II. Freedom of Choice and the Demand for Housing

Q. What I mean is not very difficult to understand if you have ever been a Negro and looked for a home. It's very easy to understand how discrimination hurts others. A. Let's explore that for a minute. Just how does it hurt others?

Q. Well, when a Negro looks for a place to live, be it a house or an apartment, he has difficulty in finding a decent place. The result is that he is crowded into a narrow ghetto in the central urban areas. This ghetto, because of the limited supply of residential housing available to Negroes, is overcrowded, restricted as to municipal services, has poor sanitation facilities, is plagued with a high crime rate, and costs more in rent than a comparable white area. Negro areas are typically the oldest and most undesirable areas in a community, and if they are not slums when the Negroes move in, they become slums shortly thereafter. When urban renewal programs come along, they are prevented from clearing these slums by the shortage of available housing for Negroes. A. While the social conditions you describe may exist, the real question is whether they are caused by racial discrimination. In other words, I'm not arguing with the effect, but rather with the causes you ascribe to that effect.⁴

Q. But isn't the cause obvious? A. Quite the contrary, the cause has been obscured.

Q. Perhaps you can tell me wherein the obscurity lies? A. I'll do my best. Housing is a commodity like any other. It is bought and sold on the open market like food or clothing. Its only difference is that it is not consumed, and of course it is stationary. Otherwise, like all commodities, it can go up or down in value, depending on supply and demand. It depreciates, or even appreciates. The rental market acts the same way.⁵ Thus, a Negro who has the price of the commodity can get it the same as anybody else.

Q. But that is utterly nonsense. We all know that Negroes with money can't get housing in many areas, perhaps even in most areas unless they are Negro areas. A. Now wait a minute. I didn't say a

⁴ See Van Alstyne & Karst, State Action, 14 Stan. L. Rev. 5, 47 (1961) for a recent statement of these generalities.
⁵ Block v. Hirsh, 256 U.S. 88 (1921).
The wood is new, and better, the paint is fresh, the house is modern, the plumbing is newer, and so forth.

Q. But suppose I need eight rooms, and not modern plumbing? A. You can get it in a new house also. Just tell the builder not to install that new kitchen or brand-new bathroom fixtures. Get second-hand fixtures. Or, you can tell him to install old pipes, use second-hand lumber, or otherwise obtain lower cost by giving up another item of value.

Q. But a custom built new house is still more expensive than an old house of equivalent value. A. True, but houses of equivalent value built under equivalent conditions cost the same. It is inevitable. Housing is a commodity with a market value. An old house which has a desirable location or other desirable features will rise in value to become equivalent to a new house of the same quality and desirability. A free housing market will inevitably do this. 6

Q. But what about all those cases which declare that discrimination against Negroes in the sale and rental of housing results in inadequate housing for them, thus compelling them to live in circumscribed areas under substandard, unhealthy, unsanitary and crowded living conditions? If you look in my footnote, you will see three such recent cases.7 A. I’ve looked at the cases in your footnote and I remain unmoved. No real scientific study has ever been made which has proved any connection between discrimination in housing and inadequate housing. As I have pointed out, any inadequacy in housing could be, and would have been, alleviated by building new Negro housing, if there was a will to do so. If you will look at my footnote in return, you will see this clearly.8

Q. But if the Negro housing market could be satisfied by new

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Q. What did you mean when you said that Negro leaders were often opposed to good housing for Negroes? That seems to be a ridiculous statement. A. It's not the statement which is ridiculous, it's the situation which is absurd. Negroes need good housing, but as much Negro building as could be done is not being done because efforts are concentrated on integration in housing.

III. Freedom of Choice and Integration in Housing

Q. I don't understand what you mean. A. It's very simple. Negro leaders would prefer to see the mass of Negroes living in substandard housing rather than building new housing for them unless that new housing was integrated.16

Q. And what's wrong with that? Recent decisions have repeatedly favored integration in housing. In fact a New York judge stated as justification for antidiscrimination legislation in housing as follows: "It is now believed that many of our problems arising from the diverse nature of our population will be brought nearer solution by integration."17 And the Supreme Court of New Jersey declared: "Segregated housing seriously complicates the problem of public school integration."18 A. But this doesn't affect the ability of Negroes to get good housing, and manifestly doesn't bolster the argument that antidiscrimination laws are needed to secure good housing.

Q. All right, let's concede for a minute the inapplicability of that argument and go on to the promotion of integration. Surely you'll concede that antidiscrimination legislation in housing promotes integration, won't you? A. Not only will I concede it, but I affirm it. In fact, that's the principal object of this legislation.

Q. So we've agreed then that antidiscrimination legislation has a valid purpose, the promotion of integration. A. We are indeed agreed that it has the purpose of promoting integration, but I don't agree the purpose is valid.

Q. Well, why not? People who get to know each other by be-

16 Avina, op. cit. supra, n.8 at 20-22; N.Y. Times, June 8, 1962, p. 35, col. 8; June 20, 1961, p. 35, col. 8.
18 Jones v. Haridor Realty Co., supra, n.7 at 485.
matically that this is not necessarily so. It is true that some contact is coerced, but this can be kept to a minimum. This coerced minimum may increase, rather than decrease, prejudice.

Q. But this surely cannot be true with children. Few five-year-olds are precocious enough to drive the family car across town to see a friend. A. Rarely will a selection be that small in a city area. A parent will usually be able to find a child of the same ethnic background for his child to play with if he is bent on segregating the child. Moreover, in suburbs the building of fences for this purpose is not unknown. True, here again, some contact is coerced, but parents may keep it to a minimum, and the strain of so doing is again likely to reinforce prejudice.

Q. But even if there is only a little intergroup contact, that's better than none, isn't it? A. Sometimes yes, sometimes no. Sometimes the limited urban intergroup contact produces friction and hostility.

Q. From a theoretical point of view, this hardly seems logical. A. The problem is that people are not wholly logical creatures. Some of the worst incidents of intergroup violence have occurred in lower-class neighborhoods containing diverse ethnic groups. Juvenile gangs are a manifestation of this.

Q. That may be true in lower-class neighborhoods, but certainly not in upper-class areas. A. Oh no? What about Cicero, Illinois, Levittown, Pennsylvania, and other less publicized incidents? If people don't like each other, they find a way to show it.

Q. That is certainly not a very healthy attitude. We can hardly encourage this, or even give it recognition. A. I really don't know what you mean, for once.

19 Connecticut Commission on Civil Rights, *Private Interracial Neighborhoods in Connecticut* 25-6 (1957) reported that in 219 neighborhoods with long established mixed occupancy, a survey showed that 75% of the adults had no contact with Negroes living next door or three doors away in their home, while 83% had no contact with them outside of their home.


22 See, for example, N.Y. Times, May 2, 1961, p. 31, col. 1; July 21, 1960, p. 14, col. 2; Sept. 29, 1959, p. 35, col. 1.
A. Let's examine this a little bit more closely. Q. You'll get the same result no matter how closely you look.

A. I'm not so sure. Have you ever asked a young lady to dinner. Q. Obviously.

A. Do you think she would be immoral to refuse you? Would you become a "second-class citizen" if she did? Q. Foolish perhaps, but not immoral.

A. Isn't this discrimination—that is to say, a distinction—and hence immoral? Q. It's a distinction; and hence discrimination, but it is not immoral.

A. Why wouldn't she be immoral? After all, you wanted to have dinner with her, to be in her company. Q. Well, I suppose she is entitled to have dinner with whom she wants.

A. But isn't this a matter of morality? Q. I would say it was a matter of taste.

A. How do you distinguish morality from taste? Q. Discrimination which, hurts another is immoral, but if one is just exercising one's rights, it's simply a matter of taste.

A. Then why would it not be moral for her to have dinner with only those of her own race, if that's what she wants? Q. Because discrimination based on race, creed, or color hurts another.

A. Why wouldn't refusing to choose you for a dinner companion hurt you? Q. Because such a choice would be based on taste.

A. Why is discrimination on racial grounds not based on "taste"?26 Q. Racial discrimination is arbitrary.

A. Aren't there numerous other discriminations which are just as arbitrary?27 Some people like blondes, some people like red-

26 "Taste depends . . . sometimes upon irrational taboo. It varies 'with the period, the place, and the training, environment and characteristics of persons.'" Commonwealth v. Leinenstadt, 318 Mass. 545, 62 N.E.2d 840, 844 (1945).

27 Arbitrary means "Fixed or done capriciously or at pleasure; without adequate determining principle; not founded on the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone." King v. Falls County, 42 S.W.2d 481, 482 (Tex. Civ. App. 1931). "Tests which are to apply only to certain particular individuals are necessarily arbitrary." Volpe v. City of New York, 178 Misc. 243, 52 N.Y.S.2d 828, 831 (1941).
consistent with Christianity? The practice of burning heretics and
witches at the stake? Which heritage would you care to rely on?
Q. Naturally, I am relying on only the progressive traditions in
our heritage.

A. How do you know which traditions are progressive? Q. We
can depend on our inborn moral sense.

A. What about the vast majority of people who discriminate?
Q. Children don’t discriminate. Discrimination must be learned.
A. Children don’t eat with forks or read; that must be learned
also.

Q. But we must teach them to have a moral outlook. A. Here
we go back again to the problem of how you know nondiscrimina-
tion is moral.

Q. Well, perhaps I can demonstrate it this way. Negroes have
been maltreated for years. They feel that discrimination is wrong
when practiced against them. Even if discrimination is generally
not harmful, discrimination against Negroes is associated in their
minds with past maltreatment and hence cuts them deeply. Isn’t
it immoral to thus hurt them?

A. If your grandfather had killed a man, would you expect
to be hanged? Q. I hope not. A. Then why should you get special
privileges because your grandfather was maltreated?

Q. But supposing I had been maltreated? A. If I hit you with
my car, should you be entitled to collect from the man next door?

Q. Regardless of our own concepts of morality, we cannot af-
ford to discriminate because in the eyes of the colored two-thirds
of the world discrimination based on color is wrong. A. This is
not universally true. Color discrimination is not unknown in
African and Asian countries.30

Q. However, it is officially against public pronouncements.
Whatever deviations there may be, officially it is wrong. A. Why
should American policy be dictated by foreign countries? Let us do
what is right because it is right for Americans. Should we, although

30 For an outbreak of anti-white and anti-Asian racism in Tanganyika, see N.Y.
struggle . . . [and] tyrannical dictators arrayed against this nation in the struggle proclaim throughout the world . . . that we do not practice what we preach, and that 'equality of opportunity' is a sham and a pretense․" Will not discrimination fatally cripple the fight against communism? A. To start with, since communism has never won a free election anywhere, I doubt that public opinion in a foreign country about this nation's practices will affect anything. However, more to the point, the world has lots of examples of government regimentation. Instead of apologizing for our lack of it, we should shout from the housetops how this country prizes individual liberty and human privacy. An example of an unregimented nation may be attractive to people of all skin colors.

Q. Equality of opportunity and the ringing phrase of the Declaration of Independence that "All men are created equal" would go down the drain. A. No, not at all. Equal before the law, all men are. The law knows neither distinctions of race, economic class, taste, intelligence, breeding, creed, or other difference. All vote, all may seek public office, all may speak, work, or do anything the law permits to one. But though all are equal in law, they are not equal in fact, or in the eyes of their fellows. And more important, they are not the same. If a man discriminates against a white person, because he is not worth $20,000, does this deny his equality in law? If it does, then why ban discrimination for race only? If it does not, then why is racial discrimination different from other discriminations? If all have equal freedom of choice, then all have the equality on which American ideals are based.

Q. You ignore the ringing words of Mr. Justice Harlan, who in his dissent in Plessy v. Ferguson\textsuperscript{5} said: "Our Constitution is color-blind." A. But people are not, nor can they be made so if all the statute-books of the land were filled to overflowing.\textsuperscript{6}

Q. Mr. Justice Harlan also declared: "In respect of civil rights, all citizens are equal before the law. The humblest is the

\textsuperscript{5} Colorado Antidiscrimination Comm. v. Case, — P.2d — (Colo. 1962).
\textsuperscript{6} 163 U.S. 537 (1896).
\textsuperscript{7} Id. at 559.
\textsuperscript{8} Justice Harlan as much as admitted this when he said: "Every true man has pride of race, and under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper." Id. at 554.
interested in the people next door, and he hopes the inherent physical proximity will compel them to associate with him. Although he may be right in a few instances, he is attaining his ends at the sacrifice of another’s freedom.

Q. What of it? Why should he not have a Freedom of Choice to do so? A. Because that is not freedom for him, but subservience for others. If a man whom I chose not to dine with wanted to eat with me, no rational person would claim that I was restricting his Freedom of Choice by refusing to eat with him. My right not to associate with him is clearly superior to his right to force himself on me. Association between people must be based on mutual consent. Mutual consent is the quintessence of true equality.

Q. Are these examples really analogous? Housing is a necessity. A. True, but integrated housing is not a necessity. After all, the necessary part of housing springs from man’s need for shelter from the elements, and comfort. Integration certainly doesn’t affect these factors.

V. The Mechanics of Freedom of Choice

Q. You couldn’t have Freedom of Choice in housing anyway. It’s utterly impractical. A. I don’t see why it’s impractical. It seems quite practical to me.

Q. Think of choices that would result. Some people would not want Negroes; some people wouldn’t want Jews; some people wouldn’t want Irish or Italians or Catholics generally or Orientals, or American Indians or what have you. How would you determine to whom houses would be sold or apartments rented? Would

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45 Supra, n.19 at 34-5.
46 Cf. Kelner v. Harris, 196 S.W. 1 (Mo. 1917).
47 Mays v. Burgess, 79 App. D.C. 543, 147 F.2d 869, 873 (1945): “And it should now be apparent that if ever the two races are to meet on mutually satisfactory ground, it cannot be through legal coercion or through the intimidation of factions, or the violence of partisans, but must be the result of a mutual appreciation of each other’s problems, and a voluntary consent of individuals.”
integrated. This is true even though many or most people want integration, because integration for the sake of integration over the objection of people being integrated violates Freedom of Choice. In this, everyone's interest in preserving his right not to associate is paramount to the interest of another in compelling him to associate. Those who want integration for its own sake, a change in the status quo, can move elsewhere instead of subjecting non-assentors to their preference.

Q. But what if a landlord has spaces he must fill? A. Then his renting is for economic reasons. In other words, if as a result of the movement of those who want integration, he would have too many vacancies, or if current vacancies cannot be filled except by integration, this simply becomes an inevitable by-product of a legitimate and necessary economic policy. This is no longer integration for the sake of integration over the objections of those being integrated, but is simply an inevitable result of the pursuit of an economic requirement. However, reasonable steps to satisfy objectors should be taken if no economic detriment results. Thus, if a person moves into one side of a building, and an objector living on that side requests transfer to a vacant apartment on the other side of the building, this request should be granted.

Q. When would the property owner be required to consult his neighbors or tenants? A. When he had reasonable grounds to believe that the prospective tenant or occupant was objectionable. In most situations, this would not be difficult to discern.

VI. Conclusion

Q. Doesn't freedom of choice in housing run contrary to the current trend of America's legal thinking? A. To the trend of some thinking, yes, unfortunately. But not to the trend of all thinking by any means.

Q. It does run contrary to the trend of a good deal of thinking, and therefore it hardly seems to be a practical program. Perhaps it might be enacted in Utopia, but not here and now. A. Utopia is only as far away as we keep it ourselves. Current thinking is always subject to dramatic reversal.

Q. The idea of Freedom of Choice in housing is visionary. A. The visions of today are the policies and laws of tomorrow.
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Yinger, Milton

Ziegenhals, Walter E.
<table>
<thead>
<tr>
<th>Name</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hansen, Marcus</td>
<td>33</td>
</tr>
<tr>
<td>Haskins, Jim</td>
<td>137-139</td>
</tr>
<tr>
<td>Hata, Nadine</td>
<td>150, 151, 154</td>
</tr>
<tr>
<td>Hawgood, John</td>
<td>32</td>
</tr>
<tr>
<td>Hayakawa, S.</td>
<td>134</td>
</tr>
<tr>
<td>Hecht, James</td>
<td>78</td>
</tr>
<tr>
<td>Hefley, James &amp; Marti</td>
<td>81</td>
</tr>
<tr>
<td>Hersey, Evelyn</td>
<td>23, 24, 25</td>
</tr>
<tr>
<td>Hesburgh, Theodore</td>
<td>12</td>
</tr>
<tr>
<td>Hesselgrave, David</td>
<td>156</td>
</tr>
<tr>
<td>Hiebert, Paul</td>
<td>19</td>
</tr>
<tr>
<td>Higham, John</td>
<td>3, 6, 18</td>
</tr>
<tr>
<td>Hocker, P. N.</td>
<td>121</td>
</tr>
<tr>
<td>Holsey, John</td>
<td>158</td>
</tr>
<tr>
<td>Ilerley, Dwight</td>
<td>66</td>
</tr>
<tr>
<td>Jamerson, Reginald</td>
<td>128, 129</td>
</tr>
<tr>
<td>Jones, Rachel</td>
<td>144</td>
</tr>
<tr>
<td>Kallen, Horace</td>
<td>34, 35</td>
</tr>
<tr>
<td>Kellermann, Bill</td>
<td>16</td>
</tr>
<tr>
<td>Kemp, Charles</td>
<td>82</td>
</tr>
<tr>
<td>Kennedy, John F.</td>
<td>3, 7, 81</td>
</tr>
<tr>
<td>Keys, Sharrel</td>
<td>77</td>
</tr>
<tr>
<td>Killian, Lewis</td>
<td>86</td>
</tr>
<tr>
<td>Kingsbury, John</td>
<td>106</td>
</tr>
<tr>
<td>Kim, Sam-Kwan</td>
<td>163, 164</td>
</tr>
<tr>
<td>Kjolseth, Rolf</td>
<td>115, 125, 130, 156</td>
</tr>
<tr>
<td>Knight, Oliver</td>
<td>2</td>
</tr>
<tr>
<td>Kromminga, Carl</td>
<td>17</td>
</tr>
<tr>
<td>Labov, William</td>
<td>131</td>
</tr>
<tr>
<td>Lambert,</td>
<td>121</td>
</tr>
<tr>
<td>Laurenti, Luigi</td>
<td>61</td>
</tr>
<tr>
<td>Liu, Felix</td>
<td>162, 163</td>
</tr>
<tr>
<td>Loewen, Jacob</td>
<td>110</td>
</tr>
<tr>
<td>McEntire, Davis</td>
<td>60</td>
</tr>
<tr>
<td>McGavran, Donald A.</td>
<td>17, 54, 57, 151, 152</td>
</tr>
<tr>
<td>McMurrin, Sterling</td>
<td>151</td>
</tr>
<tr>
<td>Morgan, J. C.</td>
<td>114</td>
</tr>
<tr>
<td>Morris, Van Cleve</td>
<td>126, 156</td>
</tr>
<tr>
<td>Morris, R. P.</td>
<td>128</td>
</tr>
<tr>
<td>Morison and Commager</td>
<td>56</td>
</tr>
<tr>
<td>Moynihan, Daniel</td>
<td>36, 57, 77</td>
</tr>
<tr>
<td>Munoz, Raul</td>
<td>122</td>
</tr>
<tr>
<td>Naisbitt, John</td>
<td>75, 71</td>
</tr>
<tr>
<td>Neill, Stephen</td>
<td>169</td>
</tr>
<tr>
<td>Novak, Michael</td>
<td>23, 39</td>
</tr>
<tr>
<td>Nunis, Doyce</td>
<td>108-110, 114</td>
</tr>
<tr>
<td>Paine, Thomas</td>
<td>1</td>
</tr>
<tr>
<td>Palen, J. John</td>
<td>57</td>
</tr>
<tr>
<td>Parvin, Earl</td>
<td>55, 83, 163</td>
</tr>
<tr>
<td>Paulston, Christina</td>
<td>125, 129</td>
</tr>
<tr>
<td>Peal, E.</td>
<td>121</td>
</tr>
<tr>
<td>Perinpanayagam, G. T.</td>
<td>117</td>
</tr>
<tr>
<td>Perry, John</td>
<td>106</td>
</tr>
<tr>
<td>Petersen, William</td>
<td>29, 30, 56</td>
</tr>
<tr>
<td>Pia, Yong</td>
<td>126, 156</td>
</tr>
<tr>
<td>Puig, Carlos</td>
<td>153</td>
</tr>
<tr>
<td>Randle, J. A. W.</td>
<td>120</td>
</tr>
<tr>
<td>Reimers, David</td>
<td>6, 7</td>
</tr>
<tr>
<td>Ridge, Martin</td>
<td>110, 114, 124</td>
</tr>
<tr>
<td>Rienow, Robert &amp; Leona</td>
<td>7, 12</td>
</tr>
<tr>
<td>Rodino, Peter</td>
<td>12</td>
</tr>
<tr>
<td>Rodriguez, Richard</td>
<td>134-136</td>
</tr>
<tr>
<td>Romo, Ricardo</td>
<td>59</td>
</tr>
<tr>
<td>Roosevelt, Theodore</td>
<td>111</td>
</tr>
<tr>
<td>Rose, Larry</td>
<td>82</td>
</tr>
<tr>
<td>Rosen, Harry &amp; David</td>
<td>67</td>
</tr>
<tr>
<td>Rosen, Philip</td>
<td>23, 24, 81</td>
</tr>
<tr>
<td>Rothman, Jack</td>
<td>64, 65</td>
</tr>
<tr>
<td>Rumelin, Carl</td>
<td>33</td>
</tr>
<tr>
<td>Ryan, Richard</td>
<td>59</td>
</tr>
<tr>
<td>Samarlin, William</td>
<td>110</td>
</tr>
<tr>
<td>Samuelson, Paul</td>
<td>93</td>
</tr>
</tbody>
</table>
SUBJECT INDEX

A
Acculturation 5, 25, 49, 108
Affirmative action 38, 86-88, 90, 91, 93-96, 98-105, 114, 161, 168
  age discrimination issues 104
  and economics 93
  and qualification testing 90
  and the church 104
  and quota systems 88
  backbone of the arguments in favor of affirmative action programs 91
  compensation for past injustice and discrimination 94
  current issues 102
  definition 86
  goals and quotas, differences between 89
    became, in essence, synonymous terms. 91
  history of 86
  mostly favors middle class 92
  problems involved 87
  Reagan administration and job seniority 102, 103
  two sources for laws on 86, 87
America
  early homogeneity 3
  early, mostly Protestant 3
  polychrome, polyglot community 2
  unique destiny 1
  willingness to welcome immigrants 1
American
  definition of 21
  nationality does exist 45
  sense of peoplehood 45
Andrew Greeley
  integration of diversity 40
Anglo 3, 5, 14, 19, 22-25, 27, 31-34, 43, 44, 56, 114, 123, 125, 129
  "Law of Anglo Love of Ethnic Irrelevance" 115
Anglo-conformity model 3, 5, 19, 25, 27, 31, 43, 56
  ethnic group in church 24
  examples of 23
  most prevailing standard 25
  second generation takes for granted 25
Anti-integrationist housing forces -
  freedom of choice argument on housing 62
Asians 4, 7-9, 44, 70, 160
  denied citizenship 5
  denied permission to immigrate 5
  measuring 43
  rate and degree 44
  Richard Rodriguez' example 135
Bilingual Education Act of 1968  111, 112
and human rights  131
assumed purpose of bilingual education to be
transition to English  112
also known as Title VII  111
Bilingual Education Act of 1974  113
Revision of 1978  113
strengthened biculturalism  113
closer to original purpose  113
arguments against  130
Bilingualism  20, 107, 111, 114, 116, 119–121, 128, 130,
132, 136, 146, 148–150, 153, 157
and Church Growth  153
bilingual outreach programs  155
language churches win monolingual
people the easiest  153
need for language churches  152
tends to follow generational assimilation and the
trends of society  153
and ethclass  156
and the church  149
should the church mainstream  151
common outside U.S.  114
does not result in cognitive deficiency  120
evidence of value inconclusive,  121
flaws in early research  119
maintenance theory  112
positive cognitive effect  121
Bilingualism in Canada  149
Charter of the French Language - Bill 101  147
differences between U.S. and Canadian bilingualism  148
historical perspective  146
Official Languages Act  147
is Canadian bilingualism a model
for the United States?  149
unique  146
Bilinguals
two kinds: compound and coordinate  119
Bilingualism and the church
advocates from academic and artistic circles  143
and ethnic pluralism  143
and middle-class blacks  143
and scholastic achievement  138
and Whorfian hypothesis  141
ethnic church leaders should be English-speaking  152
Blacks  11, 14, 31, 47, 50, 56, 58, 65, 70, 71, 74, 84,
87, 92, 96, 98, 136, 138, 140, 142, 143, 145, 146, 159
Churches and community change
ambivalent positions 78
negative influence 77
Civil Rights Act 86-90, 93, 98, 110, 113
Civil Rights Movement 7, 10, 32, 36, 58, 92, 124, 159, 161, 171
lasting impact on society 10
main impetus for new ethnicity 36
Chicago School of sociology
and melting pot theory 29
Classless society
ideal of in Hyde Park, Chicago 66
value systems between socioeconomic levels 66
Code switching 119
Cognitive deficiency
child cannot deal with two sets of language codes at
the same time 118
Commission on Race and Housing 60
major source of information 60
Commonweal on zoning 71
Community change 58, 60, 72, 75, 76, 78, 81, 82, 151
community churches can exercise either a positive or a
source materials 81
Freedom of Choice Argument 62
Contextualization 162, 171
Coordinate bilinguals 119
Corporate pluralism 38
Cranston, Alan - pro maintenance position 112
Cubans 108
Cultural mold of the United States - set by English 22
Cultural pluralism 36, 37, 39, 45
Culture of poverty 47

D
Deerfield, Ill. experience 67
Diglossia
definition 125
two-way pluralistic educational model 125
Disadvantaged 97, 112, 115, 139-141
meaning of 139
Spanish-speaking children are perceived as 115
Discrimination
past, and affirmative action 88
Diversity 22, 32, 38, 40, 45, 48, 49, 51, 54, 101, 109, 117, 150
within ethnic groups 51
Dodger Stadium - uprooted historic hispanic barrio 59
Griggs vs. Duke Power Company (1971)
affirmative action ruling 94
on affirmative action 90
Growth of Cities 59
uprooted large segments of the population 59

H
Hart-Cellar Act 7, 9
abolished national origins system 7
produced new wave of immigrants 7
Heart language 116
advocates of bilingual/bicultural
education appeal to 117
Hispanics 48, 49, 59, 107, 114, 115, 124, 127, 130,
136, 154, 157, 160, 163
challenge to English language 107
Hispanic intellectuals - feelings of frustration 114
Hispanic politics 114
Hispanic population
already present before anglos arrived 108
electing to bypass the process of acculturation 108
fourth largest in world 107
largest non-English group in history 107
Homogeneity 3, 61
Homogeneous groups 14, 17, 34, 42, 43, 49,
53, 57, 107, 168
affected by immigration 14
Homogeneous unit principle 17, 42, 49, 53, 57, 168
and ethclass theory 42
and receptivity 17
Housing 11, 58-63, 66-72, 74-76, 78, 79, 84, 86, 161, 169
and population changes 58
church's moral responsibility 59
community change and class structure 73
Deerfield, Ill. experience 67
depreciation of existing property values 60
freedom of choice argument 62
freedom of choice argument, Handlin version 63
"ghettos that people don't want to get out of" 63
implications for the church 75
influence of churches 76
issues faced by churches 58
low income families rented out rooms 65
major issues of the Civil Rights Movement 58
recurring arguments pro and con 60
why neighborhoods deteriorate 65
K
Koreans 165-167

L
Language
symbolic function 109
U.S. has no official 107
language churches 49
language schools 49
Latin America 7, 9, 123, 130, 159, 161, 162
Lau vs Nichols 113
emphasis on transition to English 113
main test case on bilingual education 113
liberal pluralism 38
Language requirement for statehood 111
La Salle Street church, Chicago 82

M
Maintenance of culture argument 124
in church 127
perpetuate mother tongue 112
Major issues of the Civil Rights Movement 58
Manifest Destiny 26
McCarren-Walter Immigration and Naturalization Act 7
eliminated racism 7
retained national origins system 7
Meese, Edwin - on affirmative action 103
Melting pot 25
concept is unworkable 39
left identifiable ethnic groups 37
roots of the theory 26
theoretical assumptions 30
pot will boil again 48
will produce amalgamation 46
Middle class 73, 92, 101, 166
Middle class blacks
caught in vise on housing 74
effected by community change 65
stereotyped with all nonwhites 74
Migration 58
first wave 58
southern rural blacks 58
Minorities defined 87
Mission - of churches 14, 17, 57, 81-83, 165, 172
Monolingualism
essential to national unity 110
unique in United States 115
Mores - culturally conditioned 51
Multi-ethnic churches 49-51, 55
organizational models 52, 171
presents problems and challenges for the church 54
symbolic ethnicity 47
theories of 34
Political refugees 13, 15
Property values and ethnicity 61
primary variables 61
Proposition Fourteen 68
California constitutional amendment 68
open housing bill 68
opposed by churches 68
Protestant 3, 4, 6, 20, 22, 30-32, 68, 73, 76, 77
Puerto Ricans 108
Puerto Rico - only real exception to the
supremacy of English 111
Push-pull factors 9, 19

Q
Qualification Testing 90
and affirmative action 90
Quotas 6, 7, 9, 38, 88, 91, 93, 98, 101-103, 105, 164, 168
and affirmative action plans 91
and Bakke case 99
arguments against 91
Philadelphia plan 91
upheld in Weber vs Kaiser Aluminum 93
immigration 6, 7, 9

R
Racial prejudice 11, 61
Reagan Administration 9, 103
Receptivity 17, 116
and homogeneous unit principle 17
Redlining 67, 69
ethical issue for churches 67
Refugees 7
quota system mortgage 7
Reparations 94, 97, 104
Restrictive Covenants 59
Ronald Reagan signed 59
Shelley vs Kraemer in 1948 outlawed 59
violation of the Fourteenth Amendment 59
Reverse discrimination 88, 94-98, 100-102, 105
and Bakke case 99
arguments against 94
arguments in favor 96
definition of 98
Edwin Meese on 103
two different meanings 8, 94
Urban church 13, 17, 81
models for 17
redefined mission and structure 17
Urban Mission (magazine) 82

V
Vietnam war - new wave of immigrants 9

W
WASP 22, 137
"Law of Anglo Love of Ethnic Irrelevance" 115
meaning of 22
Weber vs Kaiser Aluminum
affirmative action decision 93
White ethnic groups
employment patterns 47
White flight 70
Whorfian hypothesis 141
World War I 110, 150
World War II 7, 58

Z
Ziegenhals, Walter
on churches and community change 77
Zoning 69-71
Arlington Heights Case 70
church in Arlington Heights, Ill. 70
upheld by Supreme Court 71
white America's most sophisticated and resilient
devices of segregation 69