

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 8: The New Deal/Great Society Era—Equality/Race/The Fall of Jim Crow

Executive and Legislative Action Promoting Racial Equality

Presidents and members of Congress from the late 1940s to the 1960s made the crucial decisions that formally eradicated Jim Crow from American life. President Truman on July 26, 1948, issued Executive Order 9981, which abolished segregation in the armed forces of the United States. Congress during the 1960s passed a series of Civil Rights Acts under both the Commerce Clause and the Fourteenth Amendment. These measures outlawed discrimination in places of public accommodation, employment and housing. The Voting Rights Act of 1965 outlawed racial discrimination in voting. The Supreme Court, most often unanimously, sustained all these measures.

*A new issue emerged toward the end of the New Deal/Great Society Era: affirmative action and racial preferences. The phrase “affirmative action” as originally used by liberal proponents of racial equality referred to the constitutionally uncontroversial effort to seek out qualified persons of color for university seats and employment opportunities. President Johnson and liberals in Congress often emphasized that federal statutes were committed to the constitutional principle of no discrimination. By the middle 1960s, affirmative action was acquiring other meanings. President Johnson in a major speech suggested that government should consider the disadvantages persons of color had suffered when assessing qualifications for various positions. Federal agencies began suggesting to businesses that they ought to have hiring goals, goals that could very easily in practice harden into racial preferences or quotas. As a result, both the meaning and constitutionality of affirmative action was unclear when Richard Nixon assumed the presidency in 1968. That affirmative action had the potential to shatter liberal alliances, however, was becoming clear. Consider the following passage from Justice Douglas’s dissenting opinion in *Wright v. Rockefeller* (1964). On most matters, Douglas was probably the most committed racial egalitarian on the Court. He and Justice Goldberg broke with the Warren Court majority when considering whether New York could use race as a factor when apportioning legislative districts. “Racial electoral registers, like religious ones,” Douglas wrote,*

have no place in a society that honors the Lincoln tradition—‘of the people, by the people, for the people.’ Here the individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on.

The following executive orders, statutes, and short speeches are sometimes considered the founding documents of the contemporary racial constitutional order. Certainly, no American who aspires to power at present could criticize any of the laws that abolished segregation. On what constitutional principle did these documents abolish segregation? Consider two alternatives. An anti-classification perspective maintains that what was wrong with Jim Crow was the effort to define people primarily in terms of their race. An anti-subordination perspective maintains that what was wrong with Jim Crow was the effort to create and maintain a superior race. Do the materials below clearly take one of these two perspectives? Are they ambivalent? Do they reflect other perspectives on the constitutional status of race?

Harry Truman, “Executive Order 9981”

It is hereby declared to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin. This policy shall be put into effect as rapidly as possible, having due regard to the time required to effectuate any necessary changes without impairing efficiency or morale.

*Fair Housing Act of 1968*¹

SEC. 801. It is the policy of the United States to provide, within constitutional limitations, fair housing through the United States.

...

SEC. 804. . . . [I]t shall be unlawful—

- (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.
- (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin.
- (c) To make, print, or publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination.
- (d) To represent to any person because of race, color, religion or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.
- (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular, race, color, religion, or national origin.
- (f) ...

SEC. 805. . . . [I]t shall be unlawful for any bank, building and loan association, insurance company or other . . . enterprise whose business consists in whole or in part in the making of commercial real estate loans to deny a loan or other financial assistance to a person applying therefor . . . because of the race, color, religion, or national origin of such person or of any person associated with him in connection with such loans or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given. . . .

SEC. 806. . . . [I]t shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, or national origin.

¹ 82 U.S. Stat. 73, 81, 83-84 (1968).