THE CIVIL RIGHTS BILL.

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THE only pretense of any constitutional authority for the Civil Rights Bill, which has recently become a law, rests upon the first and fifth sections of the Fourteenth Amendment. Whether these sections really bestow such authority or not must be determined by the truthful answer of two questions. *First.* What are the sections themselves? *Secondly.* What is the Civil Rights Bill? We propose briefly to answer both of these questions. The sections of the amendment referred to read as follows:

"SECTION 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."

We have here, first, a definition of citizenship. "All persons born or naturalized in the United States and subject to the jurisdiction thereof" are declared to be "citizens of the United States." So, also, "all persons born or naturalized in the United States and subject to the jurisdiction thereof" and resident in a particular state are citizens of that state. The two citizenships are distinct, and neither is defined as a derivative from the other. While no new rights, not previously existing, are granted to either citizenship, the circle of persons entitled to citizen rights is enlarged so as to embrace the colored population of this country.

We have, in the next place, three prohibitions addressed to and imposed upon the several states, as follows: 1. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." 2. No state shall "deprive any person of life, liberty, or property without due process of law." 3. No state shall "deny to any person within its jurisdiction the equal protection of the laws." All these prohibitions are addressed exclusively to *states* considered in their corporate character as political entities, and not at all to *individuals* considered as separate persons.

The third and last thing here found is an express grant of power authorizing Congress to enforce these provisions by appropriate legislation. The scope of the power is to be determined by the provisions themselves. Within this scope Congress has the power of enforcement, and beyond it no such power exists.

The two sections of the Civil Rights Bill upon which the whole question as to its constitutionality turns are the first and the fourth. We quote the first, as follows:

"That all 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 and water, theaters and other places of public amusement, 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."

This section, followed by the penalties for its violation as prescribed in the second section of the bill, is in legal effect addressed to hotel-keepers, the owners of public conveyances, and the proprietors, managers, or lessees of theaters or other places of public amusement. These parties are required to afford a "full and equal enjoyment" of accommodations to "all persons within the jurisdiction of the United States" in respect to the matters recited, with the proviso that any limitations which may be "established by law" and made "applicable alike to all citizens of every race and color, regardless of any previous condition of servitude," shall not expose them to the prescribed penalties.

The great difficulty that we meet as to the constitutionality of this legislation consists in the fact that it does not lie within the scope of the Fourteenth Amendment at all. This amendment, after defining the two kinds of citizenship as to the persons entitled thereto, imposes three specific restraints upon *state* authority, and as to *individuals* it simply says nothing. Hotel-keepers, the owners of public conveyances, and the proprietors, managers, or lessees of theaters or other places of public amusement, are not the parties to whom the amendments speaks or over whose conduct it gives Congress any jurisdiction. They are not the state and not capable of doing any of the things forbidden to be done by a state. They are private individuals, as much so as a banker or a grocer or the keeper of a barber-shop, having no governmental character and placed by the Fourteenth Amendment under no restraint whatever as to the manner of conducting their business. The amendment, upon its very face and by the limitations which its own language imposes, has nothing to do with them or their business, any more than with the laws of gravitation or the next eclipse of the sun.

Let us take the several parts of the amendment above quoted as constitutional premises, and then attach this section of the Civil Rights Bill to each one as the statutory conclusion. Take, first, the definition of citizenship. "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"; and, *therefore*, Congress has the constitutional power to legislate in respect to the management of inns, public conveyances, theaters, and other places of public amusement. Manifestly, the simple description of the persons who are citizens, so that they can be identified and distinguished from all other persons, determines nothing in respect to the nature and extent of their rights or in respect to the powers of Congress. The description is simply a legal mark of identification and in itself no grant of power. It merely *locates* rights as to persons, and as to what these rights are and what powers Congress possesses information must be sought elsewhere.

Again, "No *state* shall make or enforce any *law* which shall abridge the privileges or immunities of citizens of the United States"; and, *therefore*, no hotel-keeper or owner of a public conveyance or manager of a theater or other place of public amusement shall deny to any person "within the jurisdiction of the United States" the

"full and equal enjoyment" of the accommodations connected with his particular business, "except for reasons by law applicable to the citizens of every race and color and regardless of any previous condition of servitude." Putting the constitutional premise in immediate juxtaposition with the conclusion, we beg to know whether the former embraces the latter. Does it assert it? Has it any reference to it? Does the Fourteenth Amendment, when it speaks to *states* as such and says that they shall not do certain things and authorizes Congress to enforce the prohibitory mandate, mean the *private individuals* designated by their business in the first section of the Civil Rights Bill, and punished by the provisions of the second section in the event that in the management of their business they disregard the requirements of the first section? If the amendment be thus flexible in its character and can be used for a purpose that does not lie within the plain meaning of the language, then it is high time to have the amendment itself amended.

The same difficulty is experienced in the attempt to connect the conclusion with either of the other clauses, the one saying that no *state* shall "deprive any person of life, liberty, or property without due process of law," and the other saying that no *state* shall "deny to any person within its jurisdiction the equal protection of the laws." These clauses are perfectly intelligible as addressed to states. But when they are so construed as to make them the constitutional and logical basis of legislation by Congress to act upon the keepers of inns, the owners of public conveyances, and the proprietors and managers of theaters or other places of public amusement, then they not only cease to be intelligible, but they become absurd and ridiculous. The things which they forbid cannot possibly be done by any species of private action. A state in its organic character, and a state only, by the very terms of the language, and not a hotel-keeper, can do the things forbidden by these clauses.

The plain truth is, the matters enumerated in the first section of this bill are not such in their nature and kind as to bring them within the scope of any legislative power granted to Congress. So far as they relate to the question of civil rights, the rights are not such as pertain to the status of United States citizenship at all. Their proper place, their real place, is in the category of state citizenship. Whether all the citizens of a particular state shall have the same accommodations at an inn, a theater, an opera, a circus, or public show of any kind, or in the means of public transport within that state, is plainly a question for that particular state to consider and determine. There is undoubtedly an element of impartial justice involved in such a question, which no state ought to ignore; yet the question itself has no relations which give Congress any jurisdiction over it, unless we assume—what certainly is not true—that the Fourteenth Amendment has clothed Congress with the local, municipal, and police powers hitherto exercised by the states. This dangerous assumption, without any authority in the amendment therefor, is virtually made in the Civil Rights Bill, and it is only upon this false principle that its constitutionality can be vindicated for a moment.

The fourth or jury section of the bill, to which we now proceed, reads as follows:

"That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as a 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, on conviction thereof, be deemed guilty of a misdemeanor and be fined not more than $5,000."

There being no doubt about the power of Congress to pass such a law in respect to jurors in the courts of the United States, the single question before us is whether it has the same power in respect to the selection of jurors in state courts. Let it be distinctly observed that the section does not seek to secure the common-law right of trial by jury, but rather the right to serve as jurors in state courts, against any exclusion on the ground stated. This is a very proper question for each state to determine in respect to its own courts, and we say frankly that we see no reason why a black man should be excluded simply on account of his color; but we do see a most weighty reason why Congress should not attempt to interfere with the discretion of the states in this matter, and this reason consists in the fact that it has no such power.

To sit upon a jury is not a right of anybody, whether a citizen of the United States or of a state, except as it is conferred by law by being imposed as a duty; and, above all, to sit upon a state jury is clearly no right attached by the Constitution to the status of United States citizenship. A juror is a quasi-officer of law for the time being, designated by law for a public service, and having a duty assigned to him which he must perform. The government that establishes a jury system assumes its right to command the services of those whom it sees fit to select for this purpose, and also to exercise its own discretion in the selection, both as to manner and persons. It may appoint jurors. It may provide that they shall be elected, or it may designate a class of persons from which jurors shall be drawn as they are wanted. Different methods of selection have been adopted in the different states, and yet in no state has the jury service ever been imposed upon the entire people. The practice has been to assign the service to a certain class of persons having such qualifications or characteristics as are determined by law.

Now, is any man or any class of persons deprived of any right inhering in citizenship by not being placed in the juror class and, hence, not selected for the jury service? We answer emphatically, *No.* Minors are excluded from this service in every state of the Union, and yet they are citizens. The same is true of women, who also are citizens. In some of the states a property qualification is demanded, which excludes all citizens who do not possess this qualification. In some of the states a qualification of intelligence and character is required. In all of the states a certain condition of impartiality of mind is demanded before one can enter the jury-box. The simple truth is that comparatively but a small portion of the whole people has ever belonged to the jury class. Will any one in his senses pretend that those who do not belong to this class are thereby deprived of any right that attaches to citizenship? If so, then seven-eighths of the people from time immemorial have been oppressed by the jury laws of this country. Mere citizenship no more creates the right to be a juror than it does to be a judge or a sheriff. The right to be a juror, so far as it is a right at all, grows out of appointment; and as to the persons who shall be appointed and the manner of their appointment, the state government, which creates the court of which the jury forms a part, is and ought to be the exclusive judge.

What right, then, has Congress to interfere in any way with the selection and organization of a state jury, or to lay down any rule affecting it, or to enforce that rule by a penalty? None whatever, any more than it has to interfere with the selection and organization of a state legislature. The jury service in a state court is no attribute of United States citizenship, any more than the right to practice law in a state court is an attribute of such citizenship. No one by being made ineligible to this service is deprived of "life, liberty, or property without due process of law," and no one for this reason is denied "the equal protection of the laws." Such protection has nothing to do with the persons, whether white or black, who serve as jurors, any more than with the person who acts as a judge; but refers to the manner in which the laws themselves are administered. Women and minors cannot serve as jurors; yet nobody pretends that this is to them a denial of "the equal protection of the laws."

The conclusion to which we are irresistibly forced is that there is not a solitary fragment of authority in the Fourteenth Amendment for the jury section of the Civil Rights Bill. Let us in thought frame another bill, and suppose it to be passed by Congress, reading as follows:

"That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as a grand or petit juror in the courts of any state on account of *sex, or age, or for the want of any fixed amount of property.*"

Such being the bill, is there, then, a single lawyer in the United States who would claim that the Fourteenth Amendment gives Congress any power to pass it? We presume not; and yet the argument in favor of such a bill as derived from the Fourteenth Amendment is just as strong as it is in favor of the one already passed. The amendment gives Congress no more authority to say that "race, color, or previous condition of servitude" shall not be a ground of exclusion from the jury service in a state court than it does to say that sex, or age, or the want of any fixed amount of property shall not be a ground of exclusion. It gives Congress no authority for saying anything on the subject, and the marvel is that it should make the attempt. On the simple question of citizenship the amendment places the colored man on a level with the white man, not because he is a colored man, but because he has the characteristics that establish citizenship. Looking at him as a citizen, it knows nothing about the question of race or color, any more than it does about that of sex or age. And under the amendment Congress might just as well legislate in respect to the latter question as in respect to the former. It might just as well undertake to protect women from being excluded from the jury service in state courts as to make the attempt in respect to colored men. It has just as much power to do the one as it has to do the other, and it has no power to do either.

Let us say distinctly, in closing this article, that we object to the Civil Rights Bill *not at all* in regard to the *ends* which it professes to seek, but *wholly* because it is without any constitutional authority. This one objection is conclusive. No class can be more interested than the colored people themselves in having the Constitution read precisely as it is, and not as it is not. It guarantees to them certain rights, and if it may be stretched in one direction to, their seeming advantage, by one Congress, then who shall assure them that it may not be contracted, to their disadvantage, in another direction, by a different Congress? If the country gets into the habit of playing political and party tricks with the Constitution, no one can tell beforehand what sort of tricks we shall finally have.