

7-1-1998

## A Time for Reflection

Marc A. Fajer

*University of Miami School of Law*, [mfajer@law.miami.edu](mailto:mfajer@law.miami.edu)

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Civil Rights and Discrimination Commons](#), and the [Housing Law Commons](#)

---

### Recommended Citation

Marc A. Fajer, *A Time for Reflection*, 52 U. Miami L. Rev. 925 (1998)

Available at: <https://repository.law.miami.edu/umlr/vol52/iss4/2>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

## A Time for Reflection

MARC A. FAJER

“Promises Kept, Promises Broken,” the conference dealing with discrimination in housing that gives rise to this symposium issue, began on February 6, 1998. Exactly fifty years earlier, on February 6, 1948, another distinguished group of people—the Conference of Southern Governors—gathered in Florida to discuss discrimination.<sup>1</sup> The topic of discussion was the recent civil rights proposals by President Truman. These proposals, sought to prohibit certain discrimination in voting and employment and provide federal civil rights remedies for lynching.<sup>2</sup> During these discussions, Mississippi Governor Fielding Wright threatened to withdraw his support for Truman in the 1948 presidential elections, if Truman continued to push for federal civil rights legislation.<sup>3</sup> Governor Thompson of Georgia opposed Governor Wright, arguing that the Southern Democratic Governors should not undermine the leadership of their party. However, he did state to the press that the civil rights program was “unnecessary” and “unwise.”<sup>4</sup> Notably, one of the participants in the conference on that day, Governor Strom Thurmond of South Carolina, would leave the Democratic Party for the first time<sup>5</sup> over precisely these issues and run against Truman that fall on a Dixiecrat ticket.<sup>6</sup>

Simultaneously, in Washington, D.C., the Supreme Court was

---

1. See John N. Popham, *South's Governors Hear 'Revolt' Talk*, N.Y. TIMES, Feb. 7, 1948, at 19.

2. These proposals did not involve housing discrimination, which was the subject of this symposium. See Popham, *supra* note 1.

3. See *id.*

4. See *id.*

5. Governor Thurmond later changed his political affiliation from the Democratic to the Republican Party while he was a Senator for South Carolina in the 1960s. See Mary Lynn F. Jones, *Senate's 9 X-Dems Would Give Party Majority*, THE HILL, Apr. 29, 1998, at 1.

6. See GORTON CARRUTH, THE ENCYCLOPEDIA OF AMERICAN FACTS AND DATES 540 (9th ed. 1993).

deliberating on two companion housing discrimination cases it had heard in January of 1948. One of them, a case out of Detroit called *McGhee v. Sipes*,<sup>7</sup> had been argued by Thurgood Marshall. Marshall had not wanted to take *McGhee* to the U.S. Supreme Court because the NAACP had lost on its principal legal issue in a number of other cases in the federal courts.<sup>8</sup> However, the lawyers in a case out of St. Louis that became a companion to *McGhee*, had petitioned for certiorari against Marshall's advice, and Marshall felt compelled to bring *McGhee* to the Supreme Court, as well, because he wanted to argue the issue himself.<sup>9</sup> In *McGhee*, Marshall submitted a Brandeis brief, giving statistics about urban segregation<sup>10</sup> and making dire predications about what would happen to America if segregated housing was allowed to remain a reality.<sup>11</sup> Some of his language seems prescient today:

The dangers to society which are inherent in the restriction of members of minority groups to overcrowded slum areas are so great and are so well recognized that a court of equity, charged with maintaining the public interest, should not, to the exercise of the power given to it by the people, intensify so dangerous a situation. . . . [P]erhaps perpetual covenants against racial or religious minorities might not have been oppressive in frontier days, when there was a surplus of unappropriated land; but frontier days in America have passed. All the land is appropriated and owned. White people have the bulk of the land. Will they try to make provision for the irresistible demands of an expanding population, or will they blindly permit private individuals whose social vision is no broader than their personal prejudices to constrict the natural expansion of residential area until we reach the point where the irresistible force meet the immovable body?<sup>12</sup>

Marshall's employment of the Brandeis brief was successful in *McGhee* and this success apparently was one of the reasons<sup>13</sup> that he adopted a similar briefing strategy a few years later for *Brown v. Board of Education of Topeka*.<sup>14</sup>

*McGhee*, of course, is better known today by the name of its companion case, *Shelley v. Kraemer*,<sup>15</sup> which held that it was unconstitutional for a state to enforce a racially-restrictive covenant.<sup>16</sup> The

---

7. 334 U.S. 1 (1948).

8. See RICHARD KLUGER, *SIMPLE JUSTICE* 248-49 (1976).

9. See KLUGER, *supra* note 8, at 249.

10. See Brief for Petitioner at 46-57, *McGhee v. Sipes*, 334 U.S.1 (1948).

11. See *id.* at 36-37.

12. See generally *id.*

13. See KLUGER, *supra* note 8, at 254, 339.

14. 347 U.S. 483 (1954).

15. 334 U.S. 1 (1948).

16. See *id.* at 20.

Supreme Court's decision in *Shelley* had quick and noticeable impacts in American cities: within four years, twenty-one thousand Chicago families had moved into formerly segregated housing.<sup>17</sup> About ten percent of the residential blocks in the District of Columbia would be integrated by the 1950 census only two years after *Shelley* was decided.<sup>18</sup> However, the *Shelley* court's promise to end housing discrimination would not be fulfilled. The case merely forbade the state from enforcing private agreements; it did nothing to prevent private parties from acting on their own or in concert with other private actors.

The limits of *Shelley* are well illustrated by a Florida case called *MacGregor v. Florida Real Estate Commission*.<sup>19</sup> That case involved a real estate broker whose client, the seller of a residence, wished to enforce a covenant preventing Jews from living on the property in question.<sup>20</sup> The broker lied to his client regarding the religion of the buyer in order to complete the deal, yet the seller allowed the sale to proceed even after he found out that the broker had lied.<sup>21</sup> The state real estate board attempted to discipline the broker for lying to his client and the broker defended his actions relying on *Shelley*.<sup>22</sup> The Florida Supreme Court unanimously held that the discipline was not barred by *Shelley*, stating that "[e]nforcement of a perhaps discriminatory contract is one thing; punishment of admitted breach of trust, bad faith, deception and infidelity to his known duty is quite another."<sup>23</sup> Thus, while the state itself could not have acted to enforce the covenant in question, it could act to punish a private actor who attempted to circumvent it. The Florida Supreme Court denied rehearing in *MacGregor* on February 5th, 1958,<sup>24</sup> forty years and a day before the "Promises Kept, Promises Broken" conference began.

On February 6th, 1968, thirty years to the day prior to the beginning of the conference, Senators Walter Mondale and Edward Brooke introduced an amendment to a then-pending civil rights bill that would eventually become the Fair Housing Act.<sup>25</sup> The amendment received relatively little attention as the media was focused on the war in Viet-

---

17. See KLUGER, *supra* note 8, at 255.

18. See *id.*

19. 99 So. 2d 709 (Fla. 1958).

20. See *id.* at 710.

21. See *id.*

22. See *id.* at 712.

23. See *id.*

24. See *id.* at 709.

25. See Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and Perspective*, 8 WASHBURN L.J. 149, 152 (1969).

nam<sup>26</sup> and on the Republican Presidential Nomination.<sup>27</sup> The *New York Times* noted the introduction of the amendment in one sentence on page twenty three; “[t]he liberals. . . moved to strengthen what is generally regarded as a relatively mild civil rights bill by proposing the addition of an open-housing provision outlawing discrimination in the sale or rental of housing.”<sup>28</sup>

The amendment’s road to passage was rocky. After the provision had stalled in the Senate, the liberals agreed to a compromise with Senator Everett Dirksen that brought them the influential Illinois Senator’s support in return for severely limiting the federal enforcement power that the Bill would create.<sup>29</sup> The Senate, however, still did not pass the bill. Then, on March 1st, the Kerner Commission issued its famous report on the riots of the previous summer, attributing them to racial segregation.<sup>30</sup> Ten days later, the Senate passed the Fair Housing Act.<sup>31</sup>

The Bill moved on to the House, where it was feared that it would die.<sup>32</sup> However, the momentous events of that Spring changed the fate of the bill, as they did the fate of many people. On March 28th, the House Rules Committee began hearings on the Bill.<sup>33</sup> Two days later, President Johnson announced that he was not running for re-election.<sup>34</sup> Four days later, Martin Luther King was assassinated in Memphis.<sup>35</sup> As the violence that flared in the wake of King’s death spread across the country, the House of Representatives met, its members well aware of rioting in the streets of Washington and of the armed protection they were receiving as they deliberated the Fair Housing Act.<sup>36</sup> On April 10th, the House passed the Bill and the next day President Johnson signed it into law.<sup>37</sup> His speech upon signing of the Bill captures the hope that was attached to it and the optimism that was so much a part of the era despite the contentious events of the day.

I do not exaggerate when I say that the proudest moments of my presidency had been times such as this when I have signed into law the promises of the century. . . [n]ow the Negro families no longer suffer the humiliation of being turned away because of their

---

26. See generally N.Y. TIMES, Feb. 7, 1968, at A1, A11, A13-A17.

27. *Id.* at A18-A21.

28. John W. Finney, *Senate Liberals Win Rights Test*, N.Y. TIMES, Feb. 7, 1968, at 23.

29. See Dubofsky, *supra* note 25, at 156-58.

30. See *id.* at 158.

31. See *id.* at 159.

32. See *id.* at 160.

33. See *id.*

34. See CARRUTH, *supra* note 6, at 654.

35. See *id.*

36. See Dubofsky, *supra* note 25, at 160.

37. See *id.*

race. . . [N]ow with this bill the voice of justice speaks again. It proclaims that Fair Housing for all—all human beings who live in this country—is now a part of the American way of life. . . [T]his afternoon as we gather here in this historic room in the White House, I think we can all take some heart that democracy's work is being done. In the Civil Rights Act of 1968, America does move forward and the bell of freedom rings a little louder.<sup>38</sup>

However, the February compromise with Senator Dirksen had left its mark upon the Fair Housing Act. Lacking federal enforcement powers, the Act was soon seen as insufficient to fulfill Johnson's "promises of the century."<sup>39</sup> By the 1980's, many commentators were bemoaning the fact that the Act had no teeth.<sup>40</sup> A *New York Times* editorial referred to it as "fighting the devil with a wooden sword."<sup>41</sup> In 1988, ten years prior to "Promises Kept, Promises Broken," Congress amended the Fair Housing Act, adding provisions granting enforcement power<sup>42</sup> and created new protected categories: family status and "handicap."<sup>43</sup> The Bill passed Congress on August 28th of that year.<sup>44</sup> At that time, Lisia Mihaly, a staff member of the Children's Defense Fund, was quoted as saying "[t]his is an incredibly important piece of legislation for families. . . [i]t's a triumph for the cause of children we think it's a very, very important victory."<sup>45</sup> President Reagan, who signed the Bill the following month, calling it "[t]he most important civil rights legislation in twenty years."<sup>46</sup> He added that the amendments brought us "one step closer to Martin Luther King's dream."<sup>47</sup>

However, even as the 1988 amendments passed, there were signs that the new provisions would not be panaceas. The Reagan administration had opposed the inclusion of protection for family status in the Bill<sup>48</sup> and was therefore unlikely to expend many resources trying to

38. *Statement by President on Rights Bill*, N.Y. TIMES, Apr. 12, 1968, at 18.

39. *Id.*

40. James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1087 n. 157 (1989) (citing sources).

41. *See Housing Law: A Wooden Sword*, N.Y. TIMES, June 29, 1988, at 26.

42. *See* 42 U.S.C. § 3612 (1994) (granting enforcement powers to the Secretary of the Department of Housing and Urban Development; *see also* 42 U.S.C. § 3614 (1994) (granting enforcement powers to the Attorney General); 42 U.S.C. § 3613 (1994) (addressing enforcement by private persons).

43. *See* 42 U.S.C. § 3604a-3604f (1994).

44. *See* William K. Stevens, *Housing Bias Bill May Bring End to "No Children Allowed,"* N.Y. TIMES, Aug. 29, 1988, at 1.

45. *See id.*

46. UNITED STATES GOV'T PRINTING OFFICE, PUBLIC PAPERS, RONALD REAGAN 1155, 1156 (1988-89).

47. *See id.*

48. *House Backs Move to Strengthen Enforcement of Housing Rights*, N.Y. TIMES, June 30, 1988, at 20.

enforce the new provision. The publicity surrounding the bill and President Reagan's speech<sup>49</sup> barely mentioned the "handicap" provisions,<sup>50</sup> which were, in many respects, much more significant intrusions into traditional property rights than other previous discrimination provisions in the Act. In addition, commentators who had been crying out for the enforcement powers granted by the amendments expressed concerns that the addition of the categories "familial status" and "handicap" to the Act would take resources away from what they saw as the primary purposes of the Act, preventing racial segregation and discrimination.<sup>51</sup> Despite these concerns, one prominent expert in the field hailed the Bill, saying it was "the most significant Civil Rights enactment in a generation. . . [a] combination of local legislative efforts, aggressive local programs for monitoring and testing, and creative judicial and administrative remedies seeking affirmatively to advance fair housing integration may permit Title VIII finally to achieve the promise which eluded it during the first generation."<sup>52</sup>

The procession of anniversaries that coincide in 1998 made the timing of the "Promises Kept, Promises Broken" conference ideal for assessing, if not the "promises of the century," at least those of a generation. The purpose of the conference was to discuss the promises of the Congresses of 1968 and 1988, assess how they had succeeded and how they had failed, and determine where we should go from there. The articles in this symposium issue represent some of the ideas and questions generated by the many experts in the field who gathered in 1998 to reflect on the Fair Housing Act and its many promises.

---

49. See, e.g., Julie Johnson, *Reagan Signs Bill to Fight Housing Discrimination*, N.Y. TIMES, Sept. 14, 1988, at 29.

50. See 42 U.S.C. § 3604(f) (1994) (making unlawful discrimination in the sale or rental of a dwelling on the basis of handicap).

51. See Kushner, *supra* note 40, at 1096-97.

52. See *id.* at 1119.