sumptuary law. Surely the history of government should teach us that such law, deeply resented, widely evaded, serves a nation not well, but ill.

TITLE VIII—REGISTRATION AND VOTING STATISTICS

This is a short section, directing the Secretary of Commerce to compile certain statistics on voting by race "in such geographic

areas as may be recommended by the Commission on Civil Rights." The purpose is to lay the groundwork under Section 2 of the Fourteenth Amendment for an effort to reduce the number of seats in Congress now held by Southern States. This commission proposes to meet such an assault when it comes.

* * *

The bill contains two final sections. Title IX would grant a special privilege to civil rights litigants granted to no other litigants in American jurisprudence. The effect of this provision would be to hamstring the State courts by guaranteeing civil rights litigants an opportunity for prolonged delay in certain cases. Title X is a miscellaneous section, authorizing the appropriation of "such sums as are necessary to carry out the provisions of this act," and asserting the usual principle of statutory severability.

That is the package. The bill is 49 pages long. It has not been possible in this commentary to touch upon a hundred points that might be covered in a more extended paper. Six members of the House Judiciary Committee, in their able minority report, termed the bill "revolutionary." In the very deepest meanings of the word, reaching to the changes this law would work in our federal system and in the immense accretions of power here contrived, it is a fair word for a very bad bill.

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● The powers delegated by the proposed Constitution to the Federal government are few and defined. Those which are to remain with the States are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

—JAMES MADISON,
Federalist No. 45.

★ ★ ★

● The traditions and habits of centuries were not intended to be overthrown when that Amendment [the Fourteenth] was passed.

—JUSTICE OLIVER WENDELL HOLMES,

Interstate Consolidated Street Railway v. *Massachusetts,*
207 U.S. 79, 87.

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