

Chicago, July 26, 1963.

Striking at Bias

Varied Powers of Congress to Enforce Civil Rights Cited

The writer of the following is Hamilton Fish Professor of International Law and Diplomacy and Professor of Law, Columbia University.

TO THE EDITOR OF THE NEW YORK TIMES:

So much of the discussion of the proposed civil rights legislation appears to ask which is the proper constitutional provision to be incanted in support of legislation outlawing discrimination. Surely, the question is rather in what respects racial discrimination is properly the concern of Congress under the Constitution. The concerns and powers of Congress, moreover, are cumulative, not alternative.

A determined Congress could strike at important segments of racial discrimination with the far reaches of its defense powers (for example, discrimination which hampers the defense effort); its foreign affairs power (for example, discrimination which affects our foreign relations, at least discrimination against diplomats); its spending power (for example, discrimination by bodies or agencies which receive Federal funds).

There are also the powers of Congress that have been discussed. Of course, Congress can outlaw discrimination in interstate commerce, or which affects interstate commerce.

Public Authority's Complicity

Congress can, in addition, pursuant to the 14th Amendment, strike at discrimination for which the state is responsible, and at the widespread complicity of public authority in private discrimination. It may be possible to draft a provision outlawing discrimination for which the state is responsible, perhaps even leaving it to the courts to determine later where the state may properly be held responsible.

Congress could also forbid state and local officials to require, promote, encourage or enforce racial discrimination.

In regard to places of public accommodation, I am confident that the Supreme Court would uphold an act of Congress which forbids local judges and local police to enforce discrimination, for example, through trespass prosecutions. These prohibitions on the acts of local officials could be enforced by criminal penalty, by injunction, by suits for monetary damages.

It is not either one power of Congress or another, nor a matter of incanting several. The various powers of Congress can support various provisions adding up to an effective civil rights act. LOUIS HENKIN.

New York, July 25, 1963.