

Promises to Keep

*African-Americans
and the Constitutional Order,
1776 to the Present*

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The Civil Rights Movement and American Law, 1950–1969

Rosa Parks, a forty-two-year-old Montgomery, Alabama seamstress, was tired when she left work on Thursday, December 1, 1955. Her neck and shoulders aching after a long day at her sewing machine, she wearily boarded the Cleveland Avenue bus for the long trip home. Like the other black riders, Mrs. Parks moved toward the back of the bus, taking a seat in the first row of the colored section. As more riders boarded at succeeding stops, black passengers stood in the aisles, even though a few seats in the white section remained vacant. By the third stop the last “white” seat was taken leaving one white man standing at the front of the bus. In keeping with company policy (which was to expand the white section row by row as it became filled), the driver brusquely ordered Parks and the other three blacks in her row to surrender their seats. The others complied, but Parks refused to move—even when the driver stopped the bus and threatened to have her arrested for violating the city’s bus segregation ordinance. Prolonging the trip home was the last thing Parks wanted, yet she deeply resented the bus company’s humiliating policies and had resolved that she would never surrender her seat to a white. Several minutes later, police officers responded to the driver’s call for help, arrested Mrs. Parks, and took her to the police station, where she was booked and placed in the city jail. Although the United States Supreme Court had declared segregation unconstitutional one-and-a-half years earlier, Montgomery officials, like most other southern whites, remained determined to preserve Jim Crow.

Mrs. Parks’s arrest set off feverish activity in the Montgomery black

community. E. D. Nixon, who had worked closely with her in the local NAACP chapter, quickly learned of her arrest, posted bond to secure her release, and drove her home. Later that evening, Nixon conferred with Jo Ann Robinson, a black English professor at Alabama State College and the president of the Women's Political Caucus (WPC). The two had long wished to organize a bus boycott and agreed that Parks's arrest offered the perfect opportunity to mobilize Montgomery blacks. Mrs. Robinson and her colleagues in the WPC immediately went to work. They spent the night in the college mimeographing room cranking out thousands of copies of a flier urging blacks to protest Parks's arrest by staying off the buses on Monday. As bleary-eyed WPC members began to distribute the handbills the next morning, Nixon was on the phone, summoning Montgomery's black leaders to assemble that evening to discuss the boycott. Those who attended agreed to endorse a boycott and to convene a mass meeting at the Holt Street Baptist Church on Monday evening to determine whether there was sufficient community support to continue the protest.

On Monday, December 5, the movement developed greater momentum. The first day of the boycott was almost 100 percent effective, despite the fact that most blacks were dependent on city buses for transportation. That afternoon, black leaders met again, endorsing a series of resolutions drafted by Nixon. Acknowledging white intransigence, they demanded, not integration, but a more humane form of segregation. They proposed that blacks could seat themselves from the rear to the front, whites from the front to the rear, and no black, once seated, would be ordered to surrender his or her seat. They also formed a new organization, the Montgomery Improvement Association (MIA), to coordinate the protest and to negotiate with city officials. The group then chose as its president a twenty-six-year-old minister who had recently come to the pulpit of the prestigious Dexter Avenue Baptist Church after completing his Ph.D. in theology at Boston University. His name was Martin Luther King, Jr.

That evening, a huge crowd packed the Holt Street Church, spilling out into the surrounding churchyard. King electrified the throng with a largely improvised speech. In rolling cadences, he assured his listeners that they were not wrong to resist "being trampled over by the iron feet of oppression." "If we are wrong—the Supreme Court of this nation is wrong," he insisted. ". . . If we are wrong—Jesus of Nazareth was merely a utopian dreamer who never came down to earth! If we are

wrong—justice is a lie.” He urged the audience to employ nonviolent protest to call attention to the evils of segregation and to compel whites to do justice. “First and foremost we are American citizens,” he explained. “We are not here advocating violence. . . . The only weapon that we have in our hands this evening is the weapon of protest,” and “the great glory of American democracy is the right to protest for right.” Moved by King’s call for action, the audience roared its approval and agreed to continue the boycott until city officials capitulated.¹

In the days following Monday’s meeting, MIA leaders organized a vast car pool that transported thousands of boycotters, while thousands of other blacks braved the elements and walked to jobs, schools, and stores. Even though the boycott drove the bus company into the red, city officials remained resolute, refusing to accept the MIA’s moderate demands. In the face of white intransigence, blacks continued to walk, and MIA leaders filed a lawsuit in federal district court that transformed the nature of their demands. No longer seeking merely to modify segregation, they asked that Jim Crow bus service be declared unconstitutional. As the boycott dragged on, the homes of MIA leaders (beginning with King’s) were bombed; black leaders (including King) and car pool drivers were arrested on trumped up speeding charges; and more than 100 boycott leaders were charged with violating an obscure state law outlawing boycotts “without just cause or legal excuse.”² White retaliation only steeled blacks’ resolve, and throughout the spring, summer, and fall of 1956 working class blacks continued the boycott, seemingly oblivious to the great personal inconvenience involved. Although white officials were equally resolute, blacks’ persistence ultimately paid off. In June the U.S. district court declared Montgomery’s bus segregation statute unconstitutional. When city attorneys appealed to the Supreme Court, the justices unanimously sustained the lower court’s ruling.³ Just before dawn on December 21, 1956, one year and twenty days after Rosa Parks refused to give up her seat, King and other boycott leaders ceremoniously boarded a city bus and took seats near the front as photographers snapped photos and reporters scribbled notes.

The triumph the journalists reported was a portent of the following turbulent decade. Court decisions and statutes attacking the South’s caste system would meet massive, determined, ingenious, and often violent resistance from whites determined to preserve their power and privilege. In the face of such resistance, court decisions and laws would not, by themselves, guarantee equality. Blacks would have to mobilize and stand

up to whites, challenging the day-to-day operation of the caste system if they were to breathe life into pronouncements from Washington and force cautious national leaders to make civil rights a priority. Yet the success of the Montgomery movement also suggested that community mobilization, while vital, had its limits. After all, it was not until the Supreme Court spoke that city officials capitulated. Neither law nor mass protest was, by itself, sufficient to end the caste system; only a combination of the two would accomplish that monumental task and bring the long deferred promise of equality closer to realization. Martin Luther King, Jr. understood that as he donned the mantle of leadership that December evening in 1955. "Not only are we using the tools of persuasion, but we've got to use tools of coercion," he prophetically told the audience at the Holt Street Baptist Church. "Not only is this thing a process of education, but it is also a process of legislation."⁴

Challenge and Response, 1950-1960

In part, the rumblings of protest in Montgomery were triggered by the successful culmination of the NAACP's long legal battle against segregation. Since the 1930s Thurgood Marshall and his colleagues on the NAACP legal staff had crisscrossed the South, arguing scores of cases designed to chip away at segregation. Their campaign had produced a long string of important victories and had brought the Supreme Court to the verge of abandoning the separate but equal doctrine of *Plessy v. Ferguson*. Encouraged by the trend of the Court's decisions and by growing support for black equality, Marshall and his staff sought to push the Court further. During 1951, attorneys from the NAACP Legal Defense Fund, representing black parents in Delaware, Virginia, South Carolina, Kansas, and the District of Columbia who were seeking to have their children admitted to white schools, directly challenged the constitutionality of segregated education. *Sweatt v. Painter*'s emphasis on the intangible aspects of education, they argued, meant that segregated schools were necessarily unequal. They cited social science research that demonstrated that segregation had a devastating effect on black children, destroying their self-esteem and their incentive to learn. Therefore, even if physical facilities were equal, the black lawyers contended, segregated schools denied blacks equality.

In 1952 the Supreme Court agreed to hear appeals in these cases,

consolidating the four state cases under the title of the Kansas case, *Brown v. Board of Education of Topeka*, while addressing the somewhat different constitutional issues posed by the District of Columbia appeal in a separate case, *Bolling v. Sharpe*.⁵ In doing so, the justices set the stage for a full-scale debate over the constitutionality of segregated education, a debate that forced often anguished consideration of the nature of judicial power. All of the justices except Kentuckian Stanley Reed found segregation distasteful and did not wish to reaffirm *Plessy*. Nevertheless, most had reservations about the wisdom of declaring segregation unconstitutional. They realized that most white southerners passionately supported segregation and would bitterly resist its demise. Southern opposition, they feared, might lead to an endless stream of cases that would drag the Court into day-to-day management of local school districts. And if the Court's mandate were not backed by the president and the Congress, it might prove unenforceable, severely damaging the Court's prestige.

Several of the justices, notably Felix Frankfurter and Robert Jackson, also worried that the Court might exceed the proper limits of its authority if it reversed *Plessy*. They had long criticized conservative judges for using the general language of the due process clause to declare unconstitutional state laws regulating business and to write their personal preference for laissez faire economic policy into the law. In a democracy, they firmly believed, elected officials should make public policy, and judges should invoke the power of judicial review only when legislation clearly violated the Constitution. This philosophy of judicial self-restraint made the *Brown* case a difficult one for Frankfurter and Jackson. Both found racial segregation repugnant; however, the Fourteenth Amendment's equal protection clause did not expressly prohibit it, and there was little evidence that the framers of the Fourteenth Amendment had intended it to do so. In addition, Congress (which had express authority to enforce the equal protection clause) had supported segregated schools in the District of Columbia since the 1860s, suggesting that it did not view segregation as unconstitutional. Furthermore, for fifty-six years the Supreme Court had maintained that segregation and equal protection were not incompatible. Consequently, Frankfurter and Jackson worried that in striking down segregation they would be writing their personal preferences into law and usurping authority best left to legislators—the very things for which they had taken conservatives to task. Although both men would overcome these doubts and Frankfurter

would help unify the Court against segregation, in early 1953 neither was firmly committed to reversing *Plessy*.

The Court was thus in disarray as the justices considered *Brown* during the spring of 1953. Justice Reed was committed to upholding segregation, Chief Justice Vinson leaned in that direction, and several other members of the Court were undecided. Because even the staunchest foes of segregation believed that a divided Court would encourage southern resistance, the justices agreed to postpone a decision. In June 1953 they ordered the case held over for reargument, creating a one-year delay that would profoundly affect the outcome. In early September, barely one month before the Court reconvened, Chief Justice Vinson died, and President Dwight Eisenhower appointed Governor Earl Warren of California as his successor. While Vinson had been noncommittal, Warren firmly believed that segregation denigrated blacks and therefore was a clear violation of equal protection. He used his considerable political skills and powers of persuasion to win over doubters and forged unanimous support for a decision declaring segregated schools unconstitutional.

While Warren had no doubt about the proper outcome, he was determined to avoid "precipitous action that would inflame [the white South] more than necessary."⁶ This concern rather than abstract legal principles shaped his opinion in the *Brown* case, which was announced on May 17, 1954. To avoid antagonizing whites, Warren refrained from attacking segregation as part of a caste system that was designed to preserve white supremacy and that was on its face a denial of equal protection. Rather than suggesting that *Plessy* had been wrongly decided and that southerners had supported a blatantly unconstitutional institution for more than a half century, he contended that recent developments had made segregation incompatible with the guarantees of equal protection. In recent years public education had become far more important than it had been when the Fourteenth Amendment had been adopted or when *Plessy* had been decided. In fact, it now was "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." Citing recent social science research, Warren argued that segregation denied black children the full benefit of education and thus put them at a considerable disadvantage. "To separate them from others of similar age and qualifications," he explained, "solely because of their race generates a

feeling of inferiority . . . that may affect their hearts and minds in a way unlikely ever to be undone." Therefore, the chief justice concluded, "separate educational facilities are inherently unequal."⁷

An important question remained: how would legal principle be translated into practice? If segregation were unconstitutional, black children presumably had the right to attend nonsegregated schools immediately. Warren and his colleagues were not prepared to issue such an order, however, fearing that if they moved too fast they would unduly antagonize white southerners. They believed that democracy ultimately relied on consent rather than force and were determined to win at least grudging acceptance from southern whites. Massive resistance, they feared, would produce chaos, block compliance with the decision, humiliate the court, and threaten the rule of law. Consequently, Warren's opinion postponed a decision on implementation until the Court's next term, reassuring whites that the Court would not act rashly.

One year later, in May 1955, the Court issued another decision (commonly known as "*Brown II*"), addressing the thorny problem of enforcement. Eager to conciliate whites, Warren's *Brown II* opinion emphasized that implementation would be gradual and would take into account local conditions. He ordered the cases returned to the courts in which they had been tried, giving judges who were familiar with each local situation responsibility for enforcement. While the lower courts were to require school officials to "make a prompt and reasonable start" toward compliance, they were to consider the complex problems involved and give local officials adequate time to deal with them. Judges were to implement *Brown* "with all deliberate speed," Warren concluded. In their desire to defuse white resistance the justices placed responsibility for implementing *Brown* on the lower federal courts but gave them vague and even contradictory instructions (what was "deliberate speed"?) as to how they should proceed.⁸

Hope that the white South would accept *Brown* quickly faded. Although many school districts in the border states grudgingly acquiesced, whites in the Deep South bitterly denounced the decision as an unconstitutional act of judicial tyranny and vowed to resist. In 1955, Mississippi whites organized the Citizens' Council to hold the line against integration. It quickly spread across the Deep South, claiming 250,000 members by 1956 and orchestrating a campaign of economic reprisals against blacks and whites who dared to challenge segregation. Some whites demanded sterner measures. The months following *Brown* wit-

nessed a resurgence of the Ku Klux Klan and a wave of bombings, murders, beatings, and cross burnings aimed at intimidating black activists. In Mississippi three prominent black leaders were murdered during the summer and fall of 1955—one, Lemar Smith, shot to death in broad daylight on the grounds of the Pike County Courthouse. In 1956 mobs prevented black students from enrolling in the University of Alabama and in the public schools of Mansfield, Texas, and Clinton, Tennessee. Nor did the violence quickly subside. In 1957, as Birmingham blacks began efforts to desegregate the public schools, a black man was savagely beaten and castrated by a group of whites who told him, "This is what will happen if Negroes try to integrate the schools."⁹

With the South aflame, state legislatures quickly crafted measures designed to preserve segregation. Several states passed laws prohibiting school officials from obeying court orders to integrate. Others ordered integrated schools closed and offered to pay private school tuition to children in communities that closed their public schools. Less bombastic, but more effective, were the pupil placement laws enacted by most southern states. These measures purported to meet *Brown's* requirement for gradual desegregation by establishing ostensibly nonracial criteria for assignment of new students to schools and by allowing students already enrolled to apply for transfers to any school in their district. When assigning new students to schools or considering applications for transfers, school officials were directed to consider such things as the academic preparation, moral character, and home environment of the pupil, "the effect of admission of the pupil upon the academic progress of other students, . . . [and] the possibility of . . . disorder among pupils or others."¹⁰ These criteria were flexible enough to permit white officials to assign black children to all-black schools and to deny the applications of those black children who had the temerity to request transfers to white schools. Moreover, the laws established a procedural maze that students must follow to challenge school officials' decisions. The latter requirement was particularly important. Because federal law required persons to exhaust all administrative remedies before suing in federal courts, time-consuming and complicated local procedures were guaranteed to keep all but the most determined blacks out of court.

In the face of determined white resistance, proponents of desegregation received little support or encouragement from the president or the Congress, fulfilling the worst fears of the justices. President Eisenhower worked behind the scenes to promote desegregation in the District of

Columbia and ultimately intervened in Little Rock when he was confronted with a direct challenge to federal supremacy; however, he had (as an aide noted) a "basic insensitivity" toward blacks' aspirations, feared that vigorous support for desegregation would reverse the progress that the Republican party had made in attracting white southerners, and believed that the *Brown* decision was ill-advised.¹¹ Consequently, the president refused to endorse *Brown* publicly thus declining to use his enormous popularity to reconcile white southerners to the decision. On more than one occasion when he was asked about desegregation, Ike responded that moral beliefs could be changed only by education, not by law. Congress did no more to assist desegregation. Although liberals pressed for adoption of legislation authorizing the Justice Department to bring desegregation suits, an alliance of southerners and northern conservatives blocked its passage.

With the political branches inert, enforcement of *Brown* depended on lawsuits initiated by blacks in hundreds of communities across the South, guaranteeing that widespread desegregation would be a long time coming. Blacks—especially those who lived in rural areas and small towns—invited economic and physical retaliation if they challenged segregation; not surprisingly, most were reluctant to press their rights under *Brown*. In 1955, for example, blacks in five Mississippi towns petitioned for school desegregation, but intense pressure from the Citizens' Council deterred them from going to court. Besides, lawsuits were too expensive for most black communities to undertake. Even when local attorneys volunteered their services or the Legal Defense Fund sent counsel to manage a case, it cost plaintiffs approximately \$15,000 (the equivalent of \$50,000 in 1990 dollars) to take a desegregation case through the federal courts. Consequently, as late as 1961 few southern school districts in the Deep South had faced school desegregation suits.

Despite the intimidation and expense, southern blacks did bring several dozen school cases before the federal courts during the late 1950s. United States district courts, presided over by a single judge, initially heard most of these. If a plaintiff requested an injunction barring enforcement of an allegedly unconstitutional state law (as was sometimes done in desegregation suits) a special three-judge district court would hear the case instead. Although parties could appeal the decisions of three-judge district panels directly to the Supreme Court, appeals from the decisions of single-judge courts went first to the courts of appeals for consideration. The nation was divided into ten circuits, each supervised

by an appeals court consisting of between three and nine judges depending on the circuit's caseload. Five of these tribunals had jurisdiction over at least one southern state (the third circuit included Delaware; the fourth Virginia, the Carolinas, Maryland, and West Virginia; the fifth, Florida, Georgia, Alabama, Mississippi, Louisiana, and Texas; the sixth, Kentucky and Tennessee; and the eighth, Arkansas) and therefore played an important role in supervising desegregation.

The judges who presided over these courts and who enjoyed enormous discretion in overseeing school desegregation under *Brown II* were white southerners. Most had grown up in a society that viewed segregation as necessary and moved in professional and social circles in which segregation was staunchly defended. A few—most notably John Minor Wisdom, John R. Brown, Elbert Tuttle, and Richard Rives of the United States Court of Appeals for the Fifth Circuit, and District Judges Frank Johnson of Alabama and J. Skelly Wright of Louisiana—defied friends and associates to become forceful advocates of integration. Most southern federal judges, however, found integration distasteful and believed that the Supreme Court had decided *Brown* incorrectly. Although only a minority of these men let their personal prejudices prevail over their constitutional duty, most were more inclined to emphasize deliberation than speed in implementing *Brown*. Indeed, given the absence of support from the president and the Congress and the vague instructions dispensed by the Supreme Court, little more could have been expected of them.

Where federal judges' devotion to segregation was stronger than their commitment to carry out their oaths of office, they sometimes effectively blocked desegregation. Consider the tortuous pace of litigation in Dallas. Although black plaintiffs initiated a desegregation suit in September 1955, District Judge William Atwell, an outspoken segregationist, refused to act for two years. After the Fifth Circuit Court of Appeals had twice overruled Atwell's dilatory tactics, it issued a third opinion, in September 1957, ordering the school board to develop a desegregation plan. When no plan was forthcoming two years later, the plaintiffs went back to the district court to compel action. Atwell had retired, but another segregationist, T. Whitfield Davidson, had taken charge of the case. After admonishing blacks to recognize "that the white man has a right to maintain his racial integrity and it can't be done so easily in integrated schools," he directed school officials to "study this question and perhaps take further action, maybe an election." The court of appeals again intervened, directing the school board to come up with a desegregation

plan and to do it soon. When the board complied and presented Davidson with a proposal to admit a few black first graders to white schools in the fall of 1961 and to integrate another grade each year until the process was completed in 1973, Davidson rejected it as too radical. "The Dallas Plan," he explained, "would lead . . . to an amalgamation of the races."¹² Once again the court of appeals reversed Davidson's decision. It suggested that the school board's twelve-year plan was too slow and would have to be accelerated, but it ordered the board to begin on schedule. In 1961, after five long and costly years of litigation, token desegregation began in Dallas.

Even when district judges did not engage in outright obstruction, progress was slow, as judges' response to the pupil placement laws suggest. Appeals courts struck down Virginia and Louisiana placement statutes that were part of legislative packages prohibiting integration; however, they took a more charitable view of those laws that did not openly announce their opposition to integration. Until the early 1960s, the United States Court of Appeals for the Fourth Circuit held that these measures were adequate steps toward desegregation and ruled that blacks could not sue until they had exhausted the administrative appeals established by the acts. The fifth circuit court was somewhat more skeptical of the pupil placement laws. In 1959, a federal district judge in Florida refused to order Dade County (Miami) school officials to present a desegregation plan, ruling that the Florida pupil placement law constituted such a plan. The fifth circuit judges quickly reversed his decision, explaining that such statutes were insufficient if districts remained segregated. Although the court did not order desegregation, Miami school officials soon began token integration in order to forestall action by the federal courts.

As the Miami case suggests, even when federal judges acted in good faith, the result was generally only token integration. After four years of litigation, District Judge J. Skelly Wright finally imposed a grade-a-year desegregation plan on New Orleans in 1960. Although Wright stood firm in the face of defiance by state officials, the plan brought only five black first graders into white schools when it was implemented in November 1960. The story was the same in Atlanta. In late 1959, under pressure from Judge Frank Hooper, the school board adopted a plan admitting a few black seniors to previously all-white schools and moving down one grade each year thereafter. Although interference from the state legislature blocked implementation in the fall of 1960, the plan took effect the

following year, and by September 1962, forty-four black high school students were enrolled in ten previously all-white schools.

As federal judges inched toward implementation of *Brown*, the Supreme Court remained aloof. It routinely affirmed without comment or refused to review lower court rulings that accepted the validity of pupil placement statutes, grade-a-year plans, and token desegregation. The Court's cautiousness is understandable. Justice Frankfurter remained a force to be reckoned with until his death in 1962. While he had played an important role in unifying the justices in *Brown* and remained an opponent of segregation, Frankfurter continued to believe that the Court's power should operate in a narrow compass and was reluctant to become deeply involved in the management of southern schools. Moreover, he and most of his colleagues believed that white resistance and the absence of support for desegregation from the president and Congress dictated caution. Although the lower federal courts were moving slowly, they were nonetheless translating *Brown's* call for desegregation into reality, demonstrating to southerners that the world would not end if blacks went to school with whites, and establishing a beachhead in the fight for integration.

The Court's only major statement on school desegregation came in response to the Little Rock crisis of 1957–1958. Under a desegregation plan approved by a federal court, nine blacks were scheduled to enter Little Rock's Central High School in September 1957. On September 3, the first day of classes, Governor Orville Faubus deployed units of the Arkansas National Guard to block admission of the black students. District Judge Ronald Davies, who continued to supervise the city's school desegregation plan, promptly directed school officials to go ahead with desegregation. On September 4, as several hundred hostile onlookers taunted and spat on the black students, National Guardsmen turned the nine youths away from the school. Intent on preventing Faubus from nullifying federal law, Davies issued an injunction on September 20, ordering the governor and members of the National Guard to desist from further interference with the court-approved desegregation plan. On Monday, September 23, when the nine blacks arrived at Central High, the National Guard was gone, but a mob had taken its place. School officials succeeded in getting the black children past the angry whites and into the school, but integration proved short-lived. Fearing a violent assault on the school, they evacuated the blacks later that day.

Confronted with open violation of federal law and a clear threat to

federal supremacy, President Eisenhower finally acted. Invoking his authority to use the military to remove obstructions to national authority, he sent units of the 101st Airborne Division to Little Rock, called the National Guard into federal service, and deployed these forces at Central High to quell resistance to the federal court's desegregation order. Although Eisenhower still declined to endorse *Brown*, he was nonetheless determined to quash open defiance of federal authority. Refusal to intervene, he informed Senator Richard Russell of Georgia, "would be tantamount to acquiescence in anarchy and the dissolution of the union."¹³ On September 24, protected by 1,000 troops, the nine black students entered the high school. In the face of continued white harassment and an epic war of wills, eight of them would remain for the entire school year, escorted at all times by the federal troops assigned to guarantee their safety.

In February 1958, with troops still present at Central High and tensions running high, the school board asked that the black children be withdrawn and desegregation postponed until September 1960. Although the district judge accepted this proposal, a unanimous Supreme Court reversed him, ruling in *Cooper v. Aaron* (1958) that the black children be allowed to remain. In an unprecedented step, all nine justices signed the Court's opinion, emphasizing their commitment to *Brown* and their determination to stay the course on school desegregation. "The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us," they explained. "Our constitutional ideal of equal justice under law is thus made living truth." The Court also declared its unwillingness to tolerate evasion: "[T]he constitutional rights of children . . . declared . . . in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'"¹⁴

The Court's strong language neither called for a quickened pace of desegregation nor signaled an end to tokenism. Nevertheless, it was an important step. Reinforced as it was by Eisenhower's action, it warned white southerners that the federal government would not capitulate. The Court reinforced this message, albeit in a less highly publicized fashion, in a series of cases dealing with other civil rights issues. Between 1955 and 1958, prodded by Thurgood Marshall and other Legal Defense Fund

attorneys, the Court extended its ban against segregation from education to other public facilities, including parks, buses, golf courses, and beaches.¹⁵ Although in the absence of congressional legislation it did not extend the ban to privately owned businesses, the Court did expand the definition of what constituted a public facility. Thus in 1961, it ruled that a privately owned restaurant that operated in a city parking garage was so closely tied to the city that discrimination by it was tantamount to state action and therefore impermissible under the Fourteenth Amendment.¹⁶ Moreover, it shielded the NAACP from harassment by southern officials, barring them from compelling the organization to reveal the names of its members. Such disclosure, the Court ruled, would subject NAACP members to retaliation and thus inhibit their First Amendment right to freedom of expression and association.¹⁷

Even Congress took action, cautious though it was, to promote civil rights. With northern voters closely divided between the two major parties in the crucial industrial states, northern Democrats were intent on holding the black vote while Republicans were determined to woo blacks back to the party of Lincoln. Consequently, there was strong bipartisan support for civil rights legislation on Capitol Hill as 1956, an election year, dawned. Eager to place the resources of the Justice Department behind plaintiffs in school desegregation cases, liberals urged that the attorney general be given authority to seek injunctions against all civil rights violations. Their efforts were defeated by a coalition of conservative Republicans and southern and western Democrats. The bill that eventually emerged from Congress, the Civil Rights Act of 1957, was a weak measure concerned principally with voting rights. It elevated the civil rights section of the Justice Department to a division directed by an assistant attorney general for civil rights, provided for appointment of a Commission on Civil Rights to investigate voting discrimination, made it a federal offense to interfere with the right to vote, and authorized the attorney general to prosecute voting rights cases.

Dissatisfied with this half-hearted measure, liberals pressed for bolder action. They demanded a comprehensive civil rights bill that would authorize the Department of Health, Education, and Welfare (HEW) to draft school desegregation plans for communities that refused to do so, empower the attorney general to seek injunctions in all cases involving civil rights violations, and prohibit employment discrimination. Liberals also wanted to put teeth in federal voting rights law. They urged that the Commission on Civil Rights be empowered to investigate complaints of

voting discrimination and to dispatch federal officials to register voters in any county in which it discovered evidence of discrimination.

Once again liberals went down to defeat as Congress enacted another mild bill. Like the 1957 law, the Civil Rights Act of 1960 dealt mainly with voting. It required state officials to preserve records of federal elections for at least two years, thus preventing destruction of incriminating records before complaints of fraud could be investigated. It also strengthened the hand of federal judges in voting cases. If they determined that local voter registration officers were guilty of discrimination, judges could dispatch federal referees to supervise registration. Although this involved the time-consuming process of litigation, it offered a potentially effective tool to combat southern officials' often ingenious manipulation of registration requirements to prevent blacks from voting. Finally, the act established criminal penalties for anyone who obstructed federal court orders (a provision aimed at nullificationists like Orville Faubus) or who crossed state lines to engage in bombings or arson.

The Pace of Change Quickens, 1960-1965

If the slow pace of change symbolized by the tepid civil rights bills of 1957 and 1960 frustrated most black leaders, it spurred black college students to challenge the status quo. They had grown up on a steady diet of Cold War rhetoric that extolled the openness of American society and proclaimed the United States the leader of the free world in its struggle against Communist dictatorship. *Brown* (handed down when they were in their early teens) led them to believe that the nation was finally prepared to make good its professions of democracy and equality by breaking down the color line. The slow pace of change in the late 1950s, however, undermined these assumptions, giving birth to a new militance that shook the foundations of the old order and hastened the pace of change.

On February 1, 1960, four neatly dressed black freshmen at North Carolina Agricultural and Technical College in Greensboro, walked into the local Woolworth store, sat down at its segregated lunch counter, and politely asked to be served. When the waitress refused, the young men remained at the counter, studying quietly, until the store closed. During the weeks that followed, more than 1,000 students joined these 4 pioneers, as the sit-ins spread to other Greensboro lunch counters, and local blacks closed ranks with the students, picketing and boycotting

Woolworth and other variety stores that discriminated against blacks. The Greensboro sit-ins sparked a direct action campaign that spread across the South like wildfire. In dozens of towns and cities, in every southern state, black youths defied segregation at lunch counters, restaurants, motels, swimming pools, beaches, libraries, and theaters and staged massive demonstrations. Using the tactics of nonviolent resistance, the demonstrators politely asserted their moral right to equal treatment and turned the other cheek when whites verbally and physically abused them. Thousands of demonstrators were arrested and chose jail over bail (or payment of fines) in order to highlight the repressiveness of the caste system. In Orangeburg, South Carolina, for example, police filled the city and county jails and incarcerated 300 more black student protesters in a hastily improvised stockade.

The sit-ins marked a turning point in the civil rights struggle. In response to the new militance, more than 200 cities began desegregation of public accommodations. Although most towns and small cities in the Deep South refused to budge, students boasted that in six months they had moved the South closer to integration than the federal courts had done in the six years following *Brown*. Even more important, the students demonstrated a new sense of urgency, indicating that they were tired of gradualism and were no longer willing to wait until judges and politicians decided the time was ripe for them to enjoy their rights. "[W]e cannot tolerate, in a nation professing democracy and among people professing Christianity, the discriminatory conditions under which the Negro is living today," Atlanta sit-in leaders proclaimed. "We do not intend to wait placidly for those rights which are already legally and morally ours to be meted out to us one at a time."¹⁸

This impatience and militance was not a flash in the pan. It was institutionalized in April 1960, when black student leaders formed the Student Non-Violent Coordinating Committee (SNCC, pronounced "snick") to perpetuate and expand the direct action campaign. Just as the young radicals were influenced by older civil rights leaders, their actions affected established civil rights groups. The Congress of Racial Equality (CORE), a small northern interracial group that had brought nonviolent resistance to the civil rights effort in the 1940s, sent representatives to the conference that gave birth to SNCC and advised the young activists on the tactics of direct action. CORE was itself invigorated by the success of the students and, in the year following the sit-ins, grew steadily and expanded its activities into the South. Martin Luther King's philosophy

and tactics of nonviolent resistance, developed during the Montgomery bus boycott, had inspired the students, and King himself had participated in the sit-ins. At the same time, the students reaffirmed the potential of direct action for King and his colleagues in the Southern Christian Leadership Conference (SCLC), prompting them to place greater emphasis on civil disobedience.

When John F. Kennedy came to the White House in January 1961, black leaders were becoming increasingly bold and impatient. Despite his youthful vigor and personal dislike for segregation, the new president spoke the language of gradualism and moved cautiously on civil rights. Blacks had played a crucial role in his razor thin victory in 1960 and would be taken care of. But they would have to settle for more federal appointments (Thurgood Marshall, for example, was appointed to the U.S. Court of Appeals for the Second Circuit in 1961), vigorous enforcement of the voting rights laws, and an economic policy that promised higher wages to all working-class Americans. Kennedy refused to ask Congress for comprehensive civil rights legislation. It had no chance of passing, he believed, and, besides, it carried too high a price tag. A bold civil rights initiative on Capitol Hill would cost support among southern whites, who would be crucial to a 1964 reelection bid, and alienate southern Democrats in Congress, whose backing on other issues was crucial.

The administration also resisted federal intervention in the South to protect civil rights activists. Attorney General Robert Kennedy resolutely maintained that the federal system gave the states responsibility for general law enforcement; the federal government had neither the constitutional authority nor the personnel to take responsibility for maintaining law and order. He pointed out that the Supreme Court's venerable state action interpretation of the Fourteenth Amendment denied the government authority to prosecute private individuals who used violence and intimidation to deny blacks equal rights and due process. The attorney general also pleaded that the federal government did not possess a police force capable of preserving the peace. Both the United States Marshals Service and the Federal Bureau of Investigation had far too few officers to take responsibility for general law enforcement in the South. Moreover, he maintained that the creation of a national police force was a threat to liberty because it could afford a ruthless president the means to suppress dissent.

Although these objections had some merit, they also "accord[ed]

nicely with the political needs of the Kennedy brothers," according to historian Michal Belknap.¹⁹ The state action restriction made successful prosecution of anti-civil rights violence problematical, but the Supreme Court might be convinced to reverse itself, as it had in *Brown*. While there were too few federal officers to police the South, there were enough of them to handle selected cases, and a small number of prosecutions might deter future violence. Federal intervention was neither impossible nor a potential threat to liberty. It was, however, calculated to raise the hackles of white southerners and therefore politically risky.

The administration's response to the freedom rides of 1961 illustrate its reluctance to intervene in the South. In December 1960, the Supreme Court ruled that the Interstate Commerce Act forbade discrimination in bus terminals serving interstate carriers.²⁰ The following May, CORE and SNCC activists left Washington, D.C. for a bus trip into the Deep South to test compliance with the Court's decision. On May 14, in Anniston and Birmingham and on May 20, in Montgomery, three separate groups of freedom riders were attacked and beaten by mobs of Alabama whites wielding chains, pipes, and baseball bats. Although local police refused to protect the protesters, Robert Kennedy resisted calls for federal intervention, choosing to work behind the scenes to defuse the crisis. He pressed the Interstate Commerce Commission to issue regulations compelling obedience to the Court's decision. (In November, the commission barred interstate carriers from using segregated terminals, forcing most southern terminals to capitulate.) He also prodded state officials to preserve order, repeatedly urging Governor John Patterson of Alabama to protect the riders and sending aides to Montgomery to confer with Patterson and to monitor the situation.

The Justice Department intervened only when state officials proved beyond all doubt that they would not act. On the evening of May 21—after a week of pleading and cajoling—the attorney general finally gave up on state officials when Montgomery police refused to respond as a mob threatened to overrun a church where Martin Luther King, Jr. spoke at a ceremony honoring the freedom riders. Fearing bloodshed, department officials deployed 100 U.S. marshals to hold the angry crowd at bay. Yet this limited intervention was the exception. As the freedom riders moved into Mississippi, the attorney general, fearing a repetition of events in Alabama, negotiated a deal with state officials. The state agreed to guarantee the safety of the riders on the condition that the Justice Department would not interfere with local prosecution of persons

who violated state segregation laws. The riders were protected from Mississippi mobs, but by the end of the summer more than 300 of them were in Mississippi jails. During the ensuing months, when mobs threatened freedom riders in three other cities, the attorney general urged state officials to preserve order but rejected calls for federal intervention.

While unsympathetic to direct action, the Kennedys were not oblivious to the demands of blacks. They believed that equality could be achieved gradually and with a minimum of confrontation if barriers to black voting were destroyed. Like Reconstruction-era Republicans, they contended that once blacks possessed the ballot, state officials would become responsive to their demands for justice. Thus the rights of blacks could be protected without major alterations in the federal system and without the need for politically embarrassing federal confrontations with state officials. In the bargain, most new black voters would join the Democratic party, helping reverse the steady erosion of Democratic strength that had occurred during the post-World War II years.

During late 1961 and 1962, administration officials urged civil rights activists to refocus their efforts from direct action to voter registration. Justice Department officials participated in a series of meetings that led to the creation of the Voter Education Project, a two-and-one-half year campaign to register southern blacks which was financed by \$870,000 from northern foundations. SCLC, CORE, and NAACP all readily agreed to participate. SNCC leaders were suspicious of being coopted by the administration but ultimately agreed to go along. The voter registration campaign, they believed, could help raise the consciousness of rural southern blacks and encourage them to challenge white supremacy.

As the campaign began, the Justice Department itself devoted greater attention to disfranchisement. Especially in the rural black belt, whites had developed a variety of techniques to keep blacks politically inactive. Although the literacy rate among blacks had increased dramatically, local officials manipulated literacy tests to deny literate blacks the right to vote. Often going beyond the letter of state law, they asked blacks difficult questions about the Constitution and state and local government—questions they never put to whites. In addition, officials developed complex voter registration forms and refused to register blacks (but not whites) who made even slight errors in completing them. Registration boards also foiled blacks' efforts to register by meeting infrequently and irregularly and by not publicizing the hours they were open for business. Officials were only part of the problem. In small towns and rural areas

blacks who attempted to register might be fired, turned off the land they farmed, denied credit by local merchants, or worse. In this climate, many blacks did not attempt to register. In 1962, only one-fourth of voting age southern blacks were registered; in Mississippi the figure stood at five percent and in Alabama, thirteen percent.

Intent on rooting out these practices, Robert Kennedy dramatically increased the size of the Civil Rights Division staff and directed it to begin wholesale prosecution of voting rights cases. The primary weapons in the campaign were the provisions of the Civil Rights Act of 1957 permitting the Justice Department to seek injunctions against attempting to prevent citizens from registering or voting. Government lawyers won injunctions barring officials from refusing to register blacks who made minor mistakes on their applications and from imposing more stringent literacy tests on blacks than on whites. They also challenged private intimidation of blacks by securing injunctions against economic coercion directed at blacks who challenged discriminatory registration practices or who were active in voter registration drives.

The campaign's results were mixed. In tandem with the Voter Education Project, Justice Department litigation helped increase the proportion of southern black adults who were registered from twenty-six to forty percent between 1962 and 1964. Nevertheless, department officials had to proceed county by county, conducting in-depth investigations to establish proof of discrimination or economic coercion. The process was time-consuming and limited the number of localities in which cases could be initiated. Furthermore, the injunctions department lawyers won ordered persons to stop a certain type of discriminatory or coercive behavior. Local whites were generally resourceful enough to devise other means to hinder black registration, forcing department lawyers to conduct further investigations and return to court. By the end of 1964, only seven percent of the black adults residing in the 46 counties in which the government had initiated suits were registered, and black registration was below ten percent in 100 southern counties.

The administration's hope that voter registration would cool off tensions produced by the sit-ins and the freedom rides, was soon disappointed. SNCC took its voter registration campaign into black belt counties in Georgia and Mississippi, where whites viewed black political empowerment as a dire threat. Predictably, whites launched a campaign of terror designed to drive out SNCC workers and to intimidate local blacks. Although state officials failed to punish the perpetrators of this

violence, the Justice Department refused to make arrests or initiate prosecutions, clinging to its position that responsibility for law enforcement lay primarily with state officials. Only in October 1962, when Mississippi officials and an armed mob prevented enforcement of a court order admitting James Meredith to the University of Mississippi, did the administration act forcefully to curb racist violence. As Eisenhower had done in the Little Rock crisis, Kennedy dispatched U.S. marshals and troops to the campus to break resistance to federal authority and to enable Meredith to enroll.

Events in Birmingham during the spring of 1963, however, finally forced President Kennedy to abandon his cautious approach to civil rights. During the winter of 1962–1963, Martin Luther King, Jr. and his closest advisors devised a bold plan for massive demonstrations in Birmingham, the toughest, most segregated city in the South. King knew that he would meet bitter resistance from the police commissioner, Eugene “Bull” Connor, a hard-line segregationist with a short fuse. Connor, who had earned his spurs during the 1930s in a brutal campaign to keep the unions out of Birmingham’s steel mills, ruled the city with an iron fist and could be counted on to respond with violence. Consequently, the city offered King an opportunity to focus the nation’s attention on the brutality of segregation, to precipitate a crisis that would force the administration off dead-center, and to win a stunning victory that would reinvigorate a sagging civil rights movement. Wyatt Tee Walker, the SCLC staff member who drafted the Birmingham plan, called it “Project C”—for confrontation.

The Birmingham campaign began in early April with a boycott of downtown merchants, sit-ins at segregated lunch counters, and marches on city hall. Connor responded by arresting protesters and obtaining an injunction against further demonstrations, but the protest continued and grew larger after King himself was arrested on April 12. During the remainder of the month, white leaders refused to negotiate, demonstrations and arrests continued, and police brutality increased. Having won the attention of the administration and the national media, King turned up the pressure. During the first week in May, he brought thousands of black children into the demonstrations, filling the city’s jail and pushing Connor over the edge. The police commissioner responded to the “children’s crusade” by unleashing club swinging patrolmen, snarling police dogs, and high pressure water hoses on peaceful demonstrators

and bystanders, cracking their heads, breaking their bones, tearing their flesh, and bruising their bodies.

King's strategy worked. As pictures of police brutality appeared on the front pages of newspapers and on TV screens in living rooms across the nation, civil rights again took centerstage, and northern support for national action mounted. The president sent Justice Department mediators to Birmingham to arrange a settlement and pressured the city's business elite to compromise. Negotiations began promptly and were successfully concluded on May 10, when King announced that whites had agreed to desegregate lunch counters, drinking fountains, rest rooms, and department store fitting rooms and had pledged to implement a nondiscriminatory hiring program in the city's industries. The victory over Bull Connor emboldened blacks across the South, touching off more than 800 boycotts and demonstrations in 200 southern towns and cities during the summer of 1963. Birmingham kindled a new assertiveness among blacks, leading them to reject tokenism and to demand fundamental change—and to demand it without delay.

Birmingham also forced John Kennedy to make civil rights a top priority—something that no president since Ulysses Grant had done. He realized that blacks were no longer willing to wait patiently and feared that unless sweeping changes were initiated, racial confrontation would tear the nation apart. Indeed, while King continued to espouse non-violence, there were indications that blacks were growing tired of turning the other cheek. On May 11, in response to a wave of racist bombings, Birmingham blacks took to the streets, pelting police with rocks and bottles and burning several white-owned businesses located in the ghetto. Elsewhere black writer James Baldwin wrote of *The Fire Next Time*, and Malcom X, the militant black nationalist who appeared on television more than any other black leader in 1963, insisted that "the day of nonviolent resistance is over."²¹ Faced with a growing racial crisis and sensing greater support for action, Kennedy went on national television on June 11 to announce that he was sending sweeping civil rights legislation to Congress. He appealed to principle, arguing that the nation confronted a moral issue "as old as the scriptures and . . . as clear as the American Constitution." But he also warned that the issue could no longer be avoided. "The events in Birmingham and elsewhere," he suggested, meant that legislation was essential "if we are to move this problem from the streets to the courts."²²

Having committed himself, the president moved quickly. He submitted legislation strengthening the voting rights laws, authorizing the attorney general to file school desegregation suits, empowering the president to end federal financial assistance to discriminatory state and local programs, and banning discrimination in places of public accommodation such as motels, restaurants, theaters, retail stores, and gas stations. Kennedy could count on support from many labor leaders, the major national Jewish organizations, and liberal groups such as Americans for Democratic Action as well as the votes of northern Democrats, but he needed support from Republican leaders to offset opposition by southern Democrats and to overcome the inevitable Senate filibuster. The president worked hard to line up Republican support, and when liberal Democrats jeopardized his efforts by attempting to broaden the bill, he intervened, convincing liberals to keep amendments to a minimum and preserving bipartisan support. When an assassin's bullet felled Kennedy in November 1963, his successor, Lyndon Johnson, made the civil rights bill his top legislative priority. Strengthening the bipartisan alliance Kennedy had forged, President Johnson secured congressional approval for the bill in June 1964.

The Civil Rights Act of 1964 translated most of the objectives of the early civil rights movement into law, harnessing the principle of equal rights to the engine of federal power. At the heart of the bill lay the goal of banishing segregation from American life, thereby realizing the principle announced ten years earlier in *Brown*. Titles III and IV authorized the attorney general to institute lawsuits challenging discrimination in public schools and other facilities "owned, operated, or managed by or on behalf of any State or subdivision thereof," thus removing from private individuals the entire burden of desegregation. Title VI used the power of the purse to attack discrimination. It directed federal agencies to adopt regulations banning discrimination in all programs receiving federal funds and to cut the flow of federal dollars if they failed to comply. With many state and local governments becoming increasingly dependent on federal largesse, especially to finance public education, this offered a potent weapon against discrimination.

The law also set its sights on discrimination in privately owned and operated businesses that served the public. Relying on an expanded commerce power that was the legacy of the New Deal, Title II prohibited discrimination on account of race, color, religion, or national origin by restaurants, hotels, motels, gas stations, theaters, stadiums, concert

halls, or other places of entertainment that "affected" interstate commerce. Although victims of discrimination might institute lawsuits and recover monetary damages, the act's sponsors realized that private citizens might be reluctant to sue. Consequently, they authorized the attorney general to initiate suits against businesses that violated the act.

Finally, the law attacked employment discrimination, a target of black leaders and congressional liberals since the 1930s. Title VII prohibited discrimination on account of race, color, religion, national origin, or sex by employers and labor unions with more than twenty-five employees or members and by employment agencies. Liberals pressed for establishment of an administrative agency to investigate complaints of employment discrimination and to issue cease-and-desist orders against violators. This afforded a far more effective remedy, they argued, than going to court. In order to maintain Republican support, however, the bill's sponsors were forced to accept watered down enforcement provisions. They established a five-member Equal Employment Opportunity Commission (EEOC) and authorized it to investigate complaints of employment discrimination. When it found evidence of discrimination, the commission was to persuade the employer or union to end its discriminatory practices. If conciliation failed, the victim of discrimination could go to court or the commission could ask the attorney general to initiate a lawsuit.

With the Civil Rights Act on the books, President Johnson turned to the problem of disfranchisement. As the administration consulted civil rights leaders and prepared new legislation, events in Selma, Alabama lent greater urgency to the issue. Despite several years of voter registration efforts and Justice Department lawsuits, only two percent of the black adults in Dallas County were registered. In January and February 1965, SNCC and SCLC staged massive demonstrations at the county courthouse in Selma to focus attention to the problem. Local officials responded by arresting more than 3,000 protesters. On March 7, as 500 protesters defied a state court injunction and began a march from Selma to the state capitol in Montgomery, some sixty miles away, state police and a mounted posse led by the sheriff moved against them. As the panic-stricken demonstrators fled, they were trampled by horsemen, shocked with electric cattle prods, and beaten with clubs and chains. That evening the television networks interrupted programs—ABC was airing *Judgment at Nuremberg*—to show the attack, and the next morning Selma was page-one news throughout the country. Lyndon Johnson seized the

moment, promptly submitting a sweeping voting rights bill to Congress and making a nationally televised speech to demand speedy passage. Lawmakers quickly fell into line, completing action on the bill in less than five months.

Cutting through state registration requirements and procedures that purported to be racially neutral, the Voting Rights Act of 1965 established formulas to identify and effective means to end discrimination. The act set its sights on the literacy test, historically the most notorious disfranchising device. In any state or county where fewer than fifty percent of the adults were registered to vote, it automatically suspended the operation of any "test or devise" that was a prerequisite for voting. Congress also provided a remedy for other types of discrimination. In counties in which there was substantial evidence of racial discrimination—as indicated by complaints filed by twenty residents or a voting discrimination suit instituted by the attorney general—federal examiners would be appointed to register voters. Moreover, lawmakers attempted to prevent southern officials from developing new techniques of discrimination. States and localities covered by the act would be required to obtain clearance from the attorney general or a three-judge district court in Washington, D.C. before implementing any new voting requirements or procedures.

After years of temporizing, the president and Congress had finally taken the lead in civil rights, drawing on the deep reservoirs of federal power to promote equality. The Supreme Court quickly gave its blessing. In two 1964 cases, *Heart of Atlanta Motel v. United States* and *Katzbach v. McClung*, the Court considered the Civil Rights Act's ban on discrimination by motels and restaurants. Drawing on a long line of cases that gave Congress broad authority to regulate businesses affecting interstate commerce, the Court unanimously upheld the statute. The *McClung* case emphasized the breadth of Congress's authority. The business involved, Ollie's Barbeque, was a small Birmingham restaurant that served a local clientele. The Court noted that Ollie's came within the scope of the law because it was open to interstate customers and because part of the food it sold had moved in interstate commerce. Moreover, it ruled that Congress had "a rational basis" for believing that such businesses affected interstate commerce and for subjecting them to regulation. They not only purchased food and other goods from interstate suppliers, but their discriminatory policies made interstate travel by blacks difficult.²³

Concurring opinions by Justices William Douglas and Arthur Goldberg offered a more direct way of upholding the act. Congress's authority to enforce the equal protection clause, they maintained, authorized it to ban discrimination in businesses open to the public. Their analysis abandoned the hoary principle, established in the *Civil Rights Cases* of 1883, that the amendment authorized Congress to ban discriminatory action by states but not by private individuals or businesses. Although the majority rejected this approach, its willingness to accept a prohibition against discrimination by private businesses enacted under the commerce power gave Congress the authority to reach most private discrimination and suggested the demise of the old distinction between state and private action that had long crippled effective civil rights legislation.

Two years later, in *South Carolina v. Katzenbach* (1966), the Court gave its blessing to the Voting Rights Act. Chief Justice Warren emphasized that in enforcing the Fifteenth Amendment, Congress was free to choose the means best suited to eliminate racial discrimination in voting. Surveying the provisions adopted by Congress—suspension of literacy tests, appointment of federal examiners, and judicial supervision of changes in voting procedures—he concluded that they were clearly designed to meet problems that Congress had encountered in its long struggle to overcome state and local officials' ingenious and persistent efforts to deny blacks the right to vote. Consequently, while the act represented an unprecedented exercise of federal power, it was clearly within Congress's authority to adopt legislation necessary and proper to enforce the Fifteenth Amendment.²⁴

The Court not only sustained the Voting Rights Act but went where Congress had feared to tread, striking down the poll tax. This device was a far less serious obstacle to black voting than discriminatory administration of literacy tests; by 1960, all but four states—Virginia, Alabama, Mississippi, and Texas—had repealed it. Nevertheless, in those states it deterred the very poor from voting and had a disproportionate effect on blacks. Anti-poll tax legislation had long received strong support on Capitol Hill, and in 1962 Congress had passed the Twenty-fourth Amendment (which was ratified two years later) banning the poll tax as a requirement for voting in *federal* elections. Although liberals made a strong effort to extend the prohibition to state elections in the Voting Rights Act, doubts about the constitutionality of a poll tax repealer torpedoed their effort. Opponents argued that, unlike literacy tests, which were administered in a discriminatory fashion, the poll tax was

applied to whites and blacks alike and therefore did not violate the Fifteenth Amendment. One year later, however, the Supreme Court gave opponents of the poll tax the outright victory that had eluded them for decades. In *Harper v. Virginia Board of Elections* (1966), the Court ruled the tax unconstitutional, resting its decision on the Fourteenth rather than the Fifteenth Amendment. Writing for the majority, Justice Douglas asserted that the poll tax discriminated against the poor and thus violated the amendment's guarantee of equal protection.²⁵

The Court also expanded the government's authority to punish anti-civil rights violence. By early 1965, growing northern outrage over violence against civil rights workers convinced the Justice Department to initiate prosecutions in several highly publicized cases of racist violence. Because the federal system gave states primary responsibility for criminal justice, crimes such as assault and murder were state, not federal, offenses. There were, however, federal statutes that punished persons who deprived others of their civil rights, and it was these which federal prosecutors employed. Principally, Justice Department officials relied on Title 18, section 241 of the *United States Code*, which punished persons who conspired to use force or intimidation to prevent anyone from exercising rights secured by the Constitution or laws of the United States.

Although the law appeared adequate to the task, many questioned whether it could be used to prosecute perpetrators of racist violence. First, many lawyers and scholars doubted whether the rights protected by section 241 included Fourteenth Amendment rights of equal protection and due process. In 1951, the Court had divided 4-4 on the question, with Justice Frankfurter maintaining that rights mentioned in section 241 were limited to those created by the Constitution (such as the right to vote in *federal* elections), not rights that government was prohibited from violating (such as the Fourteenth Amendment rights of equal protection and due process and the rights mentioned in the Bill of Rights). Otherwise, Frankfurter believed, the federal government would have carte blanche to usurp law enforcement activities that properly belonged to the states. Although Frankfurter's opinion did not represent a majority and was not binding, it cast a shadow over the government's authority to prosecute perpetrators of racist violence on grounds that they denied their victims equal protection or due process.²⁶ In addition, many observers believed that the state action rule precluded prosecution of private citizens under section 241. Given the long line of Supreme Court rulings holding that the Fourteenth Amendment authorized Congress to provide

remedies against state, but not private, denials of equal protection and due process, it was doubtful whether section 241 could be employed against private citizens, even if it were interpreted to protect Fourteenth Amendment rights. Although the Court had whittled away at the state action limitation on the Fourteenth Amendment, it had not abandoned it, as *Heart of Atlanta Motel* and *McClung* had suggested.

Two 1966 rulings swept these doubts aside. In *United States v. Price*, which involved the prosecution of eighteen whites implicated in the cold-blooded murder of three civil rights workers in Neshoba County, Mississippi, the Court ruled that Fourteenth Amendment rights were protected by section 241. Justice Abe Fortas pointed out that section 241 had its origins in Reconstruction legislation (the 1870 Enforcement Act) designed to enforce the guarantees of the Fourteenth and Fifteenth Amendments. "In this context," he concluded, "it is hardly conceivable that Congress intended [it] . . . to apply only to a narrow and relatively unimportant category of rights." Unquestionably, its "purpose and effect" was "to reach assaults upon rights under the entire Constitution . . . not merely under part of it."²⁷

In a companion case, *United States v. Guest*, the Supreme Court considered whether Congress could punish private as well as state interference with Fourteenth Amendment rights. Although Justice Potter Stewart's opinion for the Court ducked the issue, concurring opinions by Justices William Brennan and Tom Clark (which were joined by six justices) were much bolder. Challenging the limitations imposed on Congress in the *Civil Rights Cases* (1883), Justice Brennan insisted that Congress enjoyed broad power to enforce the amendment's guarantees. "Section 5 [of the Fourteenth Amendment] authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by . . . that Amendment," he wrote, "and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection." In short, Brennan concluded, Congress is authorized "to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens."²⁸

The *Price* and *Guest* cases did not bury the state action rule. They suggested that Congress's authority to enforce the amendment (expressly conferred in section 5) gave it broad discretion to strike at state and private action. Yet the justices did not claim such authority for themselves. When the Court enforced the equal protection clause (rather than

congressional legislation enforcing it), it would still require the presence of state action in order to prohibit discrimination. Nevertheless, *Guest* and *Price* gave the government the authority necessary to prosecute anti-civil rights violence. In 1966 and 1967 government lawyers used the newly reinvigorated section 241 to win convictions in several of the most outrageous instances of violence against blacks and civil rights workers. More important, the decisions unshackled Congress from the state action theory, offering it greater authority to protect individual rights. Lawmakers promptly took advantage of the Court's largesse. In Title I of the Civil Rights Act of 1968 they established a much clearer definition of federally protected civil rights than did the maddeningly vague section 241. Additionally, they gave the attorney general broad authority to prosecute anyone who used force or intimidation to interfere with these rights.

Consolidation, Expansion, and Opposition, 1965–1969

After a decade of frustration, civil rights advocates had scored major victories, dramatically expanding federal civil rights authority and establishing effective remedies against discrimination. With Lyndon Johnson in the White House, the government moved swiftly and surely, using the new legislation to destroy Jim Crow. Faced with the threat of lawsuit, most public facilities and private businesses covered by the public accommodations provisions of the Civil Rights Act of 1964 voluntarily opened their doors to blacks. Those that refused faced Justice Department lawyers who were determined to compel obedience. When it received complaints of discrimination, the department warned offenders that their practices were illegal and, if the warnings failed, took them to court. By 1968 the attorney general reported that there had been "widespread voluntary compliance" with the public accommodations section of the 1964 act and that most of the complaints that the department received involved "small eating establishments in the more rural areas." By the end of the decade, most white southerners grudgingly accepted what a few years earlier they had viewed as anathema—blacks and whites eating in the same restaurants, attending the same theaters and ball parks, and staying in the same motels.²⁹

The problem of school segregation proved tougher to resolve, but by the end of the decade the executive and judicial branches, working

together, had transformed the face of southern education. In 1964, a decade after *Brown*, only two percent of the black children living in the states of the former Confederacy attended school with whites. Officials in HEW promptly invoked their authority under the Civil Rights Act to compel desegregation. In December 1964 they informed southern school officials that they must submit desegregation plans to remain eligible for federal funds, and four months later, issued guidelines for schools to follow in drafting plans. Almost ninety-five percent of southern school districts responded, with most adopting so-called freedom of choice plans. While ostensibly these plans offered students the opportunity to attend the school of their choice, they were designed to minimize integration. Whites never chose to send their children to black schools, and many blacks, fearing reprisals by employers and merchants, kept their children in all-black schools. White officials did their best to deter blacks from entering white schools as well. Frequently they required black parents and children to appear in person to apply for transfers to white schools, informed black parents that buses serving the white school did not run through the colored section of town, warned black children that they would not be permitted to join the band, school clubs, or athletic teams, and turned away black applicants on the grounds that the white schools were too crowded.

Although these plans offered little freedom of choice, they did produce some integration in most southern districts. Moreover, HEW soon indicated that freedom of choice plans, by themselves, were not enough. In March 1966 it issued new guidelines stipulating that districts would be judged on their actual progress toward desegregation and establishing goals and timetables to speed-up the process. Clearly, HEW would not settle for token integration and would continue to keep the heat on southern districts.

The federal courts reinforced HEW policy, signaling to school officials that even if they chose to forego federal money (which amounted to almost ten percent of their funding by 1966) they would not escape genuine integration. In December 1966, Judge John Minor Wisdom of the U.S. Court of Appeals for the Fifth Circuit, shocked southern school officials with his landmark opinion in *United States v. Jefferson County Board of Education*. Wisdom not only endorsed the HEW guidelines and directed all judges in the fifth circuit to follow them in writing decrees in school desegregation suits. He also announced that compliance with the guidelines was the first step on the road to full integration. The Louisiana

native acknowledged that the Constitution prohibited discrimination and did not mandate integration. He held, however, that where segregation had been imposed by law, officials had a responsibility to take positive action to undo the results of their unconstitutional behavior. And that meant integration. "[T]he only adequate redress for a previously overt system-wide policy of segregation directed at Negroes as a collective entity," he asserted, "is a system-wide policy of integration." Although Wisdom did not disallow freedom of choice plans, he emphasized that district judges should accept them only if they led to actual integration:

What the decree contemplates, then, is continuing judicial evaluation of compliance by measuring the performance—not merely the promised performance—of school boards in carrying out their constitutional obligation "to disestablish dual, racially segregated school systems and to achieve substantial integration in such systems" [emphasis added]. . . . If school officials in any district should find that their district still has segregated facilities or schools or only token integration [emphasis added], their affirmative duty to take corrective action requires them to try an alternative to a freedom of choice plan, such as a geographic attendance plan . . . or some other acceptable substitute. . . .³⁰

Wisdom's opinion—which was endorsed by the twelve judges of the United States Court of Appeals for the Fifth Circuit sitting *en banc*—was highly significant. Written as a directive to judges throughout the circuit, it would guide the process of school desegregation in most of the Deep South. Consequently, the decision signaled that compliance with HEW's demands was unavoidable and that schools would be pushed relentlessly to integrate. Wisdom's *Jefferson* opinion also indicated a major shift in the federal courts' approach to civil rights law. Rejecting the notion that the Fourteenth Amendment merely required states to cease discriminating, it announced a result-oriented interpretation of the equal protection clause. In those places in which segregation had been imposed by law and public policy, officials had a legal obligation to take affirmative action to achieve integration. *Jefferson* also signaled a shift to color-consciousness. Although Wisdom acknowledged that the objective of the equal protection clause was colorblind public policy, he suggested that the courts must take color into account (e.g., measuring the degree of racial balance in schools) if they were to root out the effects of past discrimination and achieve genuine equality.

Less than two years later, in *Green v. County School Board* (1968) the United States Supreme Court endorsed Wisdom's approach. The case

involved a challenge to a freedom of choice plan in a largely rural Virginia county whose population was equally divided between whites and blacks. The county operated two schools, one, on the east side, which had been the white school, and the other, on the west side, which had been the black school. Although there was little residential segregation in the county and the freedom of choice plan permitted children to choose either school, no whites had elected to attend the black school and only fifteen percent of the blacks had entered the formerly all-white school. The Court held that the county's desegregation efforts were inadequate. *Brown II*, Justice Brennan pointed out, required school officials in states and localities where segregation had been established by law "to effectuate a transition to a racially nondiscriminatory school system." This meant that they were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." With eighty-five percent of its black children still in one-race schools, Brennan concluded, the county clearly had failed to meet that requirement. "The burden on a school board today," he asserted, "is to come forward with a plan that promises realistically to work, and promises realistically to work now." The message was clear. Formerly segregated school districts had the obligation to integrate promptly, and the Court would look carefully at the racial balance in the schools to determine whether they had met their obligation.³¹

Confronting HEW guidelines that annually grew more stringent, an increasing number of Justice Department lawsuits, and courts that demanded results, southern school districts capitulated. In 1968, eighteen percent of southern black pupils were attending white majority schools; two years later the figure stood at thirty-nine percent, and in 1972, it had risen to forty-six percent, making southern schools the most integrated in the nation. (In 1972 only twenty-eight percent of black pupils in the North and West were enrolled in white majority schools.) Desegregation gave black children access to better schools and resulted in improvements in educational performance by southern black children. That was not the only benefit, however. "As long as schools were segregated by law, southern blacks lived in a society whose public authority defined them as inferior and where, for them, democratic principles were a mockery," notes historian Allen Matusow. "Insistence on unitary school systems meant that for blacks and whites there was now one law, one standard of democracy, and one community."³²

The Johnson administration also moved forcefully against voting discrimination. Under the Voting Rights Act, literacy tests were suspended in six states—Virginia, South Carolina, Georgia, Alabama, Mississippi, and Louisiana—and in parts of North Carolina. While this eliminated the most potent disfranchising device, many registration officials continued to employ dilatory tactics to prevent blacks from registering. In order to overcome this resistance, the Justice Department dispatched federal registrars to fifty-eight counties between 1965 and 1968. Civil rights activists pressed for appointment of more registrars, pointing out that they had been sent to only a third of the counties in which fewer than half of the adult blacks were registered. Nevertheless, the presence of federal registrars not only ended disfranchisement in the counties in which they operated, but convinced officials in neighboring counties to register blacks in order to avoid federal intervention.

The results of the campaign were impressive. Between 1964 and 1969, black registration in the Deep South almost doubled, increasing from thirty-six to sixty-five percent of black adults in the region. In Mississippi, where only seven percent of adult blacks had been registered in 1964, the figure stood at sixty-seven percent in 1969. Moreover, black voting quickly produced significant results. By 1968, in the five states in which federal registrars had been employed (South Carolina, Georgia, Alabama, Mississippi, and Louisiana), more than 120 blacks had won elective office. Granted, most of these served in county and municipal government, but their success marked a dramatic departure in a region in which blacks had not been permitted to vote, much less hold office, for more than seventy years. Nevertheless, blacks were minorities in every southern state, and most whites continued to follow the color line in politics. Consequently, black candidates could reasonably expect success only if they ran in black-majority or near-black-majority districts. And this meant that they had little chance of victory in state-wide contests or in most local elections.

Black voting, however, was not in vain. Even in districts with black minorities, they frequently held the balance of power and could defeat openly racist office seekers. Consequently, white politicians soon learned that appeals to racism were likely to backfire and largely abandoned the scurrilous race-baiting that had been a staple of southern politics. This opened the way for a new generation of moderate white politicians such as Jimmy Carter, Reubin Askew, Ernest Hollings, and Dale Bumpers who emerged in the 1970s, and ultimately convinced even

the formerly staunch segregationist George Wallace to court black voters. Furthermore, most white elected officials, aware of the growing power of blacks, became more responsive to them. Dr. John Cashin, the head of Alabama's all-black National Democratic party, noted that black voting had an especially salutary effect on law enforcement. "It's no longer standard operating procedure for whites to kill blacks at will," he explained in 1973. "And it's all because of politics."³³ Although southern blacks had a long way to go if they were to exercise effective political power, the Voting Rights Act radically altered southern politics and government.

The late 1960s witnessed the demise of disfranchisement and Jim Crow, bringing to a successful conclusion a campaign by three generations of black activists. As important as this victory was, however, it highlighted how much remained to be done. Because of discrimination by employers and labor unions, low levels of educational achievement (the product of poverty and separate and unequal schools), and despair, far too many blacks were trapped in menial, poorly paying jobs or were chronically unemployed. Mired in poverty, with little hope of improving their lot, they attached little importance to the right to vote or to be served in restaurants they could not afford in the first place. Poverty, combined with the practices of banks, realtors, and city governments, guaranteed that urban blacks remained in the nation's decaying inner cities. There they lived in substandard housing owned by landlords who often extracted exorbitant rents from a captive market. Furthermore, residential segregation meant that black children attended segregated schools. In 1962, for example, two-thirds of the black students in Gary, Indiana were enrolled in schools which were at least ninety-nine percent black. Predictably, these schools were more crowded, enjoyed less modern facilities, and provided environments that were less conducive to learning than predominantly white schools.

These problems were by no means exclusively southern. Indeed, they were most acute in northern cities such as New York, Gary, Cleveland, Boston, Los Angeles, Detroit, and Chicago. Consequently, as the 1960s progressed, civil rights leaders devoted increasing attention to the North. During the first half of the decade CORE and black community organizations picketed segregated housing projects and businesses guilty of employment discrimination, boycotted segregated schools, and staged rent strikes to force landlords to bring their buildings up to standards mandated by city codes. In 1966, with black protest already percolating

in northern cities, Martin Luther King, Jr. focused the nation's attention on the racial problems of the North by going to Chicago, where he led a massive campaign against housing discrimination. There, King's marchers were greeted by mobs of virulently racist whites—some waving Confederate flags and wearing Nazi helmets—who were determined to keep blacks in the ghetto. These white mobs were backed by Mayor Richard Daley, head of the most powerful political machine in the nation. King left Chicago after nine months with little to show for his efforts, merely confirming what those who had been in the trenches already knew: the problems that existed in the North would be even more difficult to solve than those the movement had encountered in Birmingham and Selma.

Deadly race riots erupted almost like clockwork during the long, hot summers of the mid and late-1960s, shifting public attention to the northern ghettos. Beginning in Harlem in 1964 and Watts the following summer, riots swept 43 cities in 1966 and 164 urban areas in 1967. Frustrated by the contradiction between the promise of the civil rights movement and the hopelessness of their own situation, urban blacks unleashed the rage that had accumulated during three centuries of oppression. They struck at the most visible symbols of white domination: white policemen and white-owned ghetto businesses. And they struck hard. In Watts rioting lasted for four days and left 34 dead, more than 1,000 injured, and almost 1,000 buildings damaged or destroyed. Three years later, in Detroit, the toll was even worse: 43 persons died, well over 1,000 were injured, and 1,300 buildings were burned.

Although the causes of northern blacks' dissatisfaction—poverty, employment discrimination, and segregated schools and housing—were obvious, solutions proved elusive. The Civil Rights Act of 1964 had included a nationwide ban on discrimination by employers and labor unions with at least twenty-five employees or members and created the EEOC to supervise implementation. Although the 41,000 complaints brought between 1965 and 1969 suggest broad awareness of the law's provisions, the commission's small staff proved inadequate to the task at hand. By 1969, it had determined that 24,000 of the complaints had merit, but had completed investigations in only 18,000 of these, leaving a backlog of 6,000 cases. After the staff completed its investigation, cases went to the five-member commission, which determined whether there was reasonable cause to believe that a violation had occurred and then drafted its decision. A critical bottleneck developed at this point. By

1969, the commission had written decisions in only 4,800 cases (finding for the complainants in 2,500) and was taking an average of between eighteen and twenty months to dispose of each case. This not only delayed relief for complainants, but meant that many cases had become moot by the time decisions were announced.

The EEOC's chief problem, however, was lack of enforcement authority. If it found reasonable cause that discrimination had occurred, it could attempt to resolve the case through negotiation. If that failed, the commission had two options. It could advise the complainant that he or she could sue or, if the case revealed a widespread pattern of discrimination, request the Justice Department to initiate litigation. With the threat of sanctions remote, the staff had little success in arranging voluntary settlements with employers. By 1969, it had attempted to settle 3,360 cases by negotiation, but had succeeded in only 683 cases affecting 14,000 persons. Moreover, the agency's small staff could not effectively monitor these agreements, and employers and unions sometimes renege. Thus with limited staff and authority, the commissioners made little headway against discrimination.

The other major federal employment discrimination program accomplished even less. In September 1965, President Johnson issued Executive Order 11246, prohibiting job discrimination by firms which supplied goods or services to the federal government or which held federal construction contracts. The order authorized the secretary of labor to establish regulations outlining fair employment practices and to terminate contracts with those who failed to comply. Because companies holding government contracts employed an estimated one-third of the workforce, vigorous enforcement promised substantial results. After issuing the order, however, the administration—increasingly preoccupied with the Vietnam War and reluctant to ruffle the feathers of conservative politicians, businessmen, and labor leaders whose support for that venture was crucial—quickly forgot it. The Office of Federal Contract Compliance (OFCC), created by the Labor Department to oversee enforcement, was poorly staffed and lethargic. It failed to draft clear guidelines for government agencies to follow in dealing with contractors and imposed no sanctions on contractors until May 1968.

Although the attack on job discrimination was weak, it achieved some modest gains. EEOC won redress for several thousand victims of discrimination and began to attack systemic discrimination. Aware that tests that measured general education created barriers for many blacks

(who for decades had endured Jim Crow schools), the commission began a campaign against the use of employment tests that measured knowledge or skills not relevant to the job the applicant was seeking. The commission's effort would bear fruit in the 1970s, curbing a common source of discrimination. While the Justice Department initiated few job discrimination suits, it won several major victories in the lower federal courts, invalidating seniority systems that perpetrated the effects of earlier discrimination and discriminatory practices common among unions in the construction industry. Moreover, the civil rights movement and, especially, the publicity surrounding the Civil Rights Act and the activities of the EEOC, helped alter public opinion. A 1968 poll, conducted in fifteen cities, for example, indicated that only twenty-three percent of those interviewed opposed enforcement of equal employment laws.

Although labor shortages and rapid economic growth played an important role, changes in public opinion and the presence of legal sanctions against discrimination helped black workers score steady gains during the 1960s and early 1970s. The percentage of blacks employed as managers, professionals, and skilled workers almost doubled between 1958 and 1973, while the proportion engaged in service work and farm and nonfarm labor declined by one-third. Black women experienced especially dramatic changes during these years; the proportion working as domestic servants decreased from thirty-three to fifteen percent, while the proportion employed in clerical, sales, and professional jobs increased from nineteen to forty percent. Black workers also saw sharp, although still inadequate, gains in income. In 1959, black men, on average, earned only fifty-three percent as much as white men; by 1971, they earned sixty-six percent as much as whites. During the same period, the income of black women also increased, moving from sixty-six percent to ninety percent of the earnings of white women.

Although these gains were impressive, they should not be exaggerated. Blacks who moved up the ladder to become managers, professionals, and skilled workers, generally made it to the lowest rungs of those occupations. Thus in the professions blacks were concentrated in teaching and social work rather than in the more highly remunerative fields of law and medicine. For many blacks who were trapped in the ghettos and who lacked the education, skills, socialization, and hope necessary to take advantage of a more favorable job market, little changed. They still worked at menial jobs, suffered high rates of

unemployment, and often left the job market altogether. The result was broken families, drug addiction, and crime, problems scarcely amenable to resolution by laws guaranteeing equality of opportunity.

Like poverty, northern school segregation proved an elusive target. In northern cities, residential segregation bred highly segregated neighborhood schools. Observers labeled the outcome *de facto* segregation to distinguish it from the South's legally imposed, or *de jure* segregation. School officials themselves, however, often played a subtle but important role in its genesis and perpetuation, developing student transfer policies, drawing school attendance zones, locating new schools, and assigning faculty with an eye toward keeping black and white children separate. The federal courts generally refused to challenge *de facto* segregation, ruling that the Fourteenth Amendment did not require integration but merely prohibited public officials from segregating students on the basis of race. Even when the federal courts began to require southern schools to integrate, little changed in the North. Federal judges pointed out that southern schools were obligated to integrate in order to correct wrongs that resulted from *de jure* segregation, but that this obligation did not extend to northern schools, where segregation resulted from residential patterns rather than state law. Although some courts did order desegregation when plaintiffs proved that school officials had adopted policies that were intended to encourage segregation, this requirement placed a heavy burden on plaintiffs and made northern school suits difficult to win. Moreover, until 1973 the Supreme Court remained silent, offering no encouragement to opponents of *de facto* segregation.

Because residential segregation contributed to school segregation and trapped blacks in economically depressed inner city neighborhoods, federal fair housing legislation became a high priority for civil rights leaders. In 1966, as Martin Luther King's Chicago campaign focused attention on the consequences of housing discrimination, President Johnson recommended passage of a fair housing law. Liberals eagerly supported the bill, but it encountered rough sailing as many northern legislators joined southerners in opposition. As long as discrimination had been as open, obvious, brutal—and remote—as that practiced in the South, northerners had supported legislation to eradicate it. Housing discrimination in the North, however, was another matter. As King's reception in Chicago suggested, many northern whites, who had fled their old neighborhoods when blacks had entered or who feared that integration would lower the value of their property, bitterly opposed open

housing legislation. Consequently, Congress stalled for two years before passing a weak bill in 1968.

The new legislation applied to more than eighty percent of the nation's housing stock. When it became fully operational in December 1969, the law banned discrimination on account of race, religion, or national origin in the sale or rental of most apartments and homes. The only dwellings excepted were single-family homes sold or rented without the assistance of a realtor and small apartment buildings with resident owners. The law also prohibited discriminatory lending practices by banks and savings and loan associations. Unfortunately, its enforcement provisions were as weak as its coverage was broad. Instead of creating an enforcement agency with authority to issue cease-and-desist orders against violators, the act empowered the Department of Housing and Urban Development to investigate complaints and to negotiate voluntary agreements with those found guilty of discrimination. If this conciliatory approach failed, the attorney general was authorized to bring lawsuits in cases that revealed a broad pattern of discrimination. Otherwise, individual victims of discrimination would have to initiate their own lawsuits—an expensive and time-consuming process that could drag on for years. Not surprisingly, the fair housing law did little to alleviate the problem of housing discrimination. Because it failed to afford timely redress, victims of discrimination largely disregarded it, filing fewer than 1,500 complaints during the first two years it was in effect.

At the same time that Congress passed the fair housing act, the Supreme Court addressed itself to the housing issue in its landmark decision in *Jones v. Alfred H. Mayer Co.* (1968). The case involved a suit brought by a black couple against a St. Louis real estate developer under Title 42, section 1982 of the *United States Code*. Originally enacted as part of the Civil Rights Act of 1866, section 1982 provided that all citizens were entitled to the same right "as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, or convey real and personal property." The Court rejected Mayer's contention that the statute had been aimed at the black codes and did not apply to private action. Justice Potter Stewart held that Congress, acting under the Thirteenth Amendment (which contained no state action limitation) had intended to erase all badges of servitude, whether they were imposed by state law or by private action. Moreover, he concluded that Congress had been fully justified in prohibiting discrimination in the sale of real estate. "At the very least, the freedom that Congress is empowered to secure

under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live," Stewart wrote. "If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep."³⁴

Although the ruling required victims of housing discrimination to go to court to win redress, it was significant nonetheless. It applied to all housing, even those units that were not covered by the housing act. In addition, *Jones* suggested that the Court would take a broader view of the Reconstruction amendments and federal civil rights laws, offering civil rights lawyers a wider array of weapons against private discrimination. For example, section 1981, also originally enacted as part of the Civil Rights Act of 1866, provided that all persons "shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white persons." Under the *Jones* precedent, persons who were denied employment or admission to a private school on account of race could seek damages under section 1981, claiming that they had been denied the same rights as white persons to make contracts.³⁵ Although the Civil Rights Act of 1964 offered remedies against employment discrimination, suits under section 1981 could still prove useful. They could be initiated without first going through the EEOC complaint process, and they offered victims of discrimination monetary damage awards not available under the 1964 act.

While the Court was becoming bolder, politicians were beginning to hedge their bets on civil rights, as the checkered history of the fair housing law suggests. Indeed, by the late 1960s commentators spoke of a "white backlash" that made bold new initiatives risky. As the civil rights movement migrated north, challenging the pervasive job discrimination that benefited white workers and the school and housing segregation that insulated whites from blacks, many northern whites decided that it was time to slow the pace of change. Then, too, many northerners reacted strongly against what they considered bewildering, threatening developments in the black community. They recoiled as young black militants, disillusioned by a lifetime of painful encounters with white racism and despairing of meaningful change within the system, rejected nonviolence and integration and spoke the language of Black Power. Many whites also looked on, first in disbelief and then in anger as urban blacks rioted. Unable or unwilling to understand the rage that had gathered during 300 years of slavery and racism, they increasingly viewed crime control as

more important than civil rights. Failing to appreciate the obstacles that many blacks still confronted, they angrily denounced blacks as ingrates who failed to appreciate whites' support for civil rights legislation.

As they soured on civil rights and reacted viscerally against white students who burned draft cards and American flags to protest the Vietnam War, many northerners who had voted for John Kennedy and Lyndon Johnson threw their support to flag-waving conservatives who asserted that individual initiative was the best anti-poverty program and who promised to restore law and order. In the 1966 congressional campaign Republicans picked up forty-seven House seats, while Ronald Reagan, the new darling of the Republican right, won the California gubernatorial election in a landslide. Two years later, the liberals' old nemesis, Richard M. Nixon, captured the White House.

By 1969, as liberals lost control of the presidency, civil rights advocates had cause for alarm. Granted, the 1960s had witnessed unprecedented advances: the destruction of the South's deeply entrenched system of segregation and disfranchisement which for generations had humiliated blacks and kept them powerless; a dramatic expansion of federal power to protect civil rights and to achieve genuine equality; a growing assertiveness and political sophistication among blacks which assured continued pressure for advances in civil rights; and an altered national consciousness which made it difficult for political leaders to ignore civil rights. Nevertheless, difficult, perhaps intractable, problems remained. Yet for many whites these problems were less visible and seemed less pressing than the blatant discrimination and brutality that the civil rights movement had challenged in the South. Moreover, the conservative resurgence suggested that civil rights advocates would encounter growing resistance to new initiatives designed to achieve the long list of objectives that remained unfulfilled.

7

The Elusive Quest for Equality, 1969–1990

The city of Boston was in turmoil as the public schools prepared to open in the fall of 1974. The previous June, Federal District Judge W. Arthur Garrity had ruled that the city's schools were unconstitutionally segregated. As a remedy for the violation of black children's constitutional rights, Garrity had established a desegregation plan that relied heavily on busing. Black children would be transported from predominantly black neighborhoods to schools in white areas, while whites would be bused to ghetto schools. On the average, students would spend thirty minutes per day in transit. Although few whites cheered the ruling, opposition was most intense in the tightly-knit Irish working class neighborhoods of Charlestown and South Boston. There, residents harbored a century-old antipathy to blacks, were devoted to their community schools, and adamantly opposed sending their children to ghetto schools. Whipsawed by the economic stagnation and high inflation of the early 1970s, they bitterly resented what they perceived as the government's special concern for minorities. Moreover, they denounced the inequity of busing, charging that the wealthy could avoid integration by moving to the suburbs or by sending their children to private schools, options that were not available to the working class residents of Charlestown and South Boston. "Someone's got to explain it to me," demanded one white parent. "I'll listen to anybody, but someone's got to tell me how this Garrity guy, this big deal judge gets all this power to move people around, right the hell out of their neighborhood, while everybody else in the world comes out of it free and equal."¹