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Constitutional Law - Commercial Speech - Municipal Ordinance Which Prohibits the Display of "For Sale" and "Sold" Signs on Residential Property in Order to Prevent Panic Selling is Constitutional

Mary M. Popper

CASE NOTES

CONSTITUTIONAL LAW—Commercial Speech—Municipal Ordinance Which Prohibits the Display of "For Sale" and "Sold" Signs on Residential Property in Order To Prevent Panic Selling is Constitutional. *Linmark Associates, Inc. v. Township of Willingboro,* 535 F.2d 786 (3d Cir.), *cert. granted,* 97 S. Ct. 351 (1976).

A real estate broker and a landowner in the township of Willingboro, New Jersey, challenged the constitutionality of an ordinance which prohibited the display of "for sale" and "sold" signs on residential property.[1] The asserted purpose of the ordinance was to prevent panic selling by whites in an integrated neighborhood.[2] Plaintiffs alleged that the ordinance deprived them of their right to free speech under the first and fourteenth amendments.[3]

The district court[4] concluded that the prohibition against the signs was essentially censorial and, therefore, it abridged the property owners' first amendment guarantee of free speech.[5] Furthermore, the court noted that the effect of the ordinance could be racially discriminatory by denying blacks an equal opportunity to buy housing in Willingboro.[6] It said that without the signs, the only way a buyer could learn what houses were for sale was through realtors.[7] This would enable real estate agents to "steer" clients in such a way as to perpetuate existing racial patterns in housing.[8]

The Third Circuit Court of Appeals reversed the district court and held the signs were primarily commercial speech.[9] The court stated

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1. Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 789 (3d Cir.), *cert. granted,* 97 S. Ct. 351 (1976).
2. *Id.* at 791.
3. *Id.* at 789.
4. Linmark Assocs., Inc. v. Township of Willingboro, No. 74-1120 (D.N.J. Feb. 20, 1975).
5. *Id.* at 5-6.
6. *Id.* at 4-5.
7. *Id.*
8. *Id.* The district court also noted that the ordinance infringed on the constitutional right to travel since members of minority groups might be denied a fair opportunity to buy suitable housing. *Id.* at 5.
9. 535 F.2d at 794. The court of appeals concluded that plaintiffs did not have standing to raise a third party interest in the right to travel. *Id.* Moreover, since there were other methods of learning about what houses were for sale and since the informational effect of the

that the message inherent in a "for sale" sign is a proposal for a commercial transaction.[10] The message inherent in a "sold" sign is that a commercial transaction has taken place.[11] Since neither message contains comment on social policy, political protest, or similar elements of pure speech,[12] the court found that the governmental interests forwarded by the ordinance sufficiently outweighed any infringement on first amendment rights.[13] While the court of appeals did not deny the possibility of a future conspiracy by realtors and homeowners to forego other forms of advertising and to discriminate against black buyers, the court pointed out that this possibility existed with or without the signs.[14] Such a conspiracy would be difficult where integration has already been successfully achieved, as it has in Willingboro,[15] and the court lacked evidence of such intentions in the community.[16] The court of appeals held the ordinance "effected no racial classifications. It fell, without discrimination, on all realtors and on all races, colors and creeds alike."[17] Thus, the court concluded that the ordinance was constitutional.[18]

The first amendment declares that "Congress shall make no law . . . abridging the freedom of speech or of the press."[19] The Supreme Court has held that these rights are so fundamental as to be comprehended within the fourteenth amendment guarantee of due pro-

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absence of signs fell equally upon blacks and whites, the court concluded that no one had suffered a deterring effect on his right to travel. *Id.* at 804.

See Warth v. Seldin, 422 U.S. 490 (1975). In *Warth*, plaintiffs, challenging a zoning ordinance which excluded low and moderate income families, failed to establish they were injured and thus were not able to raise the rights of third parties. *Id.* at 508. *But see* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), in which tenants were found to have standing under the Fair Housing Act of 1968, 42 U.S.C. § 3610(a) (1970), to raise the rights of others denied housing in their apartment complex because of the racially discriminatory policies of the landlord. *Id.* at 212. Plaintiffs had asserted that the rental policies had deprived them of the social and economic benefits of a racially integrated neighborhood. *Id.* at 208.

10. 535 F.2d at 796.

11. *Id.*

12. *Id.* at 794.

13. *Id.* at 795.

14. *Id.* at 803-04.

15. Integration in Willingboro was effected in response to a court injunction against racially based housing discrimination there. Levitt & Sons, Inc. v. Division Against Discrimination, 31 N.J. 514, 158 A.2d 177, *appeal dismissed*, 363 U.S. 418 (1960).

16. 535 F.2d at 804.

17. *Id.*

18. *Id.* at 805.

19. U.S. CONST. amend. I.

cess.[20] Thus these rights deserve protection from impairment by the states.[21] The presumption is that a statute is constitutional, and the ordinary standard of review regarding constitutionality is whether the law has a reasonable relationship to the desired goals.[22] However, a stricter test is applied when legislation appears to infringe on freedom of speech.[23] The state can directly restrict the right of freedom of speech only to prevent grave and immediate danger to interests which the state may lawfully protect.[24]

Incidental restrictions may be imposed on first amendment rights if they are in furtherance of a legitimate government interest. However, the interest cannot be related to the suppression of communication. The restrictions must be substantially related to the interests furthered and cannot be greater than necessary to achieve the protection of the government interests.[25]

Not all speech enjoys this rigorous protection. The Supreme Court has distinguished pure speech from other types of speech, such as libel and obscenity, which are excepted from the first amendment guarantee of freedom.[26] While commercial speech falls within these exceptions, successive Court opinions have increasingly emphasized first amendment protection of any pure speech element in advertising.

In *Valentine v. Chrestensen*,[27] the Supreme Court identified commercial speech as a proper subject of regulation within the police powers of the community.[28] Respondent had attempted to evade a

20. Gitlow v. New York, 268 U.S. 652, 664-66 (1925).

21. *Id.*

22. Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952). In *Day-Brite*, the Supreme Court applied the test to deprivation of property rights. The Court upheld a state law forbidding the withholding of pay from employees who absented themselves from work in order to vote. *Id.* at 424-25.

23. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

24. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943). For a critical appraisal of the implication of "presumptive invalidity" of any law which touches communication, see Justice Frankfurter's concurring opinion in Kovacs v. Cooper, 336 U.S. 77, 89-97 (1949).

25. Baldwin v. Redwood City, 540 F.2d 1360, 1365 (9th Cir. 1976). *See* Young v. American Mini Theatres, Inc., 96 S. Ct. 2440, 2453 (1976) (Powell, J., concurring); Procunier v. Martinez, 416 U.S. 396, 409-15 (1974); United States v. O'Brien, 391 U.S. 367, 377 (1968); Quaker Action Group v. Morton, 516 F.2d 717, 725 (D.C. Cir. 1975).

26. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

27. 316 U.S. 52 (1942).

28. *Id.* at 54-55.

local ordinance against distribution of circulars in the street. He had printed a flier containing both a protest against the city's denial of wharfage for a submarine and an advertisement for an exhibition of the same ship.[29] The Supreme Court held that since profit was the primary aim of the circulars, they did not derive first amendment protection from the appended elements of pure speech.[30]

In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[31] the Supreme Court held that newspaper advertisements were commercial speech, and that a city ordinance which prohibited the classification by sex of job advertisements did not violate the first amendment.[32] However, in *Bigelow v. Virginia*,[33] the Supreme

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29. *Id.* at 53.

30. *Id.* at 55. The Court defined commercial speech:

> 1. This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgement. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated.

Id. at 54-55.

31. 413 U.S. 376 (1973).

32. *Id.* at 385. The Court stated:

> The commercial-speech doctrine is traceable to the brief opinion in *Valentine v. Chrestensen* . . . .
>
> Subsequent cases have demonstrated, however, that speech is not rendered commercial by the mere fact that it relates to an advertisement. In *New York Times Co. v. Sullivan* . . . a city official of Montgomery, Alabama, brought a libel action against four clergymen and the New York Times. The names of the clergymen had appeared in an advertisement, carried in the Times, criticizing police action directed against members of the civil rights movement. . . .
>
> Mr. Justice Brennan, for the Court, found the *Chrestensen* advertisement easily distinguishable:
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> "The publication here was not a 'commercial' advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."
>
> In the crucial respects, the advertisements in the present record resemble the *Chrestensen* rather than the *Sullivan* advertisement.

Id. at 384-85 (citations omitted).

33. 421 U.S. 809 (1975).

Court said advertising was not stripped of all first amendment protection if there was an element of pure speech in the message.[34] The Court found a Virginia statute which prohibited the promotion of abortion[35] unconstitutional as applied to newspaper advertisements.[36] It stated that the degree of infringement on any first amendment right must be balanced against the importance of a legitimate government purpose.[37]

Since every anti-sign ordinance encumbers speech to some extent, the *Linmark* court first determined whether the speech involved deserved protection by the stringent standards applied under the first amendment.[38] The signs were primarily commercial advertisement, and had a substantial non-speech element. In *Bigelow* the pure speech element was explicit in the message of the advertisement; in *Linmark,* the pure speech element (*i.e.*, the owner is moving) was implied in the signs.[39] The *Linmark* court pointed out that while commercial speech enjoys some protection, the manner of communication may be regulated when its effect is detrimental and when the element of pure speech is minimal.[40]

In *Chrestensen,* the manner of communication was distribution of handbills, and the purpose of the regulation apparently was to avoid litter in the streets.[41] In *Linmark,* the communication was in signs displayed at private homes.[42] The purpose of the ordinance was not to enhance the cleanliness of the city, but to prevent an anticipated reaction to the signs themselves.[43]

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,*[44] which was decided after *Linmark,* the Supreme Court found unconstitutional a Virginia statute which declared it was unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs.[45] The Court said speech

34. *Id.* at 826.
35. *Id.* at 812.
36. *Id.* at 829.
37. *Id.* at 826.
38. 535 F.2d at 794.
39. *Id.* at 795.
40. *Id.*
41. 316 U.S. at 53 n.1.
42. 535 F.2d at 789.
43. *Id.* at 800.
44. 96 S. Ct. 1817 (1976).
45. *Id.* at 1826-30.

which does nothing more than propose a commercial transaction deserves protection.[46] The Court reviewed its standards for the regulation of commercial speech. Restrictions must be justifiable without reference to the content of the regulated speech, must serve a significant government interest and must leave unimpeded sufficient alternative means of communicating the information.[47] The Court specifically objected to the denial of information to the commercial targets of advertising who would benefit from the information contained therein.[48] Advertising the price of prescription drugs would serve consumer intersts.[49]

In view of *Virginia State Board of Pharmacy*, it is arguable that the ordinance in *Linmark* fell short of the Supreme Court standard since restrictions on the signs were intended to suppress the commercial message that houses were for sale or had been sold. Although the *Linmark* court noted that there remained sufficient alternative methods of communicating the desire to sell to prospective buyers,[50] the signs were prohibited precisely because of their effectiveness in informing homeowners of sales and proposed sales. Neighborhood homeowners are not the targets of housing advertisement. However, they do have an interest in the information contained therein.

Citing *Virginia State Board of Pharmacy,* a recent New York case[51] said:[52]

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46. *Id.* at 1826. The Court stated:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Id. at 1827.

47. *Id.* at 1830.

> What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative.

Id. at 1831 (footnote omitted).

48. *Id.* at 1826-27.

49. *Id.*

50. 535 F.2d at 797.

51. Modjeska Sign Studios, Inc. v. Berle, 87 Misc. 2d 600, 386 N.Y.S.2d 765 (Sup. Ct. 1976).

52. *Id.* at 770.

> [t]he United States Supreme Court has now made clear that commercial speech is protected by the First Amendment . . . . Restrictions with respect to time, place and manner . . . are still permissible, provided they are justified without reference to the content of the regulated speech . . . .

The *Linmark* decision stated that a municipality could limit commercial speech in order to achieve a valid government goal.[53] Accordingly, the court examined the purpose and effect of the Willingboro ordinance. It found a legitimate public interest in avoiding the psychological climate which would lead to panic selling and eventually to resegregation.[54]

Village of Euclid v. Ambler Realty Co.[55] established the shaping of the community as a legitimate government interest, even if the resulting ordinances restrict the use of private land.[56] However, a local ordinance is invalid if its effect is to give support to racial discrimination in the sale or rent of property.[57]

A local ordinance may regulate housing advertisements to conform to the anti-discriminatory provisions of section 3604(e) of the Fair Housing Act of 1968.[58] In *United States v. Bob Lawrence Realty, Inc.*,[59] representations to homeowners about the racially changing composition of their neighborhoods were part of a group pattern of statutory violations by all real estate agents in the area.[60] The court found an overriding government interest in preventing

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53. 535 F.2d at 795.

54. *Id.* at 799.

55. 272 U.S. 365 (1926).

> A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgement must be allowed to control.

Id. at 388.

56. *Id.* at 389.

57. Mayers v. Ridley, 465 F.2d 630 (D.C. Cir. 1972).

58. 42 U.S.C. § 3604(e) (Supp. V, 1975), made it unlawful "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, sex, or national origin."

The court in United States v. Mitchell, 327 F. Supp. 476 (N.D. Ga. 1971), interpreted the section:

> In delineating what Congress means by "representations" in § 3604(e) the court must keep in mind the basic purpose of the sections: to prevent persons from preying on the fears of property owners and inducing panic selling resulting in monetary loss to the sellers and instability in the neighborhoods involved.

Id. at 479.

59. 474 F.2d 115 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973).

60. 474 F.2d at 118.

blockbusting[61] which outweighed the informational value of such commercial conduct.[62]

However, when restrictions apply only to realtors and not to homeowners, they are abridgements of due process.[63] In *DeKalb Real Estate Board, Inc. v. Chairman of the Board of Commissioners*,[64] an ordinance required brokers to delete their names from "for sale" signs because a large display of signs of realtors known to be black or to deal with blacks might engender panic selling.[65] The district court held the ordinance was vague and overbroad, since there was no connection between the display of the signs and the prohibition against blockbusting.[66] *Linmark* can be distinguished from *DeKalb* since the ordinance in *DeKalb* was not equally applied to realtors and homeowners.[67]

In *Barrick Realty, Inc. v. City of Gary*,[68] the city enacted an ordinance forbidding the display of "sold" or "for sale" signs.[69] The Seventh Circuit Court of Appeals found the ordinance was reasonable and appropriate to stop panic selling and white flight from

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61. In the classic blockbusting pattern, a realtor suggests to white homeowners that their neighborhood will soon become black, that this will cause a depression in prices, and that they had better sell quickly to avoid losing their investments and being among the last whites on the block. Such personal contact is typically reinforced with a rash of "for sale" and "sold" signs. Realtors are then able to buy housing at low prices and to sell at high prices to incoming blacks, thus contributing to the resegregation of the neighborhood. *See* Note, *Blockbusting*, 59 GEO. L.J. 170, 171-76 (1970).

62. 474 F.2d at 121. The Fifth Circuit Court of Appeals upheld the constitutionality of section 804, the anti-blockbusting section of the Fair Housing Act. Citing Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the court said the thirteenth amendment gives Congress power to enact laws operating upon the individual in order to enforce the prohibition against slavery and to abolish all badges and incidents of slavery in the United States. 474 F.2d at 120. Congress thus had the power to enact section 804. *Id.* Furthermore, the statute was not violative of the first amendment, since it regulates commercial activity, not speech. *Id.* at 121.

> The statute is aimed at the commercial activities of those who would profiteer off the ills of society, conduct that the Thirteenth Amendment empowers Congress to regulate.

Id.

63. DeKalb Real Estate Bd., Inc. v. Chairman of Bd. of Comm'rs, 372 F. Supp. 748 (N.D. Ga. 1973).

64. *Id.*

65. *Id.* at 754.

66. *Id.* at 755.

67. *Id.*

68. 491 F.2d 161 (7th Cir. 1974), *aff'g* 354 F. Supp. 126 (N.D. Ind. 1973).

69. 491 F.2d at 163.

racially changing neighborhoods. The lower court had found that the public interest in maintaining constitutionally mandated open housing outweighed the ordinance's regulation of commercial speech[70] and that there was no evidence of legislative intent to inhibit integration.[71] In affirming the lower court opinion, the court of appeals defended the concept of racial balancing:[72]

> It is clearly consistent with the Constitution and federal housing policy for Gary to pursue a policy of encouraging stable integrated neighborhoods and discouraging brief integration followed by prompt resegregation, even if an effect of that policy is to reduce the number of blacks moving into certain areas of the city.

In *Barrick*, the NAACP Legal Defense and Education Fund argued as *amicus curiae* that both blacks and whites had an interest in stable communities sufficient to outweigh the inconveniences in finding alternative methods of advertising and learning about homes for sale.[73]

The district court in *Linmark* had distinguished *Barrick* as involving established evidence of panic-selling and blockbusting occurring in formerly white neighborhoods.[74] However, the court of appeals stated that there was evidence of increasing concern about the signs among homeowners in Willingboro.[75] Attempts at blockbusting were anticipated because of the interest of out-of-town realtors.[76] Thus, the court found *Barrick* relevant. It approved the Willingboro ordinance as an attempt to forestall segregation.[77]

In his dissent, Judge Gibbons pointed to testimony from realtors and members of the community that there was concern in Willing-

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70. 354 F. Supp. at 132.
71. *Id.* at 136.
72. 491 F.2d at 164-65.
73. *Id.* at 165.
74. Slip Op. at 3.
75. 535 F.2d at 798-99.
76. *Id.* at 807 (Gibbons, J., dissenting).
77. *Id.* at 802. The court of appeals alluded to a 1975 report by the United States Civil Rights Commission to demonstrate that success in maintaining integration was unusual. *Id.* at 789 n.1. Figures in the report show that most blacks in cities live in areas which are 50 percent or more black. U.S. COMM'N ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING, 124, 128-29 (1975). Even though blacks in suburbs are more integrated with whites, suburban neighborhoods often become black enclaves. *Id.* at 119, 131.

For a discussion of "Balkanization" of cities and surrounding suburbs, see BUILDING THE AMERICAN CITY: REPORT OF THE NATIONAL COMM'N OF URBAN PROBLEMS TO THE CONGRESS AND TO THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 34, 91st Cong., 1st Sess. 211 (1968).

boro over the relative growth of the black and minority population and the possible effect of that growth on property values.[78] Each witness quoted in the dissent said that the proscribed signs had engendered this concern and that the ordinance would slow the change in the racial composition of the population.[79] The dissent found the evidence clearly supported the district court's conclusion that Willingboro intended to facilitate discrimination against blacks by stabilizing the non-white population at not more than 20 percent.[80] Judge Gibbons also asserted that in the nearby community of Medford Lakes, an ordinance prohibiting "for sale" and "sold" signs, together with an understanding among realtors that they were not to direct blacks to that area, had worked to maintain segregation.[81]

The majority had pointed out that there was no evidence offered concerning the effect of the Medford Lakes sign ordinance on a longstanding pattern of discrimination and that the ordinance itself had not been offered into evidence for comparison with the Willingboro ordinance.[82]

Although the *Linmark* court did not acknowledge the Willingboro ordinance as an attempt to balance the racial composition of the town, it found the purpose of the ordinance was to prevent resegregation.[83] Yet, in order to discourage resegregation, a community must also discourage a proportionally large ingress of minorities. Thus in *Linmark* two goals which the courts and statutes have supported came into conflict: that no person should be denied the opportunity to buy a particular house because of his race,[84] and that a community should be populated by all racial and ethnic groups represented in its area.[85] There has been no legislative or judicial

78. 535 F.2d at 809 (Gibbons, J., dissenting).

79. *Id.* at 807-10.

80. *Id.* at 811.

81. *Id.*

82. *Id.* at 803 n.27.

83. *Id.* at 797.

84. 42 U.S.C. § 3604(e) (Supp. V, 1975); *id.* § 3613 (1970). *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Mayers v. Ridley, 465 F.2d 630 (D.C. Cir. 1972).

85. *See, e.g.*, United States v. Bob Lawrence Realty, Inc., 474 F.2d 115 (5th Cir. 1973). In this case the court stated:

> The anti-blockbusting statute, § 3604(e), is an attempt by Congress to disprove the belief, held by many, that the Thirteenth Amendment made a promise the Nation cannot keep. Integrated housing is deemed by many to be an *a priori* requirement

determination of the constitutionality of community attempts to compromise between the aims of open housing and integration.

The Supreme Court has stated: "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled . . . ."[86] It has said that it is within the power of the legislature to determine that a community should not be segregated because of racial discrimination in sales and rentals. It has not said whether it is within the power of the legislature to determine that a community should be racially integrated.

The *Linmark* court found the Willingboro ordinance would benefit the community as a whole by helping to maintain integration. Nonetheless, the ordinance was intended to suppress the message of the signs and thus to reduce the number of commercial transactions which the signs promoted. If the *Linmark* decision does not survive the Supreme Court's latest construction of first amendment protection of commercial speech because the Willingboro ordinance restricts the content of the regulated speech, the important question of the legitimacy of racial balancing as a legislative goal will remain unanswered.

Mary M. Popper

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before our schools can be realistically integrated. . . . [I]t is indisputable that white flight is a blight upon the democratized society we envision and this Congressional Act is in the mainstream of that vision.

Id. at 127.

86. Berman v. Parker, 348 U.S. 26, 33 (1954).