THE SENATE CIVIL RIGHTS BILL.

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THE Civil Rights Bill passed by the Senate contains five sections, two of which present the purpose of the bill, while the other three relate to the machinery of its execution. We give as follows the two sections that refer to the object sought to be accomplished:

"SECTION 1. That all citizens and other persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters and other places of public amusement, and also of common schools and public institutions of learning or benevolence supported in whole or in part by general taxation, and of cemeteries so supported, and also the institutions known as agricultural colleges endowed by the United States, subject only to the conditions and limitations established by law and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

"SEC. 4. That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any state, on account of race, color, or previous condition of servitude, and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall be deemed guilty of a misdemeanor and be fined not more than $1,000."

The second section of the bill provides the penalty for any act violating the provisions of the first section, which consists in a forfeiture of $500 to the person aggrieved thereby, to be recovered in an action on the case, and also in being amenable on the charge of misdemeanor, for which, on conviction thereof, the person so violating the law "shall be fined not more than $1,000 or shall be imprisoned not more than one year." The third section provides the jurisdiction for the trial and punishment of offenses against the law. The fifth and last section makes all cases arising under the provisions of the bill reviewable by the Supreme Court of the United States.

The constitutional basis upon which the right of Congress to pass such a law is claimed is supplied by the first and fifth sections of the Fourteenth Amendment, which we reproduce as follows:

"SEC. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

"SEC. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

There is no pretense of any power in Congress to pass this bill except that which is claimed under the above sections of the Fourteenth Amendment. The theory of its advocates is that this amendment authorizes Congress legislatively to guarantee to the persons specified in the first section of the bill "the full and equal enjoyment" of the several items enumerated in the same, without any discrimination on account of "race, color, or previous condition of servitude," and also so to regulate the machinery of state courts as to forbid the exclusion of any citizen from the jury-list on account of "race, color, or previous condition of servitude." Were the proposition one of state legislation to secure these ends we should have no doubt as to its propriety or constitutionality. Many of the states have already passed civil rights bills covering substantially the same ground; and all the states should do so—not as a matter of party policy, to gain political ends, but as a matter of simple justice. The question of race or color as to legal rights and privileges is wholly out of date in this country. When, however, Congress undertakes to exercise the powers assumed in this bill we are compelled to demur, for various reasons, relating to the structure of the bill itself, its propriety and constitutionality. These reasons we submit in the following order:

1. It is a well-established principle that the General Government is one of *enumerated* powers, and that beyond these it has no power of action. Mr. Justice Swayne, in a case which arose in Kentucky with reference to the Thirteenth Amendment, stated this doctrine in the following terse and forcible language:

"What is unwarranted or forbidden by the Constitution can no more be done in one way than in another. The authority of the National Government is *limited*, though supreme in the sphere of its action. As compared with the state governments, the subjects upon which it acts are few in number. Its objects are all *national*. It is one wholly of *delegated* powers, and . . . whenever an act of that government is challenged *a grant of power must be shown or the act is void*."

2. The tenth amendment expressly declares that "the powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people." This settles the question that all governmental powers left after the deduction of those delegated to the United States and those prohibited to the states are absolutely and exclusively state powers, and that the General Government cannot enter upon this field of reserved powers without violating alike the letter and the spirit of the Constitution.

3. The prohibitory clauses in the first section of the Fourteenth Amendment which the fifth section authorizes Congress to enforce by appropriate legislation are distinctly and definitely declared to be inhibitions upon *state* authority, and not upon the acts of *individuals*. The state, as a body politic, having the lawmaking power, is forbidden to do certain things, just as in the tenth section of article first it is forbidden to do the things there enumerated; and Congress is authorized legislatively to provide for carrying these restraints into execution. There is not a syllable in the language that has the least reference to individuals. It is with the action of a state that the prohibitions deal in the way of restricting its power; and this, of necessity, fixes a limit to the power of legislation granted to Congress in the same amendment. This power plainly cannot go beyond the restriction itself. The restriction measures the power and determines its scope. Congress has power to enforce cor-

tain provisions. What provisions? The ones enumerated in the amendment, and, among others, such provisions as are prohibitions upon state power. It has the right to see to it that these prohibitions upon *state* authority are made operative; and beyond this we do not see any grant of power to Congress. Now, the Civil Rights Bill, while making no provision for exercising this power or discharging this duty in respect to any infraction of the prohibitions by state authority, directs its whole force to *individuals* whom it makes offenders for certain acts. It assumes that a constitutional prohibition imposed upon a state, with power vested in Congress to carry it into effect, is a direct grant of power to Congress to legislate in respect to individuals. The amendment says that "no state" shall do certain things, and that Congress shall have power to provide for enforcing the prohibition; and the bill says that no individual shall do certain things. We are utterly unable to see how the language of the amendment sustains the bill.

4. The "privileges or immunities" which are guaranteed by the Fourteenth Amendment against any abridgment by state authority are expressly declared to be such as belong to "citizens of the *United States*." Nothing is said about those of state citizenship; no reference is made to them and no power is bestowed upon Congress to legislate in regard to them. They stand just as they stood before, under the exclusive jurisdiction of the states, with the right in the states to determine what they shall be and how they shall be protected. On this point the Supreme Court of the United States, in deciding the New Orleans Slaughter-house case, laid down the following doctrine:

"Of the privileges and immunities of the citizen of the United States and of the privileges and immunities of the citizen of the state we will presently consider; but we wish to state here that it is only the *former* which are placed by this clause under the protection of the Federal Constitution, and that the *latter*, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment. If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of a state, as such, the latter must rest for their security and protection where they have heretofore rested, so far as this paragraph is concerned; for they receive no additional aid from it."

This authoritative construction of the Fourteenth Amendment settles the question, so obvious upon its very face, that the restriction which it imposes upon state legislation has nothing to do with the privileges and immunities of state citizenship, but refers only to those of United States citizenship. The former are, hence, left where they always have been left—to the jurisdiction of the respective states—and have not been transferred to the care of the General Government.

Is it then true that the items designated in the first and fourth sections of the Civil Rights Bill are comprehended in "the privileges or immunities of citizens of the United States" which the states are expressly forbidden to abridge? This must be true in order to give the bill the least shadow of constitutional authority. The Supreme Court, without professing to enumerate all "the privileges or immunities of citizens of the United States," nevertheless mentions several of these privileges by way of illustrating their general character; and it is worthy of notice that not a single one of the items contained in the Civil Rights Bill is referred to. The items set forth in the bill present a new and most extraordinary interpretation of "the privileges or immunities of citizens of the United States." The "full and equal enjoyment of the accommodations" afforded by "theaters and other places of public amusement" is one of these items. The same full and equal enjoyment of the accommodations afforded by institutions of benevolence, or by cemeteries, or by common schools, or by inns, or by public conveyances on land or water is secured by the bill to "all citizens and other persons within the jurisdiction of the United States," of every race and color, regardless of any previous condition of servitude." All these items are comprehended in "the privileges or immunities of citizens of the United States," according to the theory of this bill. No judicial construction has ever asserted any such doctrine and no previous legislation of Congress has ever attempted to enforce it. The items of the bill, upon their very face, are such as fall under the police jurisdiction of the states, and cannot be touched by Congress without interfering with that jurisdiction, on the one hand, and exceeding its own powers, on the other.

5. The jury law proposed in the fourth section of the bill assumes that the right to be a juror in a state court, as against any discrimination "on account of race, color, or previous condition of servitude," is one of the "privileges or immunities of citizens of the United States" and enforces the right by a penalty imposed on the person charged with the duty of summoning jurors and violating this alleged right. That is to say, the bill undertakes to establish a rule that shall be legally operative in respect to the organization and composition of juries in state courts, thereby interfering with the jurisdiction of the states in framing their own jury laws. This is simply monstrous. We do not wonder that Senator Carpenter refused to vote for the bill with this section in it or that he said:

"Without discussing other provisions of the bill, one makes it impossible for me to vote for it, and that is the provision in regard to state juries. I know of no more power in the Government of the United States to determine the component elements of a state jury than of a state bench or a state legislature. I can see no argument which shows the power of this Government to organize state juries that does not equally apply to state legislatures—a power which, in my judgment, is not conferred upon this Government."

The simple truth is, the jury service is not an inherent right of citizenship at all, but simply a duty imposed by lawful authority. Any effort on the part of Congress to interfere with this question in respect to state courts is nothing but an outrageous usurpation. There is no warrant for it in the Constitution of the United States.

6. Mr. Justice Hunt, in deciding the case of Miss Susan B. Anthony, ruled that the Fourteenth Amendment did not guarantee to women or anybody else the right of voting, but left this right to be determined by state authority. The Judiciary Committee of the House of Representatives, in their report, in 1871, on the memorial asking Congress by a declarative act to legislate in favor of female suffrage under the authority bestowed by the Fourteenth Amendment, expressly said that such an "act was not authorized by the Constitution nor within the legislative power of Congress."

If, then, it be true, as is manifestly implied in the second section of the Fourteenth Amendment, as Justice Hunt ruled in the case of Miss Anthony and as is virtually confessed by the adoption of the Fifteenth Amendment, to secure the right of suffrage as against any denial "on account of race, color, or previous condition of servitude," that this right is not included in "the privileges or immunities of citizens of the United States" guaranteed by the Fourteenth Amendment, what reasonable pretense is there for saying that the items enumerated in this Civil Rights Bill are comprehended in this amendment? If the amendment did not secure the right of voting to anybody, black or white, and needed another amendment to confer the right on the colored people, did it secure the right to "the full and equal enjoyment" of the privileges afforded by inns, public conveyances on land and water, theaters and other places of public amusement," etc.? Not sufficiently potent to guarantee the great right of voting, is it, nevertheless, sufficiently so to guarantee these comparatively minor rights and authorize Congress to legislate for their protection and enforcement? The supposition is absurd.

7. The assumptions of legislative power made in this bill need only to be carried out into other relations completely to oust the whole jurisdiction of the states. If Congress may legislate in regard to hotels, stage-coaches, steamboats, theaters, circuses, common schools, institutions of charity, burying grounds, and state juries; if it may enter this field of items, which has always been regarded as belonging to state jurisdiction; yes, if it may do these things, then it may absorb all the powers of the states on the pretense of protecting "the privileges or immunities of citizens of the United States." Well and forcibly did the Supreme Court, in the New Orleans Slaughter-house case, say:

"Was it the purpose of the Fourteenth Amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned from the states to the Federal Government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the states?"

These questions must be answered in the affirmative if we adopt the theory that underlies this bill. It can be sustained upon no other theory. As the Court significantly said, upon a supposition parallel to this very theory, "it radically changes the whole theory of the relations of the state and Federal governments to each other, and of both of these governments to the people." It is quite time to take a careful observation and see whither we are drifting when such consequences are impending.

8. This Civil Rights Bill, should it become a law and be carried into effect, will in many of the states involve the absurdity of a *double* punishment for the same acts—one by the General Government and the other by state governments. Many of the states have already enacted civil rights bills, enforced by penal provisions, which would be violated by the very acts that would be offenses against this bill. We should then have two systems of punishment going on for the same offenses under two different jurisdictions. Both governments would take the same offenders in hand for the same acts. One or the other of these jurisdictions would be at fault. If it properly falls within the province of the states to legislate in regard to the matters contained in this bill and protect the rights of their own citizens, then the same matters cannot fall within the province of the General Government without confounding the two jurisdictions or bringing them into conflict with each other.

9. The penal clause of section second, which provides that for every offense against the provisions of the first section the person so offending shall "forfeit and pay the sum of $500 to the person aggrieved thereby," is highly objectionable for two reasons: *First*, such an absolute forfeiture, no matter what may be the degree of the grievance, would often be grossly unjust. *Secondly*, such a forfeiture is practically a bribe, disposing individuals to seek their own grievances as a means of profit. That part of the section which treats the offense as a misdemeanor and provides a penalty therefor fixes a maximum point beyond which the penalty shall not extend, with no minimum point below which it shall not descend. If the penalty be a fine, it must not be *more* than $1,000, while it may be one penny or even nothing. If the penalty be imprisonment, it must not be *more* than one year, while it may be ten minutes. This is certainly a very queer way of legally defining a penalty for a crime. It looks more like a farce than serious business.

10. If the legal effect of the bill be to force "mixed schools" in distinction from "separate schools" for white and colored children in the several states, and that, too, independently of their own choice and judgment as to what is expedient, then the bill itself, besides being without any constitutional warrant, is inexpedient to the very last degree. Such we understand to be the purport of the bill, and with this understanding we pronounce it an outrage upon the rights of the states. The public school system is a state institution altogether. It is organized by state authority, and the people in each state are taxed under this authority to pay the expenses thereof. The legal power that creates it in each state has the right to govern it, and Congress has no right to interfere with its discretion in the matter. Whether these state schools established in each state for the education of its own citizens shall be "mixed" or "separate" is for the authority creating them to determine. No other authority is so competent to judge and no other has the right of judgment upon the point. There is nothing in the Fourteenth Amendment that takes this question out of the hands of the states and puts it into those of Congress, or confers upon it jurisdiction of any kind over the public school system of the respective states. The Supreme Court of Ohio unanimously decided in 1871 that the Fourteenth Amendment did not touch the jurisdiction of that state as to the question of "mixed" or "separate" schools; and, hence, that it was a question for the legislature to determine. The same is true in respect to every state, and any attempt on the part of Congress to make it untrue is simply usurpation. It will be time enough for Congress to regulate a school system when it has authority to establish one, and then the regulation should be confined to the one it establishes.

We submit the above series of points as reasons why the Civil Rights Bill which has been passed by the Senate should not become the law of the land. The things which it undertakes to do are not within the legal province of Congress, but are within that of the respective states. This is the point we make and the great objection we urge to this bill. Believing most heartily in the doctrine of equal rights in the truest and largest sense, we, nevertheless, do not believe in having the powers which belong exclusively to the states usurped by the Federal Government. This is one of the dangers of the times, and unless seasonably guarded against our whole duplicate system of government will be subverted.