July 1962 Sit-IN Cases - Avent, et al v. North Carolina

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UNITED STATES GOVERNMENT

Memorandum

DEPARTMENT OF JUSTICE

1344

TO : Harold H. Greene, Chief
Appeals and Research Section
Civil Rights Division

DATE: December 31, 1963

DR:BR:icb

FROM : David Rubin
Battle Rankin

SUBJECT: Sit-In Cases

This memorandum contains a chronological narrative description of the history of the Thirteenth and Fourteenth Amendments. We have quoted every statement made in the debates which conceivably provides support, either specifically or generally, for the following propositions contained in the Solicitor General's memorandum of December 18, 1963, concerning the sit-in cases:

At p. 6:

> The Amendment [the Fourteenth Amendment] was concerned not merely with what a State did, but with the effect of the State's action upon the opportunities for the former slaves to become equal with other men. It was concerned with conditions--with denials of equal civil rights as a consequence of State action. The right to equal treatment in places of public accommodation is one of the fundamental rights the Amendment was intended to secure against all forms of denial as a consequence of State action. The consequence does not end when the State action ceases. We do not suggest that the victim of the discrimination has a right to service that he can enforce against the proprietor of the private establishment. Our case is pitched upon the much narrower proposition that so long as the custom of practicing discrimination against Negroes in places of public accommodation survives as a proximate consequence of earlier discriminatory State laws, Congress has power to enact legislation appropriate to remedy the violation and the State may not, without a further violation, lend the aid of its police or courts to support the discrimination.

At p. 11:

> The Amendment was intended to grant power to enact broad civil rights legislation in situations in which the States had denied the freedmen equal protection of the laws. Congress is not limited under Section 5 to inhibiting the State's violations. It has the power to secure the right to civil equality by dealing with the consequences of the violation.

We have also included any material which might be relevant to other theories tentatively raised in connection with the sit-in cases which depend on historical support, i.e., material indicating that Congress wished to abolish the incidents of slavery as well as slavery itself when it adopted the Thirteenth Amendment; material indicating that the framers of the Thirteenth and Fourteenth Amendment expected that private discrimination, at least in public places, would wither away after the Amendments took effect, and material indicating that the framers of the Fourteenth Amendment intended to impose an affirmative duty upon the States to afford protection to the Negro from private discrimination, or from certain types of private discrimination.

We have not attempted in this memorandum to editorialize about what the framers intended to do. We have felt that, within the time limitations imposed, it would be best to get as much raw material to the Solicitor General as quickly as possible. We have therefore followed the format contained in the Appendix to the Brown brief, filling in the history where necessary, eliminating where necessary. We have attempted to err on the side of inclusion rather than exclusion.

Since we have not yet completed our research on the Civil Rights Act of 1875, the history of that Act is not discussed in this memorandum, but will be submitted separately.

A. The Thirteenth Amendment

The Thirteenth Amendment originated in S.J. Res. 16, introduced by Senator Henderson of Missouri on January 11, 1864. 1/ It was referred to the Judiciary Committee, of which Senator Lyman Trumbull of Illinois was chairman (Globe, 38th Cong., 1st Sess., p. 145). 2/ The resolution was reported by Trumbull on February 10, 1864 (Globe, p. 553), in an amended form, which was the form finally adopted. At that time Senator Trumbull opened the debate, stating (Globe, p. 1313):

> If these Halls have resounded from our earliest recollections with the strifes and contests of sections, ending sometimes in blood, it was slavery which almost always occasioned them. No superficial observer, even, of our history North or South, or of any party, can doubt that slavery lies at the bottom of our present troubles. Our fathers who made the Constitution

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1/ The text of the resolution was as follows:

> Art. 1. Slavery or involuntary servitude except as a punishment for crime, shall not exist in the United States.
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> Art. 2. The Congress, whenever a majority of the members elected to each House shall deem it necessary, may propose amendments to the Constitution, or, on the application of the Legislatures of a majority of the several States, shall call a convention for proposing amendments, which in either case shall be valid, to all intents and purposes, as part of the Constitution, when ratified by the Legislatures of two thirds of the several States, or by conventions in two thirds thereof, as the one or the other mode of ratification may be proposed by Congress (Globe, 38th Cong., 1st Sess., p. 1313).

2/ All references to the Congressional Globe in this section, unless otherwise noted, are to the 38th Congress, 1st Session.

> regarded it as an evil, and looked forward to its early extinction. They felt the inconsistency of their position, while proclaiming the equal rights of all to life, liberty, and happiness, they denied liberty, happiness, and life itself to a whole race, except in subordination to them.

Senator Wilson of Massachusetts began his speech by stating (Globe, p. 1319):

> Mr. President, 'our country,' said that illustrious statesman, John Quincy Adams, 'began its existence by the universal emancipation of man from the thralldom of man.' Amidst the darkling storms of revolution it proclaimed as its living faith the sublime creed of human equality. From out the rolling clouds of battle the new Republic, as it took its position in the family of nations, proclaimed in the ear of all humanity that the poor, the humble, and sons of toil, whose hands were hardened by honest labor, whose limbs were chilled by the blasts of winter, whose cheeks were scorched by the suns of summer, were the peers, the equals, before the law, of kings and princes and nobles, of the most favored of the sons of men.

Denouncing slavery, Wilson said (Globe, p. 1320):

> Sir, this gigantic crime against the peace, the unity, and the life of the nation is to make eternal the hateful dominion of man over the souls and bodies of his fellow-man.

Near the close of his speech, Wilson declared (Globe, p. 1324):

> If this amendment shall be incorporated by the will of the nation into the Constitution of the United States, it will

obliterate the last lingering vestiges of the slave system; its chattelizing, degrading, and bloody codes; its dark, malignant, barbarizing spirit; all it was and is, everything connected with it or pertaining to it, from the face of the nation it has scarred with moral desolation, from the bosom of the country it has reddened with the blood and strewn with the graves of patriotism. The incorporation of this amendment into the organic law of the nation will make impossible forevermore the reappearing of the discarded slave system, and the returning of the despotism of the slavemasters' domination.

Then, sir when this amendment to the Constitution shall be consummated the shackle will fall from the limbs of the hapless bondman, and the lash drop from the weary hand of the taskmaster. Then the sharp cry of the agonizing hearts of severed families will cease to vex the weary ear of the nation, and to pierce the ear of Him whose judgments are now avenging the wrongs of centuries. Then the slave mart, pen, and auction-block, with their clanking fetters for human limbs, will disappear from the land they have brutalized, and the school-house will rise to enlighten the darkened intellect of a race imbruted by long years of enforced ignorance. Then the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law which makes sacred alike the proud homes and lowly cabins of freedom. Then the scarred earth, blighted by the sweat and tears of bondage, will bloom again under the quickening culture of rewarded toil. Then the wronged victim of the slave system, the poor white man, the

> sandhiller, the clay-eater of the wasted fields of Carolina, impoverished, debased, dishonored by the system that makes toil a badge of disgrace, and the instruction of the brain and soul of man a crime, will lift his abashed forehead to the skies and begin to run the race of improvement, progress, and elevation.

On March 30, 1864, the debate continued. Senator Davis of Kentucky, speaking against the amendment, argued that slavery had not caused the war, and that its abolition by federal action would be a serious violation of state sovereignty, and would have a "potency * * * for large and permanent mischief" (Globe, Appendix, pp. 104, 108). On the following day, March 31, he offered an amendment that no Negro could ever hold citizenship or public office in the United States. This was defeated by a vote of 28 to 6 (Globe, p. 1370). On that day, Senators Salsbury of Delaware and Clark of New Hampshire engaged in an extended debate over the constitutional authority of Congress to propose an amendment at a time when several states were out of the Union (Globe, pp. 1364-1370). In the course of this debate, Senator Clark asserted (Globe, p. 1369):

> There is, Mr. President, an essential difference between the emancipation of slaves and the abolition of slavery. The act of Congress of the 17th July, 1862, set free certain classes of slaves. The President's proclamation of January 1, 1863, proclaimed freedom to those of certain districts. Both were measures of emancipation. They concerned the persons of slaves, and not the institution of slavery. Whatever be their force and extent, no one pretends they altered or abolished the laws of servitude in any of the slave States. They rescued some of its victims, but they left the institution otherwise untouched. They let out some of the prisoners, but did not tear down the hated prison. They emancipated, let go from the hand, but they left the hand unlopped, to clutch again such

> unfortunate creatures as it could lay hold upon. This amendment of the Constitution is of wider scope and more searching operation. It goes deep into the soil, and upturns the roots of this poisonous plant to dry and wither. It not only sets free the present slave, but it provides for the future, and makes slavery impossible so long as this provision shall remain a part of the Constitution. Sir, this amendment will be most propitious. On all the slave-accursed soil it shall plant new institutions of freedom, and a new or regenerated people shall rise up, with an undying, ever-strengthening fealty to that Government which has bestowed nothing but benefits and blessings.

On April 4, Senator Howe of Wisconsin spoke in favor of the joint resolution (Globe, Appendix, p. 111). Pointing to the many degrading economic, moral and intellectual effects of the slave system, he stated (Globe, Appendix, p. 118):

> I think your amendment should go further than as I understand it does. I think that when the American people command that these persons shall be free, they should command that they be educated, or at least that there be no laws enacted in any State to prevent their education * * * the State which enfranchises its people and does not educate them shall be doubly damned * * *.

On April 5, 1864, Senator Reverdy Johnson of Maryland declared that the proposed amendment was proper and necessary. He declared (Globe, p. 1424):

> We mean that the Government in future shall be as it has been in the past, one, an example of human freedom for the light and example of the world, and illustrating in the blessings

> and the happiness it confers the truth of the principles incorporated into the Declaration of Independence, that life and liberty are man's inalienable right.

On the same day, Senators Davis and Powell of Kentucky each offered amendments imposing conditions upon the emancipation of the slaves. All these amendments were defeated (Globe, pp. 1424-1425). 3/

In a speech on April 6, 1864, Senator Harlan of Iowa, supporting the proposed amendment, reviewed some of the incidents of slavery (Globe, p. 1437). He pointed out that slavery necessarily resulted in the abolition of the relation between husband and wife and parent and child; it precluded the relation of person to property, because a slave was declared incapable of acquiring and holding property; it deprived slaves of status in court, and of the right to testify; it resulted in the suppression of freedom of speech and press because in the slave states "it becomes a crime to discuss * * * [slavery's] claims for protection or the wisdom of its continuance;" its continuance required the perpetuation of the ignorance of its victims. 4/ Senator Harlan asked (Globe, p. 1439):

3/ One of the Davis amendments would have added the following words to the first section of the proposed article (Globe, p. 1425):

> "But no slave shall be entitled to his or her freedom under this amendment if resident at the time it takes effect in any State the laws of which forbid free negroes to reside therein, until removed from such State by the Government of the United States."

4/ Senator Harlan also discussed the effect of slavery in degrading the white race and in impoverishing the slave states.

> If, then, none of these necessary incidents of slavery are desirable, how can an American Senator cast a vote to justify its continuance for a single hour, or withhold a vote necessary for its prohibition?

Senator Salsbury of Delaware rose to rebut Harlan. Quoting Biblical authorities, he stated that slavery had existed almost since the flood, and was a fact of nature (Globe, p. 1442):

> The theory now common seems to be that the law of God's providence is equality and uniformity. Such a law never did pervade or regulate the works of God's providence to man; but the law of His providence is inequality and diversity. I treat of this inequality of races, of human beings, precisely as I treat of the inequality which I see in inanimate and physical nature all around me.

Senator Hale of New Hampshire followed Senator Salsbury. He stated in the course of his speech (Globe, p. 1443):

> Mr. President, permit me to say that this is a day that I and many others have long wished for, long hoped for, long striven for. It is a day when the nation is to commence its real life, or if it is not the day, it is the dawning of the day; the day is near at hand. The day is to come when the American people are to wake up to the meaning of the sublime truths which their fathers uttered years ago and which have slumbered dead letters upon the pages of our Constitution, of our Declaration of Independence, and of our history -- a day when the nation is to be disembarrassed of the inconsistencies which have marked its history and

> its career, patent to the world and to ourselves when we have had the courage faithfully, fairly, and boldly to look the truth in the face.
>
> Sir, what is the truth? We have had upon the pages of our public history, our public documents, and our public records some of the sublimest truths that ever fell from human lips; and there never has been in the history of the world a more striking contrast than we have presented to heaven and earth between the grandeur and the sublimity of our professions and the degradation and infamy of our practice. That day is to pass away, and to pass away, I trust, right speedily.

Later in his speech Senator Hale declared (Globe, p. 1444):

> . . . whenever unconditionally and without equivocation we come up to the mark and place ourselves on the high standard of Christian duty and resolve that despite of all extraneous circumstances, of all doubtful contingencies, of all questions of expediency, we will place ourselves firmly upon the everlasting rock of duty and our action shall be in accordance with our conscientious convictions, then, and not till then, will that pillar of cloud by day and fire by night which led the chosen people from the house of bondage to the land of promise be ours. Then we shall indeed and in truth be worthy of our genealogy and our history. Then the sublime teachings of the Pilgrim fathers who left everything behind them that they might come hither and plant in this wilderness a temple of liberty and throw wide open its doors

> for the oppressed of earth to enter and be at rest -- then will all that be realized. Then without shame, without reproach, and without apology, we can stand in this nineteenth century, soldiers of the new civilization and of an old Christianity, going forth to battle with every impulse of our hearts and every purpose that we entertain in full accordance with the best wishes and hopes of the good on earth and of the God in heaven; when we take this position and take it firmly and ably, then and not until then shall we triumph; then and not till then shall we see the beginning of the end.

After some further debate, the Committee of the Whole agreed to the Judiciary Committee Amendment (Globe, p. 1447).

On April 7, 1864, Senator Hendricks of Indiana echoed Saulsbury's views of the natural inferiority of the Negro race. No constitutional amendment could change that, for (Globe, p. 1457)

> * * * they never will associate with the white people of this country upon terms of equality. It may be preached; it may be legislated for; it may be prayed for; but there is that difference between the two races that renders it impossible. If they are among us as a free people, they are among us as an inferior people. 5/

5/ After some further debate, Senator Hendricks, in questioning whether three quarters of the states were competent to abolish by constitutional amendment an institution which existed by virtue of state law, stated (Globe, p. 1458):

> All of our great men and jurists have held that this institution exists by virtue of State law. That State law may be the common law of the State, the usage of the State, or it may be that system of statutes which recognizes and regulates the institution . . .

Then Senator Henderson, author of the resolution, spoke for its passage. It must be done, he said, to save the Union. He also said (Globe, p. 1465):

> I will not be intimidated by the fears of negro equality. The negro may possess mental qualities entitling him to a position beyond our present belief. If so, I shall put no obstacle in the way of his elevation. There is nothing in me that despises merit or envies its rewards. Whether he shall be a citizen of any one of the States is a question for that State to determine. If New York or Massachusetts or Louisiana shall confer on him the elective franchise, it is a matter of policy with which I have nothing to do. The qualification of voters for members of Congress is a question under the exclusive control of the respective States. Whatever qualifications are prescribed by the States for electors of the lower branch of the State Legislatures, the same are constitutionally prescribed for electors of members of Congress. Senators are chosen by the State Legislatures, and the people of each State determine the qualifications of voters for both branches of the Legislature. The manner of choosing presidential electors is left to the Legislatures of the States. So in passing this amendment we do not confer upon the negro the right to vote. We give him no right except his freedom, and leave the rest to the States.

On April 8, 1864, the last day of the Senate debate, Senator Charles Sumner took the floor. He took the position that slavery was not sanctioned by the existing Constitution, stating that "what is true of slavery is true of all its incidents" (Globe, p. 1479). Recognizing that slavery still existed, however, he urged its abolition, declaring (Globe, p. 1481):

> . . . It is the rare felicity of such an act, as well outside as inside the rebel States, that, while striking a blow at the rebellion, and assuring future tranquility, so that the Republic shall no longer be a house divided against itself, it will add at once to the value of the whole fee simple wherever slavery exists, will secure individual rights, and will advance civilization itself.

Sumner also stated that (Globe, p. 1482):

> Such an amendment in any event will give completeness and permanence to emancipation, and bring the Constitution into avowed harmony with the Declaration of Independence. . . .

Sumner, however, preferred that the amendment be phrased differently. He offered the following substitute (Globe, p. 1482):

> All persons are equal before the law, so that no person can hold another as a slave; and the Congress shall have power to make all laws necessary and proper to carry this declaration into effect everywhere within the United States and the jurisdiction thereof. 6/

6/ This amendment in the nature of a substitute was originally offered on February 17, 1864, but had not been discussed prior to this time (Globe, p. 694). Sumner had also offered a joint resolution (S.J. Res. 24) on February 8, 1864 (Globe, p. 521), to the same effect.

Sumner disclaimed any intention of changing the effect of the original resolution; he only wished to express its purpose more forcefully, by explicitly stating the doctrine of equality before the law. He believed that that expression gave precision to the principle of protecting human rights enunciated in the Declaration of Independence. Acknowledging that the language was new in this country, he pointed out that it was already well known in France, and all of Europe, as an overriding principle of human rights (Ibid). 7/

Commenting on the Sumner amendment, Senator Howard stated (Globe, p. 1488):

> * * * the proposition speaks of all men being equal. I suppose before the law a woman would be equal to a man, a woman would be as free as a man. A wife would be equal to her husband and as free as her husband before the law.
>
> The learned Senator from Massachusetts, I apprehend, has made a very radical mistake in regard to the application of this language of the French constitution. The purpose for which this language was used in the original constitution of the French republic of 1791, was to abolish nobility and privileged classes. It was a mere political reformation relating to the political rights of Frenchmen, and nothing else. It was to enable all Frenchmen to reach positions of eminence

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7/ The next speaker after Sumner was Senator Powell of Kentucky, who opposed the original resolution. He stated (Globe, p. 1484):

> . . . Those who favor it do not wish the Union to be restored as it was. They are willing, I suppose, to let the southern States come in as conquered provinces, bereft of all their property and all their rights, social and political.
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> * * *
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> . . . You seem to care for nothing but the negro. That seems to be your sole desire. You seem to be inspired by no other wish than to elevate the negro to equality, and give him liberty.

and honor in the French Government, and was intended for no other purpose whatever. It was never intended there as a means of abolishing slavery at all. The Convention of 1794 abolished slavery by another and separate decree expressly putting an end to slavery within the dominions of the French republic and all its colonies.

Now, sir, I wish as much as the Senator from Massachusetts in making this amendment to use significant language, language that cannot be mistaken or misunderstood; but I prefer to dismiss all reference to French constitutions or French codes, and go back to the good old Anglo-Saxon language employed by our fathers in the ordinance of 1787, an expression which has been adjudicated upon repeatedly, which is perfectly well understood both by the public and by judicial tribunals, a phrase, I may say further, which is peculiarly near and dear to the people of the Northwestern Territory, from whose soil slavery was excluded by it. I think it is well understood, well comprehended by the people of the United States, and that no court of justice, no magistrate, no person, old or young, can misapprehend the meaning and effect of that clear, brief, and comprehensive clause. I hope we shall stand by the report of the committee.

Sumner withdrew his amendment (Globe, p. 1488, 1489). Thereafter, Senators Davis, Saulsbury and McDougall of California delivered final speeches against the resolution. Saulsbury offered a lengthy substitute, which was rejected. The final vote was then taken, resulting in passage of the resolution by a vote of 38 to 6 (Globe, p. 1490).

Proceedings were more extended in the House. When the resolution was taken up on May 31, 1864, an immediate motion for rejection by Representative Holman of Indiana was defeated by a vote of 76 to 55 (Globe, p. 2612). Representative Morris of New York then opened the debate, citing the evils of slavery which had led the country away from the principles of equality embodied in the Declaration of Independence. In his opinion, the amendment was necessary to conform the Constitution to those principles (Globe, p. 2613). At an evening session that day, Representative Herrick, also from New York, attacked the amendment as tampering with the Constitution of the fathers which would promote "eternal disunion" (Globe, p. 2615). According to Representative Herrick, the amendment would abolish "the right of the States to control their domestic affairs, and to fix each for itself the status, not only of the Negro, but of all other people who dwell within their borders." Following a speech by Representative Kellogg of New York, which is not significant here, the House adjourned (Globe, p. 2621).

The House resumed consideration of the proposed amendment on June 14, 1864. Representative Pruyn, Wood and Kalbfleisch, all of New York, argued that the amendment was an invasion of the reserved rights of the States (Globe, pp. 2939, 2940, 2945). Mr. Wood opposed the amendment because (Globe, p. 2940):

> because it aims at the introduction of a new element over which Government shall operate. It proposes to make the social interests subjects for governmental action. This is the introduction of a principle antagonist to that which underlies all republican systems. Our Union was made for the political government of the parties to it, for certain specified objects of a very general character, all of them political, and none of them relating to or affecting in any manner individual or personal interests in those things which touch the domestic concerns. There is no feature or principle of it giving to the Federal power authority over them. These were reserved and left

> exclusively to the jurisdiction of the States and 'the people thereof.' Of this character are the marital relations, the religious beliefs, the right of eminent domain within the territorial limits of the States, other private property, and all matters purely social. Slavery where it exists is a system of domestic labor; it is not the creature of law. It existed without law before this Government was established. It is incorporated into the organization of society as part of the existing domestic regulations. It cannot be brought within constitutional jurisdiction any more than can any or either of the other private and personal interests referred to.

On the other hand, Representative Higby of California upheld the power to amend the Constitution in the manner proposed (Globe, p. 2943). He stated in the course of his speech (Globe, p. 2944):

> Whenever the spirit of free discussion has arisen, and the question of slavery has been debated, they who were in favor of the abolition of slavery were told that they were in favor of giving to the slaves the civil rights that white people had, the political rights, and not only that but the social rights. The latter point was pressed with more vehemence than all the others. And while they have pressed that as an argument why slavery should not be annihilated, the secret with the South in holding fast to slavery has been the political power which it has given them in this Government. There is the charm; there is the fascination. It is power, political power. That is what they have held to.

In an evening session that day, Mr. Wheeler of Wisconsin offered a proviso to the amendment that

emancipation should not take place in the loyal border states until ten years after ratification (Globe, Appendix, p. 124). 8/ Representative Shannon declared that slavery was inconsistent with the spirit of the institutions of the nation. Not only the slave, but also the non-slaveholding class of white men was harmed by its evils. He noted that (Globe, p. 2948):

> This institution necessarily establishes three conditions of society where it prevails: the master, the slave, and that most degraded condition of all, the middleman, or the poor white trash, whose vocation is pander and pimp to the vices of both master and slave, and ultimately dependent on both, having no recognized condition, and enjoying none of the privileges of the governing or governed class, but an outcast from both and despised by both.
>
> Now let it never be forgotten that our mission also is to elevate and disinthrall that most injured and dependent class of our fellow white men from their downtrodden and degraded condition, that they too may be men, and enjoy the independence and rights of manhood.

Mr. Shannon concluded with an argument against Wheeler's proviso, insisting that Congress "must not only emancipate the slaves in the seceded States, but we must include the slaves of the border States, leaving no root of the accursed tree to spring up for the future to the peril of the country"(Globe, p. 2949).

Representative Marcy of New Hampshire, speaking against emancipation, stated that the resolution was an attempt to overthrow the Constitution, and asserted that his constituents did not believe that "the black man is equal to the white" (Globe, p. 2950). Representative Kellogg of Michigan, on the other hand, believed that the

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8/ On June 15, 1864, just before the final vote was taken, Wheeler's amendment was defeated.

adoption of the amendment was necessary in order

> * * * to carry out the objects of the Constitution itself as set forth in the preamble, and remove the only cause of discord and contention from our midst. We propose to insert an article prohibiting slavery throughout the Republic; and unless this is done I fear we shall experience greater calamities in the future than we have suffered already.
>
> We have called John Brown a fanatic; we have said that he was crazy, and I should not wonder if he was. He was a man who had a clear perception of the wickedness of slavery, and was so affected by it that he could think of nothing else. 'Here,' said he, 'are millions of human beings whom God made and Christ died for, who are robbed of every right by a people professedly Christian. They are men, but they must not read the word of God; they have no right to any reward for their labor; no right to their wives; no right to their children; no right to themselves! The law makes them property and affords them no protection, and what are the Christian people of this country doing about it? Nothing at all!
>
> But what caused this conspiracy against the best Government that ever existed? What but slavery itself and its influence upon them? It taught them to love absolute power, imbued them with a hatred of democratic ideas and institutions, and a love for those social and political distinctions in society which prevailed in the Governments of the Old World (Globe, p. 2955).

Representative Ross of Illinois indicated his belief that the amendment was part of the administration's policy to "place the Negro as to civil and political rights

on an equality with the whites * * *" (Globe, p. 2957). This was the "Negro-equality doctrine tendered by the party in power" (Globe, p. 2959). Representative Holman of Indiana also was against freeing the Negro. He characterized the amendment as an invasion of "the domestic policies of States so solemnly guarantied by the Constitution" (Globe, p. 2961). He presented this interpretation of its scope (Globe, p. 2962):

> It confers on Congress the power to invade any State to enforce the freedom of the African in war or peace. What is the meaning of all that? Is freedom the simple exemption from personal servitude? No, sir; in the language of America it means the right to participate in government, the freedom for which our fathers resisted the British empire. Mere exemption from servitude is a miserable idea of freedom. A pariah in the State, a subject, but not a citizen, holding any right at the will of the governing power. What is this but slavery? It exists in my own noble State. Then, sir, this amendment has some significance. Your policy, directed in its main purpose to the enfranchisement of a people who have looked with indifference on your struggle, who have given their strength to your enemies, and then the constitutional power to force them into freedom, to citizenship. If such be your purpose, why deceive a noble and confiding people? Your purpose in this amendment is not to increase the efficiency of your Army or to diminish the power of your enemies. No, sir; you diminish the one and increase the other. You run the hazard of all that to gratify your visionary fanaticism, the elevation of the African to the august rights of citizenship.

On June 15, 1864, the last day of House debate on the amendment, Representative Farnsworth of Illinois

deprecated the opposition fears of Negro equality and miscegenation, stating (Globe, p. 2979):

> I thank God that the Republic has at last recognized the manhood of the negro. Gentlemen may call us 'miscegenists,' and they may talk of equal rights. I do not know of any man in the party to which I belong who is fearful of coming into competition with the negro. I know there are many men of the party of my colleague who spoke last evening, [Mr. Ross] who do feel that the negro is their natural competitor and rival, and they do fear, and fear with some reason, too, that the negroes will outstrip them if we give them a fair chance. I have heard gentlemen talk about their fears that negroes might become Representatives upon this floor. Well, I am inclined to think that the country would not suffer by such a change in some instances. Oh! they are afraid of 'negro equality' and 'miscegenation.' You must not unchain the slave and allow him the fruits of his own toil and permit him to fight for the Republic for fear of negro equality and miscegenation! Can the head or heart of man conceive of anything more mean and despicable?

Mr. Mallory of Kentucky asserted that passage of the amendment would lead the States to abject submission (Globe, p. 2981):

> Give up our right to have slavery if we choose, submit to have that right wrested from us, and in what right are we secure? One after another will be usurped by the President and Congress, until all state rights will be gone, and perhaps state limits obliterated, and a grand imperial despotism erected upon our rights and liberties.

Mr. Mallory pointed out that "[n]umbers of the free states by law prohibit their immigration within their limits"

(Globe, p. 2983), and stated (Ibid):

> How have you freed them in Louisiana? Banks, with the consent of the President, has established a system of slavery there, better for the master and worse for the slave, than any that I have any experience of. By it the master is relieved of the expense of rearing the slave until he is capable of performing profitable labor, and released from all obligation to maintain him after he had become unfitted by age or disease to render remunerating service. Nor is there the least freedom conceded to the slave by this system, unless it be the liberty to wander off, when overtaken by death, and die like a dog on the first dung heap intended and uncared for by a kind and Christian master. He has not the liberty to work where he pleases; he is confined to the limits of a particular plantation. He has not the right to work when he pleases; his hours of labor are prescribed.

Representative Kelley of Pennsylvania, supporting the amendment, **derided** its opponents. He declared (Globe, p. 2984):

> Their love of Democracy and the Constitution finds expression in degrading the laboring man to a thing of sale, upon the auction-block, in shutting out from more than half our territory schools and churches and civilization in all its aspects, whether it be religion, science, art, or social life.

He said (Globe, p. 2985):

> Let justice to all men be our aim. Let us establish freedom as a permanent institution, and make it universal.

Representative Edgerton of Indiana charged that the object, in part, of the party in power was by means of the proposed amendment, to "make the Negro population not merely a passive but an active basis of representation in the Federal Government" (Globe, p. 2987). He stated (Ibid.):

> First, the negro a citizen of the United States; secondly, the negro a free citizen of the United States, protected everywhere, in defiance of existing State constitutions and laws, as such citizen; and thirdly, the negro a voting citizen of the United States, are all propositions logically involved in the proposed amendment.

At another point in his speech, Mr. Edgerton declared (Globe, p. 2987):

> There can, therefore, it seems to me, be no practical purpose to be accomplished by this attempt at constitutional amendment at this time, except to indicate to the world, and especially to the men in arms against us, that the war on our part is to accomplish the very purpose with which they charged us in the beginning,namely, the abolition of slavery in the United States, and the political and social elevation of negroes to all the rights of white men.

Mr. Edgerton asked (Globe, p. 2988):

> [Is] it right or wise, I ask, that we, a fraction of the constitutional representation in Congress, should attempt to provide for a fundamental change in the Government that will over turn their social and industrial systems, and affect for all time the absent and protesting States?

His speech concluded with this accusation against the majority in Congress (Globe, p. 2988):

> You desire no peace, and you do not intend, if you can help it, to accept peace until you have abolished slavery; deprived if not robbed by confiscation the property-holders of the South of their rightful inheritance; made negroes socially and politically the equals of white men; and remodeled the Constitution to suit your own political purposes.

Mr. Arnold of Illinois, who followed Mr. Edgerton, favored the amendment. He stated (Globe, p. 2989):

> The America of the past is gone forever. A new nation is to be born from the agony through which the people are now passing. This new nation is to be wholly free. Liberty, equality before the law is to be the great corner-stone.

The next speaker was Representative Ingersoll, who spoke in favor of the amendment. He said of the amendment (Globe, p. 2989):

> It will be heralded over the world as another grand step upward and onward in the irresistible march of a christianized civilization. The old starry banner of our country, as it "floats over the sea and over the land," will be grander and more glorious than ever before. Its stars will be brighter; it will be holier; it will mean more than a mere nationality; it will mean universal liberty; it will mean that the rights of mankind, without regard to color or race, are respected and protected. The oppressed and downtrodden of all the world will take new courage; hope will spring afresh in their struggling and weary hearts; and when they look upon that banner in distant lands they will yearn to be here, where they can enjoy the inestimable blessings which are denied them forever on their native shores.

Mr. Ingersoll gave some idea of his definition of freedom (Globe, p. 2990):

> I am in favor of the adoption of this amendment because it will secure to the oppressed slave his natural and God-given rights. I believe that the black man has certain inalienable rights, which are as sacred in the sight of Heaven as those of any other race. I believe he has a right to live, and live in a state of freedom. He has a right to breathe the free air and enjoy God's free sunshine. He has a right to till the soil, to earn his bread by the sweat of his brow, and enjoy the rewards of his own labor. He has a right to the endearments and enjoyment of family ties; and no white man has any right to rob him of or infringe upon any of these blessings.

In his view, however, freedom, in a broad sense, would not be given to the slave alone (Ibid.):

> I am in favor of the adoption of this amendment to the Constitution for the sake of the seven millions of poor white people who live in the slave States but who have ever been deprived of the blessings of manhood by reason of this thrice-accursed institution of slavery. Slavery has kept them in ignorance, in poverty, and in degradation. Abolish slavery, and school-houses will rise upon the ruins of the slave mart, intelligence will take the place of ignorance, wealth of poverty, and honor of degradation; industry will go hand in hand with virtue, and prosperity with happiness, and a disinthralled and regenerated people will rise up and bless you and be an honor to the American Republic

Mr. Randall of Pennsylvania then spoke against the amendment, maintaining that (Globe, p. 2991):

> [T]he only mode in which the Union can be restored and put on the march of a newer and more glorious progress, is by having due regard to the mutual advantages and

interests of the States. This will rest our liberties on a solid basis. This cannot be done by laying waste their lands, or by carrying off their property, or by endeavoring to make the African that which God did not intend--the physical, mental, and social equal of the white man.

A vote was taken on June 15, 1864: yeas 93, nays 65, not voting 23. Since the required two-thirds majority had not been obtained, the resolution failed. However, Congressman Ashley of Ohio, originally voting in favor of the amendment, changed his vote for the declared purpose of enabling him, under the rules, to bring on a motion to reconsider (Globe, p. 2995). No further action was taken at that session of the House.

In the second session of the 38th Congress, the "lame duck" session, President Lincoln's message on the State of the Union referred to the victory of the Republican party at the polls on the antislavery issue. He recommended the reconsideration and passage of the resolution at that session, pointing out that the next Congress would almost certainly pass the measure if this one did not (Globe, 38th Cong., 2d Sess., App., p. 3).

Representative Ashley, the floor leader for the measure in the House, opened the discussion on reconsideration on January 6, 1865, again urging that the resolution be passed, and reiterating the harmful effects of slavery upon the non-slaveholding population of the South (Globe, 38th Cong., 2d Sess., p. 138). 9 / He predicted a glorious future for the country of the amendment were adopted (Globe, p. 141):

> Suppose your Secretary of the Treasury goes into the market to-morrow to borrow $500,000,000, payable in thirty or forty years, what will be the first question asked by the capitalist? Will it be as to the rate of interest you are willing to give, or will it be rather as to your ability to pay the principal? I take it that that would be his first inquiry. He would ask you, "What will be the condition of your country and Government thirty or fourty years hence?" If you could answer him, as you might truthfully answer him, were this amendment adopted,

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9 / The remaining references to the Congressional Globe in this section are to the 38th Congress, 2d session.

> "Sir, in thirty or forty years we shall not be indebted at home or abroad a single dollar, and will be the most powerful and populous, the most enterprising and wealthy nation in the world;" if you could tell him this, and add, as you may, that in thirty or forty years we will show the world a Government whose sovereignty on the North American continent will not be questioned from ocean to ocean, and from the Isthmus of Panama to the ice-bound regions of the North; and tell him, also, that our system of free labor, guarantied by the national Constitution to all generations of men, with free schools and colleges and a free press, with churches no longer fettered with the manacles of the slavemaster, with manufactures and commerce exceeding in vastness anything which had ever been known, and a nation of men unrivaled in culture, enterprise, and wealth, and more devotedly attached to their country than the people of any other nation, because of the constitutional guarantee of the Government to protect the rights of all, and secure the liberty and equality of its people; if you could tell him this, and that such a race of free men would make the South and the entire nation what New England is to-day, your Secretary could have all the money he wanted, and on his own terms.

Representative Orth of Indiana declared that an amendment prohibiting slavery in the United States would effect a practical application of the self-evident truths embodied in the Declaration of Independence, i.e., "that all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these, are life, liberty and the pursuit of happiness" (Globe, p. 142). He continued (Globe, p. 143):

> While we remember that it is the constitutional duty of the United States to "guaranty to every State in this Union a

republican form of government," let us not forget that the surest and safest way to discharge this duty is to provide proper guards and checks for the protection of individual and social rights in these communities; to keep over them, so long as may be necessary, a guardian watch and care; to remove every opposing element; "to bind up the broken reeds;" to infuse a love of country and of devotion to the Constitution and laws of the land; and last, but not least, to see that the name and spirit of human bondage shall be erased from every State constitution, and personal freedom without distinction assured to every one of their citizens.

When these things shall have been accomplished, and society reconstructed upon this improved basis, with every germ of aristocracy uprooted, we shall then be prepared to perform the constitutional injunction, readmit these "wayward sisters" to the family circle, and establish within the borders of each, in truth and in fact, a republican form of government.

Some good people, in connection with this matter, are giving themselves, in my opinion, much unnecessary uneasiness about the question, "What shall we do for or with the late owners of these freedmen?" The one is as important as the other, and both may well claim the consideration of the statesman and the philanthropist. Both classes have been and are being liberated from the thralldom of slavery, and their new condition presents many interesting phases. The war, however, in its varying changes, is daily relieving both questions of many of their supposed complications, and probably the wisest course to pursue is to

> hasten the day when the system which has debased the one and enfeebled the other shall cease to exist; to leave both classes in the hands of God who created them, and giving to each equal protection under the law, bid them go forth with the scriptural injunction, "In the sweat of thy face shalt thou eat bread."

Representative Bliss of Ohio, in his speech on January 7, 1865, continued his opposition. Even the Negroes "have sense enough to know", he said, "that politicians cannot reverse the decree of Almighty God and make their race equal, socially or politically, with white men" (Globe, p. 150).

Representative Rogers of New Jersey denied the assertion that the amendment would have the effect of conforming our institutions to the principles of the Declaration of Independence. In his view the Declaration had nothing to do with slaves, for (Globe, p. 152):

> Neither the persons who had been imported as slaves nor their descendants, whether they had then become free or not, were then included in the general words of the Declaration of Independence or acknowledged as a part of the people. They had for more than a century before been regarded as an inferior race and not fit to associate with whites, socially or politically; that the negro might justly and lawfully be reduced to slavery for the benefit of the white race; he was bought and sold like any other article of merchandise.

Mr. Davis of New York then rose to observe that the definition of civil liberty, as indicated in Mr. Rogers' speech, apparently consisted "in the right of one people to enslave another people to whom nature has given equal rights of freedom." Repudiating that interpretation, he declared (Globe, p. 154):

> Nature made all men free, and entitled them to equal rights before the law;

> and this Government of ours must stand upon this principle, which, sooner or later, will be recognized throughout the civilized world.

His speech closed with a plea that (Globe, p. 155):

> when we speak of civil liberty let it not be that which represents only the blood of a particular race; let it be that which represents man, no matter what land may have given him birth, no matter what may have been his political condition.
>
> I am not, sir, one of those who believe that the emancipation of the black race is of itself to elevate them to an equality with the white race. I believe in the distinction of races as existing in the providence of God for his wise and beneficent designs to man; but I would make every race free and equal before the law, permitting to each the elevation to which its own capacity and culture should entitle it, and securing to each the fruits of its own progression.
>
> This we can do only by removing every vestige of African slavery from the American Republic.

On January 9, 1865, consideration was resumed. Congressman Yeaman of Kentucky, Morrill of Vermont and Odell of New York all spoke in favor of the amendment (Globe, pp. 168, 172, 174). Mr. Ward of New York, however, remained against it. He stated that (Globe, p. 177):

> * * * we are now called upon to sanction a joint resolution to amend the Constitution, so that all persons shall be equal before the law, without regard to color, and so that no person shall hereafter be held in bondage * * *
>
> Sir, it would seem to me that the sum total of the wisdom of the ruling party is contained in the dogma that the Negro is exactly like the white man.

Similarly, Representative Mallory of Kentucky refused to support the amendment, declaring (Globe, p. 179):

> I know hundreds of the Republican party--or I did know hundreds of them in former times; I do not know what their opinions may be now--who were bitterly opposed to this policy; who would have fought to the bitter end against setting free the negroes to remain in the States where they were freed, and to control the destinies of this Government by the exercise of the elective franchise, maintaining an equality with the white man, socially, civilly, politically. Do they entertain that opinion now? Does any colleague entertain it? Is he, are they, now in favor of the negro remaining when freed in the States where freed, enjoying the right of suffrage, politically the equal of the white man?

Mr. Mallory also feared that Section 2 of the Amendment, giving Congress enforcement power, would be used to require enfranchisement of the Negro. 10/

10/ He stated (Globe, p. 180):

> You intend that no State shall deny the freed negro the right of franchise. If it shall be done in any State you will set aside its action by the Federal power. I believe you intend to claim the right to prevent it by legislative enactment under that clause of this joint resolution which provides that Congress make the necessary laws to carry out the provisions of this amendment. Is not this your purpose? Will gentlemen deny it? This I aver to be the object of the leading few who control the following many of the party in power.

On the following day, January 10, 1865, remarks were made by various members essentially repeating previous arguments (Globe, pp. 189, 193, 195, 199, 200). Representative Wood of New York, an opponent, inquired "whether, even if the effect [of the amendment] shallbe to free the slaves, we shall have given to that unfortunate race any amelioration of their condition, any social or political elevation of their status, or have advantaged them in any regard whatever." (Globe, p. 194). He asked what was to be done with the freed Negro after abolition. He stated (Globe, p. 194):

> Well, sir, we will assume that we have abolished slavery. What then? The gentleman from Kentucky [Mr. Mallory] asked you yesterday what do you propose to do with these people when you have freed them? Deport them? As the gentleman told you, it would add $4,000,000,000 to your debt, but that, in his own expressive language would not deter gentlemen upon the other side of the House. The scheme of colonization has been abandoned; that scheme had for its supporters such men as Henry Clay and Daniel Webster. Our new lights have gone against that. They desire to keep these negroes here for home consumption. First, to use them as instruments by which to obtain political power. Secondly, to retain the power thus obtained. Thirdly, to gratify vengeance against the slaveholder. Fourthly, as an excuse for continuing the war, and thus to continue the army of Government officials, and finally, if possible, to elevate the negro to the condition of the white man and give him suffrage, and by that means to create a power which will forever rule and control this country.

On the other hand, Representatives Grinnell of Iowa, Farnsworth of Illinois and McBride of Oregon supported the amendment. Grinnell revelled in "this grandest opportunity . . . to make the land of the Pilgrims and of Washington free; so free that another rebellion will be impossible; to make the nation's destiny so glorious that Heaven shall look down to see" (Globe, p. 200). Congressman McBride undertook to rebut the argument that emancipation meant enfranchisement (Globe, p. 202):

> A recognition of natural rights is one thing, a grant of political franchises is quite another. * * * If political rights must necessarily follow the possession of personal liberty, then all but male citizens in our country are slaves. This illustration alone reduces the conclusion to an absurdity. Sir, let the rights and status of the negro settle themselves as they will and must upon their own just basis. If, as a race, they shall prove themselves worthy the elective franchise, I tell gentlemen they will enjoy the right; they will demand and they will win it, and they ought to have it. If, on the contrary, as a race, they are so far inferior to those with whom they must compete as to be unequal to the high and responsible position of free electors, any attempt to elevate them to that standard will be a signal failure. I have no faith in their ability to contend in the race before them successfully, and no fear of degrading my own race by contact with them, for, sir, there is an antagonism between the races which will prevent anything like a complete blending of them, and I leave all questions of the consequences of emancipation to be settled by justice and expediency as experience shall dictate.

On January 12, 1865, Representative Smith of Kentucky, Cox of Ohio, Woodbridge of Vermont, and Thayer of Pennsylvania debated the question of state rights (Globe, pp. 235-246). Representative Smith urged the House to "[g]ive the negroes their freedom and let them go where they please." (Globe, p. 236). "Shall we not" he said,"look forward one hundred and fifty years and see millions of freemen, men who know no masters, and one free country, stretching from the Atlantic to the Pacific under one Constitution, with the one motto of liberty and justice forever?" (Globe, p. 238).

Mr. Cox questioned the power to amend the Constitution in the respect proposed. He declared (Globe, p. 242):

> If we may change the relation of the blacks to the whites in one respect, may we not in another? May we not change the Constitution to give them suffrage in States in spite of all State laws to the contrary? Must we not declare all State laws based on their political inequality with the white races null and void?

On January 13, 1865, Mr. Rollins of Missouri, who had voted against the measure in the spring, now changed his vote, stating:

> "I am a believer in the Declaration of Independence wherein it is asserted that 'all men are created equal.' I believe that when it says 'all men' it means every man * * * without regard to race, color, or any other accidental circumstances by which he may be surrounded." (Globe, p. 260.)

After additional speeches in favor of the Amendment by Representatives Garfield of Ohio, Stevens of Pennsylvania 11/ and Baldwin of Massachusetts (Globe, pp. 263, 265, 266), the House adjourned for the day.

Consideration of the resolution was postponed, and not resumed until January 28, 1865. On that day, the debate consisted of a number of short addresses which added little to the discussion. (Globe, pp. 478, 480, 481, 482, 485, 487.) However, in the course of one speech, Representative Patterson of New Hampshire indicated that all the previous remarks about "negro equality" were irrelevant to the discussion of the resolution. He pointed out that

> "In seeking to purge our institutions of the mortal taint of slavery, in seeking to rescue our liberties by an organic change from the fatal imperium in imperio, it is not necessary to fix the ethnological position of the African or to prove his equality with the white races." (Globe, p. 484.)

11/ This was the speech in which Thaddeus Stevens declared what he hoped would be his epitaph after his death:

> "Here lies one who never rose to any eminence, and who only courted the low ambition to have it said that he had striven to ameliorate the condition of the poor, the lowly, the downtrodden of every race and language and color." (Globe, p. 266.)

When debate opened on January 31, 1865, the day on which the final vote was to be taken, Representatives McAllister and Coffroth of Pennsylvania, and Herrick of New York, who had all voted against the resolution in the first session, rose to announce that they had changed their minds and would now support the proposed amendment. (Globe, pp. 523, 524.) Congressman Brown of Wisconsin, however, remained opposed, on the ground, inter alia, that immediate emancipation

> " * * * utterly ignores the greatest evil of slavery; [which] extends through generations its effect in completely debasing the subject of it and making him unfit either to be a good citizen or a good man. (Globe, p. 527.)

After Mr. Ashley's pending motion to reconsider had been agreed to, the final vote was taken on the resolution. It passed by a vote of 119 to 56, slightly more than the required two-thirds, and the House immediately adjourned, "in honor of this immortal and sublime event." (Globe, p. 531.)

B. The Black Codes

The Thirteenth Amendment was submitted to the States for ratification in February, 1865. On March, 1865, Congress adjourned. During the interval between adjournment and the convening of the 39th Congress in December, 1865, the provisional governments in the Southern States, which had been established by President Johnson under his "restoration" policy, enacted the so-called "Black Codes", which were designed to restrict the freedom of the newly freed Negroes in the Southern States. These Codes discriminated against Negroes in ways which make modern segregation laws pale by comparison. They were regarded by the majority in Congress as "an attempt on the part of Johnson's reorganized governments to reestablish virtual slavery and thus reverse the result of the war."12/

The Codes were contained either in statutes or in ordinances. An ordinance of the City of Opelousas, Louisiana, referred to in the Congressional debates on the Freedmen's Bureau and Civil Rights bills, both of which were enacted before the adoption of the Fourteenth Amendment (see infra), provided, inter alia, that "no negro or freedman shall be allowed to come within the limits of the town of Opelousas without special permission from his employers, specifying the object of his visit and the time necessary for the accomplishment of the same"; that "every Negro freedman who shall be found on the streets of Opelousas after 10 o'clock at night without a written pass or permit from his employers shall be "fined or imprisoned; that "no Negro or freedman shall be permitted to rent or keep a house within the limits of the town under any circumstances" nor to reside within the town limits if not in the regular service of some white person or former owner; nor to engage in public meetings or congregations within the town limits without permission of the mayor or the president of the Board of Police (except "usual church services conducted by established ministers of religion"; nor to "sell, barter, or exchange any articles of merchandise or traffic within the limits of Opelousas without per-

12/ Randall, The Civil War and Reconstruction (1937), p. 724.

mission in writing from his employer or the mayor or president of the board." Senate Executive Document No. 2, 39th Cong., 1st Sess., pp. 92-93.

Other Black Codes referred to in the debates included the newly enacted "Freedmen's Bill" in Mississippi which prohibited Negroes from holding, leasing, or renting real estate; forced freedmen to marry whomever they were then living with; excluded Negroes from testifying against whites; and gave local authorities power to prevent freedmen from entering business (Globe, p. 941). The South Carolina Code provided that all Negroes were to be bound out to some master; the adult Negro was compelled to enter into a contract with the master and a district judge was to fix the value of the labor (Globe, p. 588). In Tennessee, a vagrant Negro could be sold to the highest bidder to pay his jail fees and his children could be bound out to a master by the county court. Also, if a master failed to pay the Negro, the Negro could not sue him or testify against him. (Globe, p. 589). Similar provisions existed in Alabama (Globe, p. 589, 517, 941). In Virginia a Negro was forced to work for "the common wages given to other laborers" and the land owners formed combinations setting rates of wages; (Globe, p. 589). If a Negro refused to work for these wages he was seized as a vagrant, and sold into service (Globe, p. (589).

C. Thirty-ninth Congress Legislation

1. The Wilson Bill (S. 9)

On December 4, 1865, the opening day of the 39th Congress, Senator Wilson introduced in the Senate a bill (S. 9) providing for the nullification of the Black Codes (Globe, p. 2). It declared null and void all state laws, statutes, acts, ordinances, rules, and regulations whereby inequality of civil rights and immunities was "recognized, authorized, established, or maintained, by reason or in consequence of any distinctions or differences of color, race, or descent or a previous condition or status of slavery or involuntary servitude . . . "(Globe, p. 39). On December 13, he moved to take up the bill without committee reference. In urging immediate adoption of his measure, Wilson noted that "whatever differences of opinion may exist in regard to the right of suffrage, I am sure there can be no difference of opinion among honest and just men in regard to maintaining the civil rights and immunities of these freedmen; they should stand at any rate like the non-voting white population of those States" (Globe, p. 39). Wilson quoted lengthy passages from the Black Codes of Mississippi and Alabama, remarking that such legislation made freedmen the "slaves of society" and that it was far better to be a slave of one man than to be the "slave of arbitrary law." He added that not only did the "old slave codes still exist" in many Southern states, but that the new codes were

> inhuman, unchristian, and inconsistent with the idea that these freedmen have rights. These freedmen are as free as I am, to work when they please, to play when they please, to go where they please, and to use the product of their labor, and those states have no right to pass such laws as are now pending and have just been passed in some of them. (Globe, p. 41)

Senator Reverdy Johnson of Maryland, although stating that he favored the general proposition of the bill, objected to it on the grounds that it was too indistinct as to the rights to be protected and that its effects were too uncertain. (Globe, p. 40). Also, Senator Cowan of Pennsylvania expressed himself as "exceedingly desirous that by some means or other the natural rights of all people in the country shall be secured to them, no matter what their color or complexion may be, and

may be secured to them in such a way as that States themselves cannot hereafter wrest them away from them" (Globe, p. 40). He thought, however, that this aim could be attained only by means of an amendment to the Constitution (Globe, p. 41). Senator Wilson rose to state his understanding that the Thirteenth Amendment had already been adopted,13/ and that under its second section, "we have the power to pass not only a bill that shall apply these provisions to the rebel States, but to Kentucky, to Maryland, to Delaware, and to all the loyal States" (Globe, p. 41).

Senator Sherman of Ohio concurred with Senators Johnson and Cowan that the measure ought to be postponed until the Amendment was finally ratified. There would then be no doubt of the power of Congress to pass the bill and to make it definite and general in its terms, and applicable throughout the United States. In his view the Thirteenth Amendment contained "not only an express guarantee of liberty to every inhabitant of the United States, but an express grant of power to Congress to secure this liberty by appropriate legislation. Now, unless a man may be free without the right to sue and be sued, to plead and be impleaded, to acquire and hold property, and to testify in a court of justice, then Congress has the power, by the express terms of this amendment, to secure all these rights." (Globe, p. 41). He also objected that the bill did not specify what rights were to be protected. He wished it to be more specific, for there was "scarcely a State in the Union

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13/ This statement was made on December 13, 1865. The Thirteenth Amendment was actually declared to have been adopted on December 8, 1865, by a proclamation of the Secretary of State, 13 Stat. 774. However, Wilson based his bill on the war powers of Congress (41).

that does not make distinctions on account of color" (Globe, p. 41). He preferred that

> when we legislate on this subject we should secure to the freedmen of the Southern States certain rights, naming them, defining precisely what they should be. For instance, we could agree that every man should have the right to sue and be sued in any court of justice * * *. So with the right to testify, * * * the right to acquire and hold property, to enjoy the fruits of their own labor, to be protected in their homes and family, the right to be educated, and to go and come at pleasure. These are among the natural rights of free men. (Globe, p. 42).

Mr. Saulsbury of Delaware indicated his doubts that the proposals just mentioned were authorized or even necessary. He believed that such measures could not be authorized under the Thirteenth Amendment, which had been enacted "for the purpose, and none other, of preventing State Legislatures from enslaving, under any pretense, those whom the first clause declared should be free." (Globe, p. 43). However, Senator Trumbull of Illinois then declared that the second section of the Thirteenth Amendment had been inserted for the very purpose "of preventing State Legislatures from enslaving, under any pretense, those whom the first clause declared should be free, and for the conferring upon Congress authority by appropriate legislation to carry the first section into effect." (Globe, p. 43).[14] He thought it was idle to say that a man was free who could not go and come at pleasure, who could not buy and sell property, and who could not enforce his rights.

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[14] He added that what was appropriate legislation was for Congress alone to determine; this was directed at protecting the Wilson bill from attacks that the Constitution did not authorize such legislation by the Federal government.

When asked by Senator Saulsbury if he had made clear his understanding of the scope of the Amendment when it was being debated in the Senate, Trumbull replied: "Ido not know that I stated it . . . I could make it no plainer than the statement itself makes it." (Globe, p. 43).

He too preferred that the Congress wait and proceed under the Amendment, which would authorize Congress to enact more sweeping legislation, and he gave notice of his intent to introduce such a bill. (Globe, p. 43). However, he expressed the hope that such legislation would be made unnecessary by the actions of the Southern states.

> I trust there may be a feeling among them in harmony with the feeling throughout the country and which shall not only abolish slavery in name, but in fact, and that the legislation of the slave states in after years may be as effective to elevate, enlighten and improve ~~the~~ African as it has been in the past to insecure and degrade him. (Id.)

A week later debate was resumed on the bill. Senator Sumner declared that the purpose of the bill was "nothing less than to establish Equality before the Law, at least so far as civil rights are concerned in the rebel states." (Globe, p. 91). The argument for the bill he found "irresistible." It was, he felt, essential to complete Emancipation. "Without it Emancipation will be only half done. It is our duty to see that it is wholly done. Slavery must be abolished not in form only, but in substance, so that there shall be no Black Code; but all shall be Equal before the Law." (Ibid.) During the course of his lengthy speech, Sumner read from letters and reports of anonymous travelers and observers commenting on conditions in the South. Typically, these letters reported that Southerners "hope as long as the black race exists here to be able to hold it in a condition of serfdom." (Globe, p. 92) and that the Black Codes would result in establishing in the South "a Mexican system of peonage." (Ibid.) Another letter writer quoted by Sumner remarked that by virtue of the Codes "The South is determined to have slavery -- the thing if not the name." (Globe, p. 94-95).

In responding to Sumner's speech, Senator Cowan objected to the vagueness of the proponents of the bill about just what civil rights they wanted to secure for the Negro. Noting that slavery had been abolished in all Southern states, he noted: "But still further guarantees are wanted; we are not told what they are. What are they? What is wanted?" (Globe, p. 96). He preferred that the States continue to regulate these matters. (Id).

On the following day, December 21, 1865, Senator Steward of Nevada opened the debate. Although he avowed he was "in favor of legislation on this subject, and such legislation as shall secure the freedom of those who were formerly slaves, and their equality before the law - - -", he was against the bill as being too radical, and he expressed the hope that the conduct of the Southern states would render Congressional enactments unnecessary. (Globe, 109-111).

Mr. Wilson responded by declaring that the Black Codes had to be annulled so that the

> man made free by the Constitution of the United States, sanctioned by the voice of the American people, is a freeman indeed; that he can go where the pleases, work when and for whom he pleases; that he can sue and be sued; that he can lease and buy and sell and own property, real and personal; that he can go into the schools and educate himself and his children; that the rights and guarantees of the good old common law are his, and that he walks the earth, proud and erect in the conscious dignity of a free man * * *. (Globe, p. 111).

He added that the policy of emancipation carried with it equality of civil rights, rather than making a freedman a "serf or peon, the slave of society, its soulless laws and customs." (Globe, p. 111).

However, he noted that the bill would probably be postponed over the Christmas recess. After the holidays, the Congress would "probably enter on the discussion of the broader question of annulling all the black laws in the country and putting these people under the protection of humane, equal, and just laws." (Id.).

Mr. Saulsbury again insisted that the Thirteenth Amendment did not authorize Congress to protect the civil rights of freedmen. He argued that the "status or condition" of slavery could be abolished "without attempting to confer on all former slaves all the civil or political rights that white people have. . . there is nothing in your Amendment which gives Congress power to enter my State and undertake to regulate the relations existing between classes and different conditions of life." (Globe, p. 113). The Congress adjourned that day for the Christmas recess and the bill was not brought up again.

2. The Schurz Report

On December 12, 1865, the Senate passed a resolution requesting President Johnson to submit to the Congress "information of the state of that portion of the Union lately in rebellion," the information to include the report to the President made by Major General Carl Schurz, which was based on a lengthy tour of the South (Cong. Globe, 39th Cong., 1st Sess., p. 30). The requested information was submitted by the President and ordered printed, on December 19, 1865 (Id., 78-80), during the course of debates on the Wilson Bill.

The report was heavily relied upon by proponents of the Reconstruction legislation in relating conditions in the South. As it ~~reviews~~ reveals some of the conditions with which the Congress was concerned, the Report throws some light on the purposes of the legislation which followed its publication.

The date was prefaced by a brief message from the President to the effect that local government was being quickly restored in the southern states; that the people were yielding obedience to the laws of the United States; and that effective measures were being taken by those states "to confer upon freedmen rights and privileges which are essential to their comfort, protection and security" (S. Ex. Doc. No. 2, p. 1). The Schurz report, however, indicated that the Southern states were far from tranquil, and that the measures taken relating to freedmen were not to be mistaken for real measures of protection. In discussing the treatment of the Negro, Schurz wrote that he had discovered a widely-spread conviction in the South that the negro would not work without physical compulsion. This attitude, he believed, naturally made Southerners want "to preserve slavery in its original form as much and as long as possible--or to introduce into the new system that element of physical compulsion which would make the Negro work." (Id. p. 17) Even though many Southerners realized that slavery in the old form could not be preserved, attempts were being made to incorporate into the new system the element of physical compulsion by adhering as much as possible to the traditions of the old system. (Id. p. 19).

He also noted that many white men possessed such "singularly bitter and vindictive feelings" toward Negroes, and that the spirit of persecution was so strong as to make necessary protection of freedmen by the military.

A second major prejudice he found against Negroes was that

> "the negro exists for the special object of raising cotton, rice, and sugar for the whites....An ingrained feeling like this is apt to bring forth that sort of class legislation which produces laws to govern one class with no other view than to benefit another. (Id.,21)

Indeed, Schurz reported that new statutes and regulations "attempted to revive slavery in a new form." (Id., p.24) [redacted] Referring to the regulations of Opelousas, Louisiana, Schurz pointed out that although the system did not exactly re-establish slavery in the old form

> "[redacted] as for the practical working of the system with regard to the welfare of the freedmen, the difference would only be for the worse. The negro is not only not permitted to be idle, but he is positively prohibited from working or carrying on a business for himself; he is compelled to be in the 'regular service' of a white man, and if he has no employer he is compelled to find one. It requires only a simple understanding among the employers, and the negro is just as much bound to his employer 'for better and for worse' as he was when slavery existed in the old form." (Id.)

Schurz concluded that the Opelousas ordinance was "a striking embodiment of the idea that although the former owner has lost his individual right of property in the former slaves, "the blacks at large belong to the whites at large." (Ibid.)

In discussing a tendency toward reaction in the South, Schurz noted that although it was probable that no attempt would be made to restore slavery in its old form

> "there are systems intermediate between slavery as it formerly existed in the south, and free labor as it exists in the north, but more nearly related to the former than to the latter, the introduction of which will be attempted."

He then referred to the Opelousas and St. Landry ordinances and the proposed "Black Code" of South Carolina. 15/

Not only did Schurz foresee the enactment of discriminatory laws, he also suggested that measures taken by the Southern states abolishing slavery and protecting freedmen were not to be mistaken for real measures of protection:

> "[W]herever abolition was publicly advocated, whether in popular meetings or in State conventions, it was on the ground of necessity --not unfrequently with the significant addition that, as soon as they had once more control of their own State affairs, they could settle the labor question to suit themselves, whatever they might have to submit to for the present. Not only did I find this to be the common talk among the people, but the same sentiment was openly avowed by public men in speech and print.

* * *

15/ Schurz' tour of the South was made in 1865, before the enactment of the "Black Codes" in the Southern states.

> It is worthy of note that the convention of Mississippi -- and the conventions of other States have followed its example -- imposed upon subsequent legislatures the obligation not only to pass laws for the protection of the freedmen in person and property, but also to guard against the dangers arising from sudden emancipation. This language is not without significance . . . It will be observed that this clause is so vaguely worded as to authorize the legislatures to place any restriction they may see fit upon the emancipated negro, in perfect consistency with the amended State constitutions; for it rests with them to define what the dangers of sudden emancipation consist in, and what measures may be required to guard against them. It is true, the clause does not authorize the legislatures to re-establish slavery in the old form; but they may pass whatever laws they see fit, stopping short only one step of what may strictly be defined as 'slavery.'" (Id. pp. 33-34.)

Schurz also noted that while southerners accepted "'the abolition of slavery' they think that some species of serfdom, peonage, or other form of compulsory labor is not slavery, and may be introduced without a violation of their pledge." (35) He noted that southern states desired reorganization of the militia for the purpose of restoring the patrol system which had been a characteristic feature of the slavery regime. (36)

In the conclusion of his report, Schurz reiterated his view that the Southern states wanted to perpetuate elements of slavery through state laws:

> "The emancipation of the slaves is submitted to only in so far as chattel slavery in the old form could not be kept up. But although the freedman is no longer considered the property of the individual master, he is considered the slave of society, and all independent State legislation will share the tendency to make him such. The ordinances abolishing slavery passed by the conventions under the pressure of circumstances, will not be looked upon as barring the establishment of a new form of servitude."

He then urged that the federal government continue in control of the South until the "advantages and blessings" of the new order of free choice had established itself.

> "As to the future peace and harmony of the Union, it is of the highest importance that the people lately in rebellion be not permitted to build up another 'peculiar institution' whose spirit is in conflict with the fundamental principles of our political system; for as long as they cherish interests peculiar to them in preference to those they have in common with the rest of the American people, their loyalty to the Union will always be uncertain." (Id. p 46.)

The Freedman's Bureau Bill (S. 60):

The provisions of the Wilson bill reappeared in an altered form in 2 sections of the Freedmen's Bureau Bill, introduced by Senator Trumbull on January 5, 1866, the first day Congress convened after the Christmas recess. It was the first "reconstruction" action following the submission of the Schurz report. The bill was reported from the Judiciary Committee on January 12 (Globe, p. 209) and debate on the floor began 5 days later.

The Bill provided for enlarging the powers of the Freedmen's Bureau, which had been set up the previous year to care for destitute freed slaves within the territory under the control of Union forces. There were eight sections in the 1866 bill. Under it the President was directed to divide the country into districts, to appoint commissioners, to reserve certain public lands in the South to be allotted to freedmen and refugees, and to purchase sites for schools. The bill also authorized the issuance of clothing, food, medical supplies, etc. to freedmen. (Globe, p. 209).

The 7th and 8th sections dealt with denials of civil rights and immunities. Under the 7th section the President was given the duty to extend military protection and jurisdiction over all cases where any of the civil rights or immunities of white persons were refused or denied to anyone in consequence of local law, custom or prejudice, on account of race, color, or previous condition of servitude; or when different punishments or penalties were inflicted on colored people than were prescribed for white persons committing like offenses. The rights and immunities specifically enumerated in the section were the right to make and enforce contracts; to sue, be parties, and give evidence; to inherit, purchase, lease, sue, hold, and convey real and personal property; and "to have full and equal benefit of all laws and proceedings for the security of person and estate." (Globe, p. 318).

Meaning of Civ Rts.

The 8th section made it a misdemeanor to deprive anyone on account of race or color or previous condition of servitude any of the rights secured to white men. Unlike the first six sections of the Bill these two applied only to those states in which the ordinary course of judicial proceedings had been interrupted by war; and the military jurisdiction authorized by the section was to end whenever the discrimination on account of which it could

be conferred ceased or the state resumed constitutional relations with the United States (Globe, 209, 318).

Unlike Senator Wilson's bill which only nullified discriminatory state laws, S. 60 sought to confer military protection in cases affecting persons discriminated against by statute or custom. One effect of the bill was to interfere with state control over matters which States and communities had heretofore regulated, such as qualifications to testify in court or to sue. Thus, the debates in Congress centered around the constitutional authority of the Congress to enact such a measure.

The proponents of the measure relied heavily on the second section of the Thirteenth Amendment as giving the Congress the necessary authority. They argued that the Black Codes merely reinstated aspects of slavery and thus Congress could act under the second section of the Amendment to nullify these Codes and to protect the rights of freedmen if it considered such action necessary.

Senate debates

Debate on the bill began on January 18, 1866, after several minor committee amendments had been agreed to.

Mr. Stewart of Nevada opened the Senate's consideration of the bill by remarking:

> . . . here is a practical measure before the Senate for the benefit of the freedmen, carrying out the constitutional provision to protect him in his civil rights . . . . I am in favor of this bill. It goes to the utmost extent that I think we are entitled to go under the constitutional amendment. There is another bill introduced by the Senator from Illinois which must go along with it, which provides civil jurisdiction for the protection of the freedman. Under this constitutional amendment we can protect the freedman and accomplish something for his real benefit. (Globe, p. 297).

Stewart was, however, opposed to the movement to grant suffrage to the Negro. While he was "in favor of legislation under the constitutional amendment that shall secure to him a chance to live, a chance to hold property, a chance to be heard in the courts, a chance to enjoy his civil rights, a chance to rise in the scale of humanity, a chance to be a man" (Globe, p. 298), still he thought that negro suffrage was not one of the issues of the war. If pushed, it would result in further conflict in the South. "Let no mere theory of the equality of races deprive us of peace and union." (Ibid.)

The following day, January 19, 1866, Senator Hendricks of Indiana, a member of the Judiciary Committee, made a lengthy speech in opposition to the bill. He objected to the proponents' interpretation of the Thirteenth Amendment:

> It is claimed that under this second section [of the Amendment] Congress may do anything necessary, in its judgment, not only to secure the freedom of the Negro, but to secure to him all civil rights that are secured to white people. I deny that construction, and it will be a very dangerous construction to adopt. The first section abolishes slavery. The second section provides that Congress may enforce the abolition of slavery "by appropriate legislation." What is slavery? It is not a relation between the slave and the State; it is not a public relation; it is a relation between two persons whereby the conduct of one is placed under the will of the other. It is purely and entirely a domestic relation . . . This constitutional amendment broke asunder this private relation between the master and his slave, and the slave then, so far as the right of the master was concerned, became free; but did the slave, under that amendment, acquire any other right than to be free from the control of his master? The law of the State

> which authorized this relationship is abrogated and annulled by this provision of the Federal Constitution, but no new rights are conferred upon the freedman. (Globe, p. 318.)

He interpreted the second section of the Amendment as authorizing Congress to "pass such a law as will secure the freedom declared in the first section, but we cannot go beyond that limitation. . . If a man has been, by this provision of the Constitution, made free from his master, and that master undertakes to make him a slave again, we may pass such laws as are sufficient in our judgment to prevent that act; but if the Legislature of the State denies to the citizen as he is now called, the freedman, equal privileges with the white man, I want to know if that Legislature, each member of that Legislature, is responsible to the penalties prescribed in this bill? It is not an act of the old master; it is an act of the state government, which defines and regulates the civil rights of the people." (319)

Senator Trumbull then rose to defend his measure and delivered what was perhaps the most forceful statement of the view that the second section of the Thirteenth Amendment authorized Congress to legislate to guarantee civil rights.

> What was the object of the constitutional amendment abolishing slavery? It was not, as the Senator says, simply to take away the power of the master over the slave. Did we not mean something more than that? Did we not mean that hereafter slavery should not exist, no matter whether the servitude was claimed as due to an individual or the State? The constitutional amendment abolishes just as absolutely all provisions of State or local law which make a man a slave as it takes away the power of his former master to control him.
>
> If the construction put by the Senator from Indiana (Mr. Hendricks) upon the amendment be the true one, and we have merely taken from the

> master the power to control the slave and left him at the mercy of the State to be deprived of his civil rights, the trumpet of freedom that we have been blowing throughout the land has given an 'uncertain sound;' and the promised freedom is a delusion. Such was not the intention of Congress, which proposed the constitutional amendment, nor is such the fair meaning of the amendment itself. With the destruction of slavery necessarily follows the destruction of the incidents to slavery. When slavery was abolished, slave codes in its support were abolished also. (322)

Such affirmative measures by the Congress were necessary because of the discriminatory laws and customs in the South:

> Those laws that prevented the colored man going from home, that did not allow him to buy or to sell, or to make contracts; that did not allow him to own property; that did not allow him to enforce rights; that did not allow him to be educated, were all badges of servitude made in the interest of slavery and

as a part of slavery. They never would have been thought of or enacted anywhere but for slavery, and when slavery falls they fall also. The policy of the States where slavery has existed has been to legislate in its interest; and out of deference to slavery, which was tolerated by the Constitution of the United States, even some of the non-slaveholding States passed laws abridging the rights of the colored man which were restraints upon liberty. When slavery goes, all this system of legislation, devised in the interest of slavery and for the purpose of degrading the colored race, or keeping the negro in ignorance, of blotting out from his very soul the light of reason, if that were possible, that he might not think, but know only, like the ox, to labor, goes with it.

Now, when slavery no longer exists, the policy of the Government is to legislate in the interest of freedom. Now, our laws are to be enacted with a view to educate, improve, enlighten, and Christianize the negro; to make him an independent man; to teach him to think and to reason; to improve the principle which the great Author of all has implanted in every human breast, which is susceptible of the highest cultivation, and destined to go on enlarging and expanding through the endless ages of eternity.

I have no doubt that under this provision of the Constitution we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation,

> to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end. If we believe a Freedmen's Bureau necessary, if we believe an act punishing any man who deprives a colored person of any civil rights on account of his color necessary--if that is one means to secure his freedom, we have the constitutional right to adopt it. If in order to prevent slavery Congress deem it necessary to declare null and void all laws which will not permit him to testify, which will not permit him to buy and sell, and to go where he pleases, it has the power to do so, and not only the power, but it becomes its duty to do so. That is what is provided to be done by this bill. Its provisions are temporary; but there is another bill on your table, somewhat akin to this, which is intended to be permanent and to extend to all parts of the country, and to protect persons of all races in equal civil rights. [The Civil Rights Bill] (Globe, p. 319-322).

As for Senator Hendricks' remarks about the Indiana miscegenation laws, Senator Trumbull thought those laws would not be affected at all as they operated alike on both races and the purpose of his bill was to secure the same civil rights and subject to the same punishments persons of all races and colors (Globe, p. 322).

A brief debate occurred on January 20, 1866, during which the Senator from Kentucky objected to the possibility that the bill would apply to his state and proposing to limit it to the rebellious states (Globe, pp. 334-337).

When debate resumed on January 22, Senator Creswell of Maryland voiced opposition to the amendment to limit the act to the Confederate states, for he thought it was necessary in his state to protect returned colored soldiers to whom the civil law of Maryland afforded no remedy (Globe, p. 339).

In reply to Senator Cowan's objection that the Freedmen's Bureau Bill would not apply in all states of the Union, Senator Wilson referred to the immediate problem of the severe Black Codes of the South (Globe, p. 340). As to the ultimate aims of the Congress he stated that:

> "The whole philosophy of our action is . . . that we cannot degrade any portion of our population or put a stain upon them, without leaving heart burnings and difficulties that will endanger the future of our country. * * * The country demands . . . the elevation of a race."

He also stated that the country demanded not only the enlargement of the powers of the Freedmen's Bureau, but "the increase of schools, and the instruction, protection, and elevation of a race." He then urged the Congress to enact the needed laws "that tend to the freedom, the elevation, the improvement of all our people . . ." (Globe, p. 341).

Mr. Cowan then protested that legislation was unnecessary, for if the Black Codes were but a thinly disguised form of slavery, they were clearly unconstitutional, and the Supreme Court was sitting to give remedy (Globe, p. 342).

Furthermore, Cowan confessed an inability to understand, from the generalities used in the bill, just what was the equality the proponents were aiming for. What was meant by equality, as he understood it, was "in the language of the Declaration of Independence . . . that each man shall have the right to pursue in his own way life, liberty, and happiness. That is the whole of it. It is not that he shall be an elector, it is not that he shall receive the especial favors of the community in any way, but

it means that if he is assailed by one stronger than himself the Government will protect him to punish the assailant. It means that if a man owes another money the Government will provide a means by which the debtor shall be compelled to pay. . .; that if an intruder and trespasser gets upon his land he shall have a remedy to recover it. That is what I understand by equality before the law." (Globe, p. 342)

Senator Wilson answered with a very impassioned speech. The equality which was to be enforced by this bill was not a matter of uniformity of person, "that all men shall be six feet high," he said, and then asked if Senator Cowan did not know that "we mean that the poorest man, be he black or white, that treads the soil of this continent, is as much entitled to the protection of the law as the richest and proudest man in the land? Does he not know that we mean that the poor man, whose wife may be dressed in cheap calico, is as much entitled to have her protected by equal law as is the rich man to have his jeweled bride protected by the laws of the land? Does he not know that the poor man's cabin, though it may be the cabin of a poor freedman in the depths of the Carolinas, is entitled to the protection of the same law that protects the palace of a Stewart or an Astor?" (Globe, p. 343).

The proponents of the legislation, he declared

> have accepted the sublime truths of the Declaration of Independence. We stand as the champions of human rights for all men, black and white, the whole world over, and we mean that just and equal laws shall pervade every rood of this nation; and when that is done our work ceases, but not until it is done. If anybody wants to stop this mighty work, all I have to say to him is just to stand out of the way and let us go on to its accomplishment, for we shall pass through or over all opposing obstacles. (Globe, p. 344)

Senator Guthrie agreed with Senator Cowan that the measure was too extreme and that the Constitution alone was sufficient to nullify the Codes (Globe, p. 346).

The amendment to restrict the bill to the rebellious states was then defeated by a vote of 33 to 11 (Globe, p. 347). Senator Davis of Kentucky then proposed an amendment to make the Freedman's Bureau subject to the jurisdiction of the state courts. This, too, was defeated 31 to 8 (Globe, p. 348). Various other amendments on details of the bill were then considered and disposed of (Globe, pp. 348-349).

On January 23, 1860, Senator Saulsbury of Delaware voiced his objection to the bill. He argued that the power to pass such a measure could not be derived under the Thirteenth Amendment, which abolished only the status of slavery:

> For the first time in the history of the legislation of this country it is attempted by Congress to invade the States of this Union, and undertake to regulate the law applicable to their own citizens. The power to enact such a law is claimed under the second section of the act providing for the Amendment to the Constitution. Can it be possible that any person can conceive that under that section such an extensive power as that now claimed is actually given? * * *
>
> What was the amendment? An amendment abolishing the status or condition of slavery, which is nothing but a status or condition which subjects one man to the control of another, and gives to that other the proceeds of the former's labor. Cannot that amendment be carried into effect and the status of freedom established without exercising such a power as this. I say here, as I have said before, that when that constitutional amendment was under consideration in this Chamber, there was no friend of the measure who claimed or avowed that such a power as this existed in the Congress under it. (Globe, p. 362)

Senator Fessenden of Maine then suggested that the present state of things should not be "avoided, shunned" because there was no provision in the Constitution!

> If so, what miserable, weak, powerless people are we. We can carry on a great war, but the moment the clash of arms has ceased to strike our ears we become utterly powerless to provide for any of its necessary and inevitable results because it is not written in the Constitution what we should do . . . .
>
> . . . Whether you call it the war power or some other power, the power must necessarily exist, from the nature of the case, somewhere, if anywhere, in us, to provide for what was one of the results of the contest in which we have been engaged. (Globe, p. 365)

But Senators McDougall, Hendricks and Davis all agreed with Senator Saulsbury on Congress' power under the Thirteenth Amendment (Globe, pp. 367, 368, 370). Senator Reverdy Johnson of Maryland announced that he would have liked to vote for the measure because he was very anxious to provide for the Negroes to a certain extent, and unfortunately he, too, had doubts as to the constitutionality of some of its provisions (Globe, p. 372).

Consideration on January 24, 1866, was largely devoted to the proposal of a series of amendments by various members of the opposition. They were all decisively defeated (Globe, pp. 392-402). On January 25, 1866, the final vote on the passage of the bill was taken. The measure passed by a vote of 37 to 10, and the Senate turned immediately to the consideration of Trumbull's Civil Rights bill (Globe, p. 421).

House debates:

In the House, a substitute bill was reported from the Select Committee on Freedmen by its Chairman, Representative Eliot of Massachusetts, on January 30, 1866 (Globe, p. 512). Save for a few minor details, the bill was substantially the same as the Senate version, and the sections on civil rights were left unchanged.

The discussion on the measure the following day, January 31, 1866, consisted chiefly of a long speech by Mr. Dawson of Pennsylvania against Reconstruction policies generally. He accused the proponents of aiming at equality for the negroes and eastern control over the affairs of the South. A result of this theory was social equality. He painted this picture of the aims of the Reconstruction proponents:

> They hold that the white and black race are equal. This they maintain involves and demands social equality; that negroes should be received on an equality in white families, should be admitted to the same tables at hotels, should be permitted to occupy the same seats in railroad cars and the same pews in churches, that they should be allowed to hold offices, to sit on juries, to vote, to be eligible to seats in the State and National Legislatures, and to be judges, or to make and expound laws for the government of white men. Their children are to attend the same schools with white children, and to sit side by side with them. Following close upon this will, of course, be marriages between the races, when, according to the philanthropic theories, the prejudices of caste will at length have been overcome, and the negro with the privilege of free miscegenation accorded him, will be in the enjoyment of his true status.

> To future generations it will be a marvel in the history of our times, that a party whose tenets were such wild ravings and frightful dreams as these should be permitted, in their support, to urge the country into the highest and most destructive of civil wars, and should, when war was inaugurated, be permitted to shape its policy in furtherance of their peculiar ends. For the full realization of their plans, they are ready to sacrifice not only our priceless system of government, but even our social superiority as well. (Globe, p. 541)

He also argued that it was a violation of the principle of self-government to impose on the South "any modification of her social condition, any political status not sanctioned by her people." (Globe, p. 543).

The next day Representative Donnelly spoke in favor of the bill. He stated that the mind of the North must assert its "majestic sway in the South." (Globe, p. 585) Otherwise he feared the "reenslavement" of the freedmen and that the South would remain a distinct people. (Id.) He said:

> The Southern insurrection was but the armed expression of certain popular convictions, which in their turn arose from peculiar social conditions. The disease was so radical and the remedy must be no less so. We must lay the ax to the root of the tree. We must legislate against the cause, not the consequences; otherwise we become the mere repressers of disturbances, not a wise and provident Government; we play the part of executioner, not the law-maker.
>
> Having prohibited slavery, we must not pause an instant until the spirit of slavery is extinct, and every trace left by it in our laws is obliterated. (Id.)

In the course of the speech, he cited provisions of some of the Black Codes and said these laws were but the "re-establishment of slavery under a new name. (Globe, p. 589). In his view, more prohibition of slavery was not enough for

> . . . slavery consists in a deprivation of natural rights. A man may be a slave for a term of years as fully as though he were held for life; he may be a slave when deprived of a portion of the wages of his labor as fully as if deprived of all; he may be held down by unjust laws to a degraded and defenseless condition as fully as though his wrists were manacled; he may be oppressed by a convocation of masters called a Legislature as fully as by a single master. In short, he who is not entirely free is necessarily a slave. (Globe, p. 588)

Mr. Donnelly favored giving the freedmen "all things essential to liberty" (Globe, p. 589), and urged that negroes be given equal opportunities to vote, to work, to be educated. Unless he had this opportunity, Mr. Donnelly declared, the freedman would remain in an amphibious condition between freedom and slavery. (Id.) He concluded:

> Mr. Speaker, it is as plain to my mind as the sun at noonday, that we must make all citizens of the country equal before the law; that we must break down all walls of caste; that we must offer equal opportunities to all men. (Globe, p. 589)

Mr. Garfield of Ohio also spoke in favor of the bill. He replied to those who attacked the bill as destructive to the federal system by declaring that personal liberty and personal rights should be "placed in the keeping of the nation" and not left to the "caprice of mobs or the contingencies of local legislation." If the Constitution did not at that time afford all the powers necessary to that end, it should be amended (Globe, App., p. 67). He asked if the Congress was brave enough to apply the principles of the Declaration of Independence to every citizen, whatever his color. According to him:

> The spirit of our Government demands that there shall be no rigid, horizontal strata running across our political society,

> through which some classes of citizens may never pass up to the surface; but it shall be rather like the ocean where every drop can seek the surface and glisten in the sun. Until we are true enough and brave enough to declare that in this country the humblest, the lowest, the meanest of our citizens shall not be prevented from passing to the highest place he is worthy to attain, we shall never realize freedom in all its glorious meanings. I do not expect we can realize this result immediately. It may be impossible to realize it very soon; but let us keep our eyes fixed in that direction, and march toward that goal. (Id.)

Consideration of the bill, on February 2, 1866, was given over to a long speech in opposition by Representative Kerr of Indiana (Globe, p. 618). This speech was filled with reflections on the necessity of preserving the federal form of government, which he felt the Freedmen's Bureau bill threatened. In the course of it,he remarked:

> I deny this construction [of the 13th Amendment] as being most untenable upon every rational principle of constitutional ~~construction~~ interpretation. The States by the adoption of this amendment certainly did not mean to surrender to Congress their cherished right of exclusive government over their own citizens in all matters of domestic concern. They only intended by this amendment to abolish slavery and forever prevent its re-establishment in any part of the country. (Globe, p. 623)

The next day, in another long speech, Mr. Marshall of Iowa also attacked the idea that the 13th Amendment empowered Congress to act. According to his interpretation, the Amendment meant that

> If any man asserts the right to hold another in bondage as his slave, his chattel, and refuses to let him go free, Congress can by

> law, under this clause, provide by appropriate legislation for the punishment of the offender and the protection from slavery of the freedman. But Congress has acquired not a particle of additional power other than this by virtue of this amendment. (Globe, p. 628)

He added that this section certainly did not empower the federal government to coerce or interfere with legislation in regard to different classes in the same state. (Id.)

Representative Hubbard of Connecticut answered Marshall by appealing to a higher law duty to provide for the general welfare for the authority to enact the bill (Globe, p. 630). He spoke further of the "righteous purpose" which he felt the Reconstruction legislation was pursuing and the evidence these measures gave that the nation was "fast becoming what it was intended to be by the fathers -- the home of liberty and an asylum for the oppressed of all the races and nations of men." He continued:

> The words caste, race, color, ever unknown to the Constitution, notwithstanding the immortal amendment giving freedom to all, are still potent for evil on the lips of men whose minds are swayed by prejudice or blinded by passion, and the freedmen need the protection of this bill.
>
> The era is dawning when it will be a reproach to talk in scorn about the distinctions of race or color. Our country is, and must be, cosmopolitan. The fathers invited the oppressed of all nations to come here and find a happy home. Many of them, from many nations, have come, and more are coming.
>
> * * * * * **
>
> . . . We have among us men of all nations, of all kindreds and tongues. They all meet here to worship at freedom's shrine, and the Constitution intends they shall all be made politically free and equal. (Globe, p. 630)

Mr. Moulton of Illinois then attempted to answer various objections to the bill. In his view, the bill's purpose was the "amelioration of the condition of the colored people," which he said would be effectuated by the abolition of discriminatory state laws. He continued:

> The very object of the bill is to break down the discrimination between whites and blacks. The object of the bill is to provide where the refugees and freedmen are discriminated against, where a State says, as many do in the South, that the black man shall not make contracts, that the black man shall not enjoy the fruits of his labor, that he shall be declared a vagabond, a vagrant, and the same laws do not operate against the white man -- that such discrimination shall not exist, notwithstanding the statute of any State. (Globe, p. 632)

He denied that intermarriage or sitting on juries were among the rights protected by the bill, and stated that:

> [Those which were protected were] the great fundamental rights that are secured by the Constitution of the United States, and that are defined in the Declaration of Independence, the right to personal liberty, the right to hold and enjoy property, to transmit property, and to make contracts. These are the great civil rights that belong to us all and are sought to be protected by the bill. (Globe, p. 632)

He stressed the fact that military jurisdiction would end whenever the discrimination ceased and pointed out that the bill put it in the power of states to exclude themselves from the bill's provisions "by ceasing to make unnatural discrimination between their own citizens." (Globe, p. 633)

Later in the afternoon, after a protracted discussion of the financing of the Bureau, Representative

Rousseau of Kentucky voiced further objections to the bill. He insisted that under the bill the Bureau could arrest and imprison those who excluded Negroes from public places:

> If you get on the cars with your wife and daughter, and if there be a spare seat, and a drunken negro comes forward to take it, and you ask him if he pleases to move a little further off, and he takes a notion that he will not do it, and should report to the bureau that because he was a negro he was not allowed to take that seat, this Freedmen's Bureau may at once arrest you and your daughter, and fine and imprison both. I say this bill authorizes that thing, and I defy any one of its friends to successfully combat that position. If you go to a theater in a place where this Freedmen's Bureau is established, and, not because they are negroes, but because they are unfit and ignorant persons, they are told they have no right to go and take seats with your family, and you prevent it, the bureau may arrest and imprison you. If a judge decides that a negro cannot be sworn in a cause being tried in his court, under the laws of a State which he has sworn to administer, why, sir, before that decision is cold upon his lips they may arrest and take him off to the agent of the bureau and punish him as before stated. (Globe Appendix, p. 70)

Furthermore, he gave examples of the present Bureau in Kentucky interfering to protect negroes from private discrimination. Thus, one negro woman complained to the Bureau about a dispute with her employer and the Bureau arrested the employer, his wife, and daughter (id.). Rousseau concluded:

> I tell you, sir, that no community of the United States can endure a system of this sort. Such have been the operations of this bureau under the old law. What will

> be its operations under this bill Heaven only knows. I cannot even imagine what a man may not assume the right to do under the provisions of this bill. (Id.)

Representative Chanler, also of Kentucky, expressed similar views and gave examples of "usurpation and unlawfulness" by the Bureau (Globe Appendix, p. 68).

During the evening session on February 5, 1966, Mr. Shanklin, an opponent of the bill, insisted that at the time the 13th Amendment had been enacted, the proponents had assured those opposed to it that the second section was intended only to carry out and secure to the negro his personal freedom. He also said the proponents had indicated they were opposed to negro suffrage and negro equality and that the Amendment could not be construed as giving Congress the power to legislate toward these ends (Globe, p. 638). He viewed the bill as an attempt to wipe out all laws and "customs and habits of society in regard to color or race." (Id.)

On February 5, 1966, Mr. Trimble of Kentucky spoke, insisting that the 13th Amendment did not authorize Congress to enact the proposed bill (Globe, pp. 647-650). However, Mr. McKee of Maryland insisted that the Bureau was essential to protect freedmen. Because of the discriminatory Black Codes, negroes were not entitled to their "full rights and protection". He asked:

> Is there a solitary State of those that have been in rebellion . . . is there a single one of these States that has passed laws to give freedmen their full protection? In vain we wait an affirmative response. Until these states have done so, says this high authority, the Freedmen's Bureau is a necessity. (Globe, p. 653)

He pointed to the existing inequalities in the laws and commented that even in his own state

> We have one code for the white man, another for the black. Where is your court of justice in any southern state where the black man can secure protection of his rights of person and property? (Ibid.)

He challenged the states to "pass such laws for their protection as will give them the same rights in their courts of justice that other men have" (Globe, p. 654). Until that was done, the bill was needed, he thought.

That same day, Representative Eliot withdrew the Committee bill and offered a substitute (Globe, p. 654). Thaddeus Stevens also offered a substitute bill (Globe, p. 655). Both substitutes left the civil rights provisions of the Committee bill untouched. On the following day, the Committee bill passed the House by a vote of 136 to 33 (Globe, p. 688). The two amendments were decisively defeated.

The substitute bill was then returned to the Senate for its concurrence. It was reported from the Judiciary Committee on February 8, 1866, with additional amendments, not relevant here (Globe, p. 742). During the brief discussion on the floor, the interference with local government was again attacked. Mr. Sherman, who had not spoken during the earlier debates, supported the bill. He said:

> We are bound by every consideration of honor, by every obligation that can rest upon any people, to protect the freedmen from the rebels of the Southern states; ay, sir, and to protect them from the loyal men of the Southern states. We know that on account of the prejudices instilled by the system of slavery pervading all the Southern states, the southern people will not do justice to the freedmen in those states . . . . We must maintain their freedom, and with it all the incidents and all the rights of freedom . . . . * * * [W]e are bound to protect these freedmen against the public sentiment and the oppression that will undoubtedly be thrown upon them by the people of the southern states. (Globe, p. 744)

The House bill, as amended, was concurred in that day (Globe, p. 748), and the next day the House agreed to the minor Senate amendments without discussion (Globe, p. 775).

President Johnson vetoed the bill on February 19, 1866. His message echoed the arguments made by the opponents to the bill: The bill contained provisions which were not warranted by the Constitution; it would provide too much patronage; the states would adequately protect the rights of freedmen. (Globe, p. 915). He also noted that the bill failed to define the civil rights and immunities it was designed to protect. (Ibid.)

In the Senate debate after the veto, only two Senators spoke, Senators Trumbull and Davis, perhaps the best representatives of the two sides. Senator Davis discussed at length the constitutional basis for the bill. He insisted that the Thirteenth Amendment simply abolished legal subjugation of one person to the will of another.

Furthermore, guaranteeing civil rights to negroes was a separate and distinct matter from abolishing slavery, and a matter which had been traditionally controlled by the states. He pointed out that in every state which had ever permitted slavery (which were the original 13 plus 9 others), emancipation had conferred no political rights on negroes. The rights of emancipated slaves were controlled by the states and were apart from the act of emancipation. In fact, "intermarriage with white persons, commingling with them in hotels, theatres, steamboats, and other civil rights and privileges were always forbid to free negroes, until Massachusetts recently achieved the unenviable notoriety of making herself an exceptionable case." (Globe, p. 936)

Senator Trumbull, in a legthy speech in reply, supported the authority of Congress to pass such a bill. In the course of it he said:

> What kind of freedom is that which the Constitution of the United States guarantees to a man that does not protect him from the lash if he is caught away from home without a pass? And how can one sit here and discharge the constitutional obligation that is upon us to pass the appropriate legislation to protect every

> man in the land in his freedom when we know such laws are being passed in the South if we do nothing to prevent their enforcement? Sir, so far from the bill being unconstitutional, I should feel that I had failed in my constitutional duty if I did not propose some measure that would protect these people in their freedom. (Globe, pp. 941-942)

However, the Senate failed to override the veto, by a vote of 30 to 18 (Globe, p. 943), and no further action was taken on this bill in either House. 16/

16/ On July 16, 1866, another Freedmen's Bureau bill, containing many of the same provisions, was passed over the President's veto.

The Civil Rights Act of 1866 (S. 61)

The Civil Rights Act of 1866, 14 Stat. 27, originated as a companion measure (S. 61) to the Freedmen's Bureau Bill (S. 60). Both bills were introduced by Senator Trumbull on January 5, 1866 (Globe, p. 129); both were reported favorably from the Judiciary Committee six days later (Globe, p. 184); and both were explained to the Senate by Senator Trumbull the following day (Globe, pp. 209, 211).

The Freedmen's Bureau Bill was considered first by the Senate. On January 25, 1866, immediately after the final vote was taken on that measure, Senator Trumbull moved to take up the Civil Rights bill, and it was made the order of the day (Globe, pp. 421-422).

Section one of the Civil Rights bill was almost identical with the original section seven of the Freedmen's Bureau Bill. As originally reported, it declared:

> There shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. (Globe, p. 474) 17/

17/ Note: This bill left out the word "prejudice" which was contained in the Freedmen's Bureau Bill, though it retained "custom," There was no discussion of this deletion in the debates.

This section was subsequently amended to provide that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, were citizens of the United States (Globe, pp. 211, 474). (Passed by vote of 31-10 on February 1, 1866 (Globe, p. 575).) The purpose of this clause was to declare Negroes to be citizens and thus to avoid the consequences of the Dred Scott decision and to make the privileges and immunities clause of the Constitution applicable to Negroes.

The other parts of the bill provided that if any person acting under color of law, statute, ordinance or custom, deprived an inhabitant of any right secured by the bill, he was subject to criminal proceedings in the federal courts. Furthermore, all civil suits involving the rights protected by the bill were removable to the federal courts (Globe, p. 475). Section 3 of the bill was patterned after the Fugitive Slave Act (Trumbull, Globe, p. 476) and provided federal facilities for the arrest and examination of alleged offenders.

Senate Debates

As with the Freedmen's Bureau Bill, the congressional debates centered around the constitutional authority to enact the bill. 18/ In arguing that Congress could abolish distinctions in state laws, proponents of the measure declared that the second section

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18/ The various provisions were objected to on different constitutional grounds. As for section 1, which prohibited distinctions in civil rights and immunities, the objection was that this intruded on matters historically determined by the States and the Thirteenth Amendment was not intended to authorize such action. Also, it was argued that the Constitution did not authorize Congress to make Negroes citizens in this manner.

of the Thirteenth Amendment had given Congress the power to do all that was necessary to secure the freedom secured by the first section. In their view, the Black Codes reenacted much of the old Slave Codes, and thus the Federal Government had the authority under the Thirteenth Amendment to intervene to wipe out these discriminatory codes and protect the rights of the freedmen.

This view was perhaps most thoroughly expounded in Senator Trumbull's remarks opening the debate in the Senate. The Thirteenth Amendment, he stated:

> . . . declared that all persons in the United States should be free. The Civil Rights Bill is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits. Of what avail was the immortal declaration "that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness," and "that to secure these rights Governments are instituted among men," to the millions of the African race in this country who were ground down and degraded and subjected to a slavery more intolerable and cruel than the world ever before knew.
>
> It is the intention of this bill to secure those rights. The laws in the slaveholding states have made a distinction against persons of African descent on account of their color, whether free or slave. (Globe, p. 474)

He then referred to provisions in the Slave Codes of Mississippi and Alabama. He believed these had become null and void with the enactment of the Thirteenth

Amendment, but that the Black Codes still imposed on freedmen "the very restrictions which were imposed upon them in consequence of the existence of slavery. The purpose of the bill under consideration is to destroy all these discriminations and to carry into effect the constitutional amendment." Indeed, Trumbull went on to say;

> any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution is prohibited. (Ibid.)

Anticipating the objection that the bill would give the Federal Government power which belonged to the States, Trumbull stated that the bill would have no operation in States which had equal laws. He felt that when the bill had been enforced in a couple of the southern States and its punishments became known, discrimination would cease in all (Globe, p. 475).

In answer to a query of what was meant by "civil rights," Trumbull replied that the first section of the bill defined them and that it did not confer "political rights" (Globe, p. 476). On this topic he also stated that:

> The first section of the bill defines what I understand to be civil rights: the right to make and enforce contracts, to sue and be sued, and to give evidence, to inherit, purchase, sell, lease, hold, and convey real and personal property, and to full and equal benefit to all laws and proceedings for the security of person and property. These I understand to be civil rights, fundamental rights belonging to every man as a free man, and which under the Constitution as it now exists we have a right to protect every man in. (Globe, p.476)

However, in the course of his speech he had referred to the rights to travel, to teach, and to preach as being secured by the bill, indicating that he thought the bill covered more than the enumerated rights.

Mr. Saulsbury of Delaware then attacked at length Senator Trumbull's interpretation of the scope of the Thirteenth Amendment. He stated that those who had voted for the Amendment had not avowed such an interpretation on the Senate floor. He argued that there was no logical and legal connection between the Amendment and the bill (Globe, p. 476), and went on to insist that the Amendment conferred no power on Congress to elevate a whole race to equality with the white race. Indeed, he pointed out, it had always been recognized that a man could be free and still not possess the same civil rights as other men (Globe, p. 477). If equal civil rights were the aim of the proponents of the Amendment, Mr. Saulsbury insisted, they should have expressly provided for this in the Amendment (Ibid.) He thought the generic term "civil rights" included all rights derived from the government and hence the right to vote was protected under the bill (Globe, p. 477). He went on to argue that the right to vote was also a property right, expressly secured by the bill (Globe, p. 478).

Consideration of the bill on January 30, 1866, was devoted primarily to a discussion of the constitutionality of the bill. The debates centered around whether the Thirteenth Amendment authorized Congress to legislate to secure civil rights; and whether Congress could make Negroes citizens without a constitutional amendment.

Senator VanWinkle of West Virginia opened the debate by insisting that an amendment was needed to make Negroes citizens (Globe, p. 498). Senator Cowan also objected to the citizenship clause. Furthermore, in his view the Thirteenth Amendment conferred no power on Congress to enact the bill, as it was not intended "to overturn this Government and to revolutionize all the laws of the various States everywhere" (Globe p. 499). He stated that he was willing to vote for a constitutional amendment which would

> secure to all men of every color and condition their natural rights, the rights which God has given them, the right to life, the right to liberty, the right to property.

But this bill, he felt, was an attempt "to do the same thing without any constitutional authority" (Globe, p. 500).

Senator Howard, who had been a member of the Judiciary Committee when the Thirteenth Amendment had been drafted, reported, and adopted, supported the broad interpretation of the Amendment and pointed out that

> [It] was in contemplation of its friends and advocates to give to Congress precisely the power over the subject of slavery and the freedmen which is now proposed to be exercised by the bill now under our consideration.
>
> It was easy to foresee and of course we foresaw, that in case this scheme of emancipation was carried out in the rebel States it would encounter the most vehement resistance on the part of the old slave-holders. It was easy to look far enough into the future to perceive that it would be a very unwelcome measure to them and that they would resort to every means in their power to prevent what they called the loss of their property under this amendment. We could foresee easily enough that they would use, if they should be permitted to do so by the General Government, all the powers of the state governments in restraining and circumscribing the rights and privileges which are plainly given by it to the emancipated negro. (Globe, p. 503)

Howard went on to declare that if the Amendment did not prohibit the State legislature from prohibiting the freedman from earning and purchasing property, from having a home and family, from eating the bread he earned, emancipation was a "mockery" (Globe, p. 504). Indeed, the intention of the framers of the Thirteenth Amendment had been to make the Negro the opposite of a slave, to make him a free man, "entitled to those rights we concede to a man who is free" (Ibid.).

Senator Reverdy Johnson, of Maryland, counsel for the defendant in the Dred Scott case, argued that under that decision Congress could not by statute naturalize a native-born Negro and that a constitutional amendment was necessary (Globe, p. 504).

Debate on January 31, 1866, was devoted principally to discussion over Congress' power to make Negroes citizens, and this continued on the following day. Senator Morrill of Maine favored the bill and asserted that the bill was extraordinary and unparalleled in the history of the country. That the bill was revolutionary was no reason for its rejection:

> I freely concede that it is revolutionary. I admit that this species of legislation is absolutely revolutionary. But are we not in the midst of revolution? Is the Senator from Kentucky utterly oblivious to the grand results of four years of war? Are we not in the midst of a civil and political revolution which has changed the fundamental principles of our Government in some respects? Sir, is it no revolution that you have changed the entire system of servitude in this country? Is it no revolution that now you can no longer talk of two systems of civilization in this country? * * *
>
> I accept, then, what the Senator from Kentucky thinks so obnoxious. We are in the midst of revolution. We have revolutionized this Constitution of ours to that extent; and every substantial change in the fundamental constitution of a country is a revolution. Why, sir, the Constitution even provides for revolutionizing itself. Nay, more it contemplates it; contemplates that in the changing phases of life, civil and political, changes in the fundamental law will become necessary; and is it needful for me to advert to the facts and events of the last four or five years to justify the declaration that revolution here is not only radical and thorough, but the result of the events of the last four years? (Globe, p. 570)

Although a revolution had occurred, there had been no usurpation, Morrill thought, since the change merely brought into harmony with the general principles of American government that which had been exceptional (Ibid.). He denied a previous assertion by Senator Cowan that American society had been established upon the principle of exclusion of inferior races. To the contrary, in his opinion, American society had not been formed in the interest of any race or class but America had always been held up as a land of refuge:

> Is there any "color" or "race" in the Declaration of Independence, allow me to ask? "All men are created equal" excludes the idea of race or color or caste. There never was in the history of this country any other distinction than that of condition, and it was all founded on condition. (Globe, pp. 570-571)

The speech concluded with an examination of the Dred Scott decision and the assertion that the Negro had been denied citizenship not on account of his race or color but only because of his enslaved condition (Globe, p. 571).

Senator Trumbull then stated that the words of the Declaration of Independence applied to the black as well as the white man and that he wished to place the matter beyond any question (Globe, pp. 573-574). Senator Hendricks of Indiana dissented from this construction of the Declaration of Independence but agreed that the question of whether Negroes and Indians should be admitted to the political community should be submitted to the people of the country (Globe, p. 574).

The citizenship clause was then agreed to by the Senate by a vote of 37-10 (Globe, p. 575). As adopted it read:

> All persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States without distinction of color.

On February 2, 1866, the day set for the final vote, Senator Davis of Kentucky renewed his opposition to the bill. He held there was no constitutional power to pass any law connected with the subject of the bill except the privileges and immunities clause, and he offered a substitute bill based on this clause (Globe, p. 595). This substitute, he asserted, would preserve the integrity of the States, whereas adoption of Senator Trumbull's bill would be "centralizing with a vengeance and by wholesale" for

> [h]ere the honorable Senator in one short bill breaks down all the domestic systems of law that prevail in all the States, so far not only as the negro, but as any man without regard to color is concerned, and he breaks down all the penal laws that inflict punishment or penalty upon all the people of the States except so far as those laws shall be entirely uniform in their application. To the extent that there is any variance in those laws, this short bill breaks them down. (Globe, p. 598)

Senator Trumbull then defended his bill from the epithets Senator Davis had applied to it. The bill, he said:

> applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness; and that is abominable and iniquitous and unconstitutional! Could anything be more monstrous or more abominable than for a member of the Senate to rise in his place and denounce with such epithets as these a bill, the only object of which is to secure equal rights to all the citizens of the country, a bill that protects a white man just as much as a black man? (Globe, p. 599)

It provided that "all people shall have equal rights," but, said Trumbull

> [i]t does not propose to regulate the political rights of individuals; it has nothing to do with the right of suffrage, or any other political right; but is simply intended to carry out a constitutional provision, and guaranty to every person of every color the same civil rights. That is all there is to it. That is the only feature of the bill, and all its provisions are aimed at the accomplishment of that one object. (Globe, pp. 599-600)

Furthermore, the bill would have no application to a State which performed its constitutional obligation and abolished "discrimination in civil rights between its citizens" (Globe, p. 600).

Senator Guthrie of Kentucky then stated his view that all laws providing for slavery fell under the Amendment and that the bill was surplusage. Although he had advised the people of Kentucky and would advise people of every State "to put these Africans upon the same footing that the whites are in relation to civil rights," to adopt "one code for all persons," and to provide "one general rule for the punishment of crime in the different states" (Globe, pp. 600-601), he did not believe that there was any authority under the Thirteenth Amendment

> to overturn the State governments, and permitting the Federal Government to run into the States to make laws on this subject when it enters into the States for nothing else. I tell you, gentlemen, it is my firm conviction that it can lead to nothing but strife and ill-feeling, which will grow and continue to grow. (Globe, p. 601)

Because the bill would result in federal-state conflict, he believed it would destroy the unity of the Government and would prove to be "the most impolitic law that ever was passed." (Ibid.)

Senator Hendricks of Indiana also feared the bill would lead to conflict between the States and the Federal Government. The bill would apply in Indiana because the State did not recognize civil equality of the races which was the purpose of the bill (Globe, pp. 601-602).

However, Mr. Lane, also of Indiana, favored the bill and stated that its object was to give effect to the Emancipation Proclamation and the Fifteenth Amendment (Globe, p. 602). Although he agreed with Senator Guthrie that the laws which related to slavery were nullified by the Thirteenth Amendment, he felt Congressional legislation was necessary because "we fear the execution of these laws if left to the State courts" (Globe, p. 602). Mr. Wilson also supported Senator Lane's argument, saying that the States had passed Black Codes wholly incompatible with freedom and these were being persistently carried into effect by local authorities. This defiance by the Southern legislatures of the rights of freedmen and the will of the Nation as embodied in the Thirteenth Amendment, made legislation imperative (Globe, p. 603). He spoke of the perishing of slavery, which had previously controlled the policies of the Nation, and declared

> By the will of the nation freedom and free institutions for all, chains and fetters for none, are forever incorporated in the fundamental law of regenerated and united America. Slave codes and auction blocks, chains and fetters and bloodhounds are things of the past, and the chattel stands forth a man with the rights and the powers of the freemen. For the better security of these new-born civil rights we are now about to pass the greatest and the grandest act in this series of acts that have emancipated a race and disenthralled a nation. It will pass, it will go upon the statute book of the Republic by the voice of the American people, and there it will remain. From the verdict of Congress in favor of this great measure no appeal will ever be entertained by the people of the United States. (Ibid.)

However, Senator Cowan objected that the purpose of the bill was "to repeal by act of Congress all state laws, all state legislation, which in any way create distinctions between black men and white men in so far as their civil rights and immunities extend. It is not to repeal legislation in regard to slaves". (Ibid.)

Senator McDougall of California returned to Mr. Guthrie's argument that legislation was unnecessary and stated that the passage of Black Codes indicated the Southern people would not follow Senator Guthrie's advice to put all people on equal footing. Since this had occurred, he felt there was a positive duty on the Congress to act wherever discriminations were adhered to (Globe, p. 605).

Just before final vote on the bill, Senator Saulsbury moved to amend the bill by expressly excepting the right to vote from its coverage. Senator Trumbull pointed out that the bill related only to civil rights and not to political rights. But Senator Saulsbury argued that the right to vote was a civil right and that, despite Senator Trumbull's disclaimer,

> [h]is meaning cannot control the operation or the effect of this law, if the bill shall become a law. I believe that if this bill is enacted into a law your judges in most of the States will determine that under these words the power of voting is given. * * *
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> * * *
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> It will not do for the honorable chairman of the Judiciary Committee to say that by specifying in other lines of the first section the right to sue and be sued, and to give evidence, to lease and to hold property, he limits these rights. He does no such thing. He may think that that is the intention; but when you come to look at the powers conferred by this section, and when you consider the closing words

> of the section, giving to everybody, without distinction of race or color, the same rights to protection of property and person and liberty, when these rights are given to the negro as freely as to the white man, I say, as a lawyer, that you confer the right of suffrage, because, under our republican form and system of government, and according to the genius of our republican institutions, one of the strongest guarantees of personal rights, of the rights of person and property, is the right of the ballot. (Globe, p. 606)

However, his amendment was defeated 39-7 (Ibid.). The bill itself was then passed by a vote of 33-12 (Ibid.).

House Debates

In the House, on March 1, 1866, Representative James A. Wilson of Iowa, Chairman of the Judiciary Committee, reported the bill favorably, but with amendments. (Globe, p. 1115). After all the Committee amendments had been agreed to, Wilson moved to recommit the bill, a procedural device explicitly intended to cut off further amendments.

In his opening speech Wilson admitted that "Some of the questions presented by this bill are not free from difficulties. Precedents, both judicial and legislative are found in sharp conflict concerning them." (Globe, p. 1115). It was, however, plain to him that Negroes freed under the Thirteenth Amendment were citizens, even without the declaration of the bill, a conclusion which he bolstered by citations of administrative precedents and by castigation of the Dred Scott case for holding otherwise. (Globe, p. 1116).

As for the provision for equality in the enjoyment of civil rights, Wilson remarked that

> This part of the bill will probably excite more opposition and elicit more discussion than any other; and yet to my mind it seems perfectly defensible. (Globe, p. 1117)

He then discussed the meaning of the terms "civil rights and immunities":

> Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed. Do they mean that all citizens shall vote in the several States? No; for suffrage is a political right which has been left under the control of the several States, subject to the action of Congress only when it becomes necessary to enforce the guarantee of a republican form of government. Nor do they mean that all citizens shall sit on the juries, or that their children shall attend

> the same schools. These are not civil rights or immunities. Well, what is the meaning? What are civil rights? I understand civil rights to be simply the absolute rights of individuals, such as--
>
> 'The right of personal security, the right of personal liberty, and the right to acquire and enjoy property.' [citing Kent's Commentaries, Vol. 1, p. 199]

He quoted two other authorities on the subject of civil rights and concluded that

> From this it is easy to gather an understanding that civil rights are the natural rights of man; and these are the rights which this bill proposes to protect every citizen in the enjoyment of throughout the entire dominion of the Republic. (Ibid)

The term "immunities" was clearer in meaning -- in this regard the bill merely "secures to citizens of the United States equality in the exemptions of the law." Thus,

> (a) colored citizen shall not, because he is colored, be subjected to obligations, duties, pains, and penalties from which other citizens are exempted. Whatever exemptions there may be shall apply to all citizens alike. One race shall not be more favored in this respect than another. One class shall not be required to support alone the burdens which should rest on all classes alike. This is the spirit and scope of the bill, and it goes not one step beyond. (Ibid)

There was no question in Mr. Wilson's mind that Congress could enact the measure, for Congress was "following the Constitution" and "reducing to statute form the spirit of the Constitution." (Ibid.) Indeed, if the States would acknowledge and guarantee the rights belonging to all citizens by virtue of "privileges and immunities" of United States citizenship and would legislate" as though all citizens were of one race and color" there would be no need for Congress to act. But as such was not the case, Congress was obliged to protect all citizens in the enjoyment of the great fundamental rights.(Globe, p. 1118) Wilson stated that Congress' power to act rested on the Thirteenth Amendment and the privileges and immunities clause. (Ibid) He also justified the bill under the broad principle that the government had been designed to secure a more perfect enjoyment of the great fundamental rights of life, liberty, and property, and thus the Government could intervene, although not expressly delegated this power, when a state denied these rights. (Globe, p. 1119)

Mr. Loan of Missouri then inquired why the penalties of the bill were limited to those who acted under color of law, and did not apply to the whole community. Mr. Wilson replied that

> That grows out of the fact that there is discrimination in reference to civil rights under the local laws of the States. Therefore we provide that the persons who under the color of these local laws should do these things shall be liable to this punishment. (Globe, p. 1120)

Representative Rogers of New Jersey, a member of the Judiciary Committee and leader of the "Administration party" in the Congress, objected to the bill on constitutional grounds. He declared there was no authorization under the Constitution for such a measure. In his view, reporting Representative Bingham's "Equal Rights" Amendment which was designed to confer this very power, implied

an opinion by the majority of the Joint Committee on Reconstruction that there was no such power at present. (Globe, p. 1120) Furthermore, if Congress had the power to pass this bill then it also had the power to take away civil rights and immunities. Thus, he concluded, a fair interpretation would mean that Congress could enter a state and supersede its normal domestic relations. (Globe, p. 1121) He also believed that the privileges and immunities language was so broad that it included all the rights which are derived from the government and thus included suffrage. (Globe, p. 1122)

Mr. Cook of Illinois then asserted that Congress could act under the second section of the Thirteenth Amendment. He interpreted this clause as meaning that "Congress shall have power to secure the rights of freemen to those men who had been slaves" and also that

> Congress should be the judge of what is necessary for the purpose of securing to them those rights. Congress must judge as to what legislation is appropriate and necessary to secure to these men the rights of free men, whether we can do this except by securing to them the right to make and enforce contracts and the other rights which are specified in this bill, and each member of this House must determine for himself, upon his oath, what legislation is appropriate to prevent their being reduced to any servitude which is involuntary. (Globe, p. 1124)

He went on to say that the discriminatory laws of the South showed that these states would not secure to freedmen any rights or freedoms. He asked:

> Does any man in this House believe that these people can be safely left in these States without the aid of Federal legislation or military power? Does any one believe that their freedom can be preserved without this aid? If any man does so believe, he is strangely blind to the history of the past year; strangely blind to the enactments passed by Legislatures touching these freedmen. (Ibid)

At the opening of the debate on March 2, 1866, Representative Thayer of Pennsylvania contended that the Thirteenth Amendment was of no practical value if the states could still pass and enforce laws which reduced a class of people to the condition of bondmen and prevented the enjoyment of the fundamental rights of citizenship. (Globe, p. 1151) In his view the measure guaranteed certain fundamental rights, which had been enumerated in the bill in order to avoid any misapprehension. It could not be construed to confer suffrage, for

> the words themselves are "civil rights and immunities," not political privileges; and nobody can successfully contend that a bill guarantying simply civil rights and immunities is a bill under which you could extend the right of suffrage, which is a political privilege and not a civil right.
>
> Then, again, the matter is put beyond all doubt by the subsequent particular definition of the general language which has been just used; and when those civil rights which are first referred to in general terms in the bill are subsequently enumerated, that enumeration precludes any possibility that the general words which have been used can be extended beyond the particulars which have been enumerated. (Ibid)

Thayer reiterated the argument that the Thirteenth Amendment was intended to abolish all the oppressive incidents of slavery and if it were not so interpreted, those who had been freed would be left in "a condition of modfied slavery, subject to the old injustice and the old tyranny. . .". (Globe, p. 1152).

He continued:

> Sir, what kind of freedom is that which is given by the amendment of the Constitution, if it is confined simply to the exemptions of the freedmen from sale and barter? Do you give freedom to a man when you allow him to be deprived of those great natural rights to which every man is entitled by nature? I ask the

> Democractic members of this House, what kind of freedom is that by which the man placed in a state of freedom is subject to the tyranny of laws which deprive him of rights which the humblest citizen in every State in Christendom enjoys? (Ibid)

He concluded by stating his approval of Bingham's proposition to put the protection of equal rights into the Constitution, although he doubted the necessity of such action. Still, "in order to make things doubly secure," he would vote for Bingham's proposal. (Globe, p. 1153)

Representative Eldridge of Wisconsin pointed out that when the Bingham joint resolution to amend the Constitution had been proposed, Mr. Thayer had supported it on the ground, advanced by Bingham, that under the present Constitution there was no warrant to enter a state to protect a citizen in his rights of life, liberty, and property. Now, he observed, Mr. Thayer seemed to differ in all his claims from Mr. Bingham. (Globe, p. 1155) He also stated that insofar as the bill was pressed in the interest of the black man, it recognized the very distinction in race and color which it was intended to abolish.

Representative Thornton also expressed opposition to the bill. If the proponents' interpretation of the Thirteenth Amendment were correct, he maintained, then Congress had an indefinite power, "unlimited except by the passions or caprice of those who may assume to exercise it." (Globe, p. 1156) Furthermore, he suggested that the term "civil rights" included suffrage and asked, given the "loose and liberal mode of construction adopted in this age, who can tell what rights may not be conferred by virtue of the terms as used in this bill? Where is it to end? Who can tell how it may be defined, how it may be construed?" (Globe, p. 1157)

Mr. Windom of Minnesota declared the bill to be

> one of the first efforts made since the formation of the Government to give practical effect to the principles of the Declaration of Independence; one of the first attempts to grasp as a vital

> reality and embody in the forms of law the great truth that all men are created equal and endowed by the Creator with the inalienable rights of life, liberty, and the pursuit of happiness. If there be any reasonable objection to the bill, it is that it does not go far enough. It assumes only to protect civil rights, and leaves the adjustment and protection of political rights to future legislation. Globe, p. 1159)

He went on to say that had the spirit and design of the original architects been followed by those who built the superstructure, the country might have been spared the horror of war, for "(a) true Republic rests upon the absolute equality of the rights of the whole people, high and low, rich and poor, white and black." (Ibid.)

According to Mr. Windom, a broad grant of power to Congress had been contemplated at the time of the adoption of the 13th Amendment. At that time, he said, it was "well understood" that "although the body of slavery might be destroyed, its spirit would still live in the hearts of those who have sacrificed so much for its preservation, the Amendment gave Congress the power to enforce "the spirit as well as the letter of the Amendment." (Globe, p. 1159)

Mr. Windom then asserted that the bill "does not attempt to confer on the freedmen social privileges "or the privilege of voting. (Ibid.) He closed his address with reference to the condition of the negro under the Black Codes and concluded by asking, "Sir, if this be liberty, may none ever know what slavery is." (Globe, p. 1160)

At this point Mr. Wilson withdrew his motion to recommit the bill, and proceeded to offer some amendments. Most were technical, and not material here; one, however, was an express proviso excluding the right of suffrage from the rights protected by the bill. Wilson stated that this addition did not change his construction of the bill, since he did not believe the term "civil rights" included the right of suffrage. After all of these amendments were adopted, he renewed his motion to recommit, and the House moved on to the consideration of other measures. (Globe, pp. 1161-1162).

Debate on the bill was not resumed until March 8, 1866. Representative Broomall of Pennsylvania argued that the bill would not only protect black men but would protect United States citizens and soldiers who were being punished in the South. (Globe, 1. 1263.) He also argued that the preamble of the Constitution and the general welfare clause authorized Congress to enact the bill. (Ibid.)

Representative Raymond expressed doubts as to the constitutionality of section two, the penal section of the bill. (Globe, p. 1266-1267.) Mr. Delano of Ohio was dubious of the power of Congress under the existing Constitution to pass such a measure. Despite Mr. Wilson's disclaimer that the bill conferred the right to act as a juror, Delano felt that section one necessarily conferred that right in the clause, "to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." (Globe, Appendix, p. 157.) Wilson replied that those words had not been in the original bill, but were inserted by an amendment offered by himself: "It was thought by some persons that unless these qualifying words were incorporated in the bill, those rights might be extended to all citizens, whether male or female, majors or minors. So that the words are intended to operate as a limitation and not as an extension * * *." (Ibid.) Delano continued his objections by pointing to the phrase in the same section, "That there shall be no discrimination in civil rights or immunities among the citizens of the United States in any State or Territory." He supposed that the enumeration of specific rights following this general declaration operated as a limitation upon it. But then the phrase to which he had previously referred followed after this enumeration, and, in his view, seemed to be an enlargement or extension of the specific rights enumerated in the bill. Under this construction, he asserted, the question whether the right to be a juror was conferred by the measure was still a debatable one. (Ibid.) Delano thought, therefore, that the bill could be interpreted to encroach upon the reserved rights of the state under the Constitution. It appeared to him that "the authority assumed as the warrant for this bill would

enable Congress to exercise almost any power over a State." (Globe, Appendix, p. 158.) He expressed strong doubts as to the authority of Congress

> to go into the States and manage and legislate with regard to all the personal rights of the citizen * * *. (Ibid.)

While the extreme assertion of state rights was a contributing cause of the war, to him

> it is just as important that we should not swing back into the assertion of powers in this Government that do not belong to it * * *. (Globe, Appendix, p. 159.)

He concluded, therefore, that since authority for this bill was not conferred by the Thirteenth Amendment, Congress should first take up and submit for ratification the amendment to the Constitution offered by Mr. Bingham. When that amendment had become part of the fundamental law, then Congress could proceed "to secure the rights of these persons in a way in which we shall not be trampling down or endangering the fundamental law of the land." (Ibid.)

Upon the conclusion of this speech, Representative Kerr of Indiana rose to present his objections to the measure. In his view the declaration of citizenship was wholly unauthorized, for the naturalization power did not permit Congress to declare native-born non-citizens to be citizens. (Globe, p. 1267-1268.) Furthermore, the Thirteenth Amendment did not grant that authority, nor did it authorize civil rights legislation by the Congress. In his opinion, all the amendment had done was to sever the domestic relation of master and slave and to prevent involuntary servitude. He asked:

> It is slavery or involuntary servitude to forbid a free negro, on account of race and color, to testify against a white man? Is it either to deny to free negroes, on the same account, the privilege of engaging in certain kinds of business in a State in which white men may engage, such as retailing spirituous liquors? Is it either to deny to children of free negroes or mulattoes, on the like account, the privilege of attending the common schools of a State with the children of white men? Is it either for a religious society, on the same ground, and in pursurance of its long-established custom, to refuse to a free negro the right to rent and occupy the most prominent pew in its church? Is it either for a State to refuse to free negroes and mulattoes the privilege of settling within its boundaries or acquiring property there? (Globe, p. 1268.)

If these elements did constitute slavery, the persons discriminated against were the slaves of the State and the Federal Government had no power to "break down any State constitutions or laws which discriminate in any way against any class of persons." (Ibid.)

Mr. Kerr then elaborated on the problems of the differing character of State and national citizenship and stated that the present bill would confound the distinction. (Globe, p. 1268-1270.) Congress should not be empowered, in protecting United States citizens under the privileges and immunities clause, to invade the States in order to prescribe what rights the States should accord to State citizens. (Ibid.)

Mr. Kerr also argued that if Congress could "declare what rights and privileges shall be enjoyed in the States by the people of one class, it can by the same kind of reasoning determine what shall be enjoyed by every class." (Globe, p. 1270.) This was clearly inconsistent with the concept of State regulation of internal and domestic affairs and would mean that Congress "may erect a great centralized, consolidated despotism in this capital." (Ibid.)

Kerr then pointed to the confused definitions of "civil rights and immunities" which the proponents offered. He pointed to the different opinions of the authorities as to which rights were "civil" ones and asked:

> Who shall settle these questions? Who shall define these terms? Their definition here by gentlemen on this floor is one thing; their definition after this bill shall have become a law will be quite another thing. (Globe, pp. 1270-1271.)

He assured the bill would reach state laws which allowed only white males to engage in the retailing of spirituous liquors, required separate schools, and prohibited immigration of negroes and would subject state officials to punishment. These illustrations indicated the "inherent viciousness of the bill." (Globe, p. 1271.)

After Mr. Kerr had concluded his speech, Representative Bingham offered an amendment to the motion to recommit, to instruct the Committee to strike out the broad language relating to "civil rights and immunities." He also wished striken all the penal provisions of the bill, substituting therefor a provision granting the remedy of a civil action for damages to one whose rights had been violated. (This proposal by Bingham had already been endorsed in advance of its offer in speeches by Representatives Raymond (Globe, p. 1267) and Delano (Globe, App., p. 156)).

The following day, March 9, 1866, Bingham was allowed thirty minutes to speak on behalf of his amendment. (Globe, p. 1296). He stated at the outset, that even if his proposed changes were adopted, the Congress had no authority to pass the bill; but by striking out the broad language of the bill, and removing its criminal penalties, he asserted, its "oppressive" effects would be eliminated. (Ibid)

To Bingham, there was no objection to the declaration of the citizenship of the Negro, for that was a fully authorized exercise of power by Congress; but,

> in view of the text of the Constitution of my country, in view of all of its past interpretations, in view of the manifest and declared intent of the men who framed it, the enforcement of the bill of rights, touching the life, liberty, and property of every citizen of the Republic within every organized State of the Union, is of the reserved powers of the States, to be enforced by State tribunals and by State officials acting under the solemn obligations of an oath imposed upon them by the Constitution of the United States. (Globe, p. 1291)

In discussing the general language of the first section of the bill, Mr. Bingham referred to Representative Wilson's views. He pointed out that the latter had privately said that he did not regard the "clause in the

first section as an obligatory requirement." (Globe, p. 1291). To Mr. Bingham, however, that clause was "as obligatory as any other clause of the section." He thought "civil rights" was a very broad term, embracing "every right that pertains to citizens as such," even political rights. If civil rights had this extent, the effect of the first section of the bill would be

> to strike down by congressional enactment every State constitution which makes a discrimination on account of race or color in any of the civil rights of the citizen. (Ibid)

Most states did have such discriminatory laws. With the objective of eliminating such laws, Bingham agreed entirely, but that should be achieved by the law and voluntary act of each State:

> The law in every State should be just; it should be no respecter of persons. It is otherwise now, and it has been otherwise for many years in many of the States of the Union. I should remedy that not by an arbitrary assumption of power, but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future. (Ibid.)

In limiting the operation of the bill to "citizens," he claimed, the House revisers of the bill had discriminated against aliens; to reach all equally with protection it was necessary to use "persons," for, while

> the bill of rights, as has been solemnly ruled by the Supreme Court of the United States, does not limit the powers of States and prohibit such gross injustice by States, it does limit the power of Congress and prohibit any such legislation by Congress. (Globe, p. 1292.)

The Freedman's Bureau bill he distinguished by reason of its application only to the insurrectionary States, and only so long as the courts were "stopped in the peaceable course of justice" by civil unrest. (Ibid.) But when peace should be restored and the courts opened, the ordinary limitations of the Constitution would apply, under which

> the care of the property, the liberty, and the life of the citizen, under the solemn sanction of an oath imposed by your Federal Constitution, is in the States, and not in the Federal Government. (Ibid.)

Mr. Bingham asserted that even his proposed constitutional amendment did not seek to disturb that traditional limitation. It sought

> to affect no change in that respect in the Constitution of the country. (Ibid.)

On the contrary, it sought only to provide power in Congress to punish all violations by State officers of their obligations to uphold the Constitution and the bill of rights,

> * * * but leaving those officers to discharge the duties enjoined upon them as citizens of the United States by that oath and by that Constitution. (Ibid.)

Borrowing de Tocqueville's phrase, this would continue "centralized government, decentralized administration" (Ibid.), which is the strength of this country:

> I have always believed that the protection in time of peace within the States of all of the rights of person and citizen was of the powers reserved to the States. And so I still believe. (Globe, p. 1293.)

Representative Shellabarger of Ohio echoed Bingham's constitutional doubts, but, in view of the great need for such protection, he resolved his doubts in favor of the bill. "Its whole effect," he said, "is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race or former condition in slavery." (Globe, p. 1293.) The Congress could not say that the states could not prohibit married women and children from testifying; it could only require "that whatever rights as to each of these enumerated civil (not political) matters the State may confer upon one race or color of the citizens shall be held by all races in equality." (Ibid.)

Mr. Wilson again took the floor to rebut these objections, many of which had come from his own party. He stated that the term "civil rights and immunities" as used in the bill and properly construed did not include all civil rights, i.e., "those which belong to the citizen of the United States as such, and those which belong to a citizen as such." (Globe, p. 1294) Instead, the bill "refers to those rights which belong to men as citizens of the United States and none other." (Ibid) These he defined as the rights of life, liberty, and property, "in connection with those which are necessary for the protection and enjoyment of the rights thus specifically named, and these are the rights to which this bill relates, having nothing to do with subjects submitted to the control of the several States." (Ibid) The penal provisions were necessary so that the citizen despaired of his rights, who was most likely to be poor, would not be obliged to press his own suit through the courts. (Globe, p. 1295). Furthermore, the meager damages proposed by Mr. Bingham was not adequate "protection" by the Government. (Ibid.)

Four days later, on March 13, 1866, the bill was reported again with amendments, as urged by Representatives Delano and Bingham, striking out the general language relating to "civil rights or immunities", and leaving only the individual rights specified. (Globe, p. 1366.) Mr. Wilson explained that the elimination of the general language did not materially change the bill, for, he still maintained, under accepted rules of construction, the specific language had limited the general. However,

> some gentlemen were apprehensive that the words we propose to strike out might give warrant for a latitudinarian construction not intended. (Ibid.)

A few other amendments, not relevant here, were also reported. All the amendments were adopted by the House. In answer to an inquiry on the omission from the final bill of the proviso explicitly excluding the right of suffrage from the operation of the bill, Wilson replied that

> Some members of the House thought, in the general words of the first section in relative to civil rights, it might be held by the courts that the right of suffrage was included in those rights. To

> obviate that difficulty and the difficulty growing out of any other construction beyond the specific rights named in the section, our amendment strikes out all of those general terms and leaves the bill with the rights specified in the section. Therefore the amendment referred to by the gentleman is unnecessary. (Globe, p. 1367.)

The Senate then had a brief discussion on March 15, 1866. In the course of this, Senator Davis remarked the bill assumed that Congress had the power to occupy those "vast fields of state and domestic legislation which regulate the civil rights, and the pains, penalties, and punishments inflicted upon the people of the respective States which were not delegated to the Government of the United States, but were reserved to the States respectively, and to the people. . .". The Senate then concurred in all the House amendments, including the deletion of the "civil rights or immunities" provision, and sent the measure to the President. (Globe, pp. 1413-1416).

On March 27, the President returned the bill without approval. (Globe, pp. 1679-1681.) His message was in large part a repetition of the argument in the Congress against the bill. He stated that

> Hitherto every subject embraced in the enumeration of rights contained in this bill has been considered as exclusively belonging to the States. They all relate to the internal policy and economy of the respective States. They are matters which in each State concern the domestic condition of its people, varying in each according to its own peculiar circumstances, and the safety and well-being of its own citizens. (Globe, p. 1680.)

If Congress could repeal all state laws discriminating between whites and blacks in the subjects covered by the bill, it could also repeal state laws discriminating on the subjects of suffrage, office, and jury service. (Ibid.) Furthermore, the former slaves did not yet possess the requisite qualifications to entitle them to all the privileges and immunities of citizens of the United States. Moreover, he believed the bill would frustrate the adjustment of capital and labor in the new economic system in the South. (Ibid.) He concluded by stating that the absorption and assumption of power by the Government, which the bill contemplated, would "sap and destroy our federative system of limited powers and break down the barriers which preserve the rights of the States." The bill marked "another step, or rather stride, toward centralization and the concentration of all legislative powers in the national government." (Globe, p. 1670.)

The veto did not come up for discussion until April 4, 1866, when Senator Trumbull reviewed what he claimed to be the inadequacies and errors of the message, point by point. (Globe, pp. 1755-1761.) He regretted that the President should have

thus alienated himself "from those who elevated him to power." (Globe, p. 1755.) At the conclusion of his speech he stated that the bill would in no manner interfere with the municipal regulations of any state which protects all alike and could have no operation in Massachusetts, New York or Illinois. Trumbull then remarked:

> How preposterous, then to charge that unless some State can have and exercise the right to punish somebody, or to deny somebody a civil right on account of his color, its rights as a state will be destroyed. It is manifest that unless this bill can be passed, nothing can be done to protect the freedmen in their liberty and their rights. (Globe, p. 1761.)

On April 5, 1866, Senator Reverdy Johnson, who supported the veto, again reviewed the Dred Scott case, noting that under that decision the Congress might be able to make a Negro a citizen of the United States but not a citizen of a State. (Globe, p. 1776.) Since this legislation related to rights inherent in State citizenship, it was an unconstitutional attempt to invade the powers reserved to the States. (Globe, pp. 1777, 1778.) For the most part, the few remaining Senate speeches were devoted to repetition of previous arguments or to general Reconstruction matters. (Globe, pp. 1781-1786; 1801-1809.)

On April 6, 1866, the day the vote on overriding the veto was taken, Senator Davis attacked it in a lengthy speech, in which he said:

> [T]here are civil rights, immunities, and privileges 'which ordinances, regulations, and customs' confer upon white persons everywhere in the United States, and withhold from negroes. On ships and steamboats the most

> comfortable and handsomely furnished cabins and state-rooms, the first tables, and other privileges; in public hotels the most luxuriously appointed parlors, chambers, and saloons, the most sumptuous tables, and baths; in churches not only the most softly cushioned pews, but the most eligible sections of the edifices; on railroads, national, local, and street, not only seats, but whole cars, are assigned to white persons to the exclusion of negroes and mulattoes. All these discriminations in the entire society of the United States are established by ordinances, regulations and customs. This bill proposes to break down and sweep them all away, and to consummate their destruction, and bring the two races upon the same great plane of perfect equality, declares all persons who enforce those distinctions to be criminals against the United States, and subjects them to punishment by fine and imprisonment, and directs the appointment of legions of officers to prosecute, both penally and civilly, for the benefit of the favored negro race, at the cost of the United States, and puts at the disposal of these officers the posse comitatus, the militia, and the Army and Navy of the United States, to enable them to execute this bold and iniquitous device to revolutionize the Government and to humiliate the degrade the white population, and especially of the late slave States, to the level of the negro race. (Globe, App., p. 187.)

If Congress possessed the authority to pass this bill, Davis asked what there was to prevent Congress from passing an entire and exclusive civil and criminal code for all the thirty-six states. (Ibid.) On that same day the vote was taken and the veto was overridden by 33 to 15.

The Senate's action was not transmitted to the House until April 9, 1866. However, on April 6, 1866, the day of the Senate's vote on the veto, Mr. Wilson announced that when the Senate's message was communicated to the House, he intended to cut off discussion and bring the House to a vote at once. There was some objection voiced to this procedure, and on that day Mr. Lawrence made a lengthy speech on the bill, and Messrs. LeBlond and Clarke spoke on Reconstruction policy.

Lawrence favored the bill; in his view it did not interfere with the rights of the States "to limit, enlarge, or declare civil rights" but merely assured that the enjoyment of certain civil rights would be shared equally by all citizens in each State. (Globe, p. 1832.) According to Lawrence the States could deny civil rights to a class of persons in two ways:

> either by prohibitory laws, or by a failure to protect any one of them.
>
> If the people of a State should become hostile to a large class of naturalized citizens and should enact laws to prohibit them and no other citizens from making contracts, from suing, from giving evidence, from inheriting, buying, holding, or selling property, or even from coming into the State, that would be prohibitory legislation. If the State should simply enact laws for native-born citizens and provide no law under which naturalized citizens could enjoy any one of these rights, and should deny them all protection by civil process or penal enactments, that would be a denial of justice.

When the States denied to "millions of citizens the means without which life, liberty, and property cannot be enjoyed", Lawrence believed the nation had

the power "to enforce and protect the equal enjoyment in the State of civil rights which are inherent in national citizenship." (Globe, p. 1835)

In his speech on Reconstruction, Mr. Clarke discussed the "evil influences" of the slave system which still permeated the minds of Southerners and made Congressional legislation under the Thirteenth Amendment essential. Furthermore, he argued for federal jurisdiction because in courts of the Southern states

> Judges, juries, lawyers, officers, must for many years, certainly during this generation, carry with them such a hatred and contempt for the freedmen as to utterly preclude the idea that they can do him full justice. A negro testifying in a State court against a white man, will labor under the disadvantage for many years of being despised by the local court and the local population. Now, sir, I do not say this in reproach, but as a simple illustration of a well-understood truth. (Globe, p. 1837.)

However, there was no further discussion in the House on April 9, 1866. After some dilatory tactics by the opposition, Representative Wilson called the previous question, and the House overrode the veto by a vote of 122 to 41. (Globe, p. 1861.)

August 16, 1962

REPLY TO THE SOLICITOR GENERAL'S MEMORANDUM ON THE SIT-IN CASES

On the invitation of the Solicitor General, I am writing my views concerning his outline for the proposed brief in the sit-in cases. This memorandum falls within the Solicitor General's category of "destructive criticisms and comments." I am afraid that I have beaten some of the issues treated in this memorandum to death. I apologize for the length and perhaps, to some extent, repetition. However, in my view, otherwise highly intelligent and reasonable men have taken quite extraordinary positions concerning these cases. Many of the arguments which have been advanced are, I believe, totally unsupportable by authority, logic, or common sense. While the Solicitor General's contentions are now only tentative, this is the time to discuss them thoroughly before they become permanent and irremediable. For if they are presented to the Supreme Court, and, even worse, if in the very unlikely event, they are adopted, they will cause great harm, I believe, to the Department of Justice, the Supreme Court, and the public interest generally.

1. Appropriate Standards.--I start from two propositions: first, we should make every effort to find a reasonable argument on behalf of the sit-ins. The government has an extremely important program of ending racial segregation. I am wholeheartedly in favor of this program and therefore would fully support filing a brief presenting all reasonable arguments which support the sit-ins and which will increase their chances of success in the Supreme Court.

The second basic proposition on which this memorandum is based is that the government has an extremely important duty to act responsibly in the Supreme Court. Every attorney has, of course, a similar duty in representing his clients. The government attorney, however, has an even higher duty because he represents not only particular clients but the public interest as a whole. Applying this high standard to these cases, it seems to me that we should avoid arguing contentions that are legally unreasonable and untenable or would have a seriously harmful practical effect on the Department of Justice for advocating them and on the Supreme Court if they were adopted.

Since we are not a party in these cases, we have especially broad freedom in fulfilling our duty since we not only can refuse to make highly dubious arguments but can decline to enter the cases at all. Unlike the situation where we are the sole party on one side of the controversy and confess error, our decision concerning the validity of various arguments in these cases does not put us in the position of being judges who review the case before decision by the Supreme Court. If we decline to enter these cases, the sit-ins' position will still be presented to the Supreme Court. The sit-ins will be hurt only by losing the benefit of the government's support and by the fact that an inference will probably be drawn that the government does not think that the sit-ins have a strong position.

The two principles which I have suggested above are completely consistent with the standard specifically suggested by the Attorney General for considering the government's participation in these cases. The Attorney General, I am told, has said to the Solicitor General that our decision should be a lawyer's decision. I do not interpret the Attorney General's statement to mean that we should act as judges. Instead, I assume that the Attorney General is interested in supporting the sit-in position as part of the government's broader program against racial discrimination. I do, however, construe the Attorney General's statement to emphasize strongly that we should apply ordinary legal standards as to what constitutes a reasonable argument in order to determine which arguments we can fairly make. In short, the Attorney General has said that he is not demanding that the government enter these cases. If there is no reasonable, lawyer-like argument which can be made on behalf of the sit-ins, he has in effect said, quite properly I believe, that the government should not participate.

2. Point 1.--The general argument made by the Solicitor General in Point I of his memorandum (pages 7-11) seems to me correct. I agree that, when a state requires segregation in public places by law, the conviction of sit-ins cannot stand. The private owner who has discriminated against Negroes has done so by compulsion of state law, whether or not he would discriminate if no state law existed. This argument does not seem to me to be novel or surprising and is, in my view, a "narrow" ground.

While I agree generally with the Solicitor General's argument on this point, I disagree mildly with the presentation. I think that far too much is made of a rather easy point. The result of the complex and subtle arguments which are made is to cause our argument to appear much weaker than it is. The only reason, in my view, for making these extended arguments in Point I is to make our much weaker argument in Point III seem stronger than it really is. In Point I we argue that if a state requires racial segregation of restaurants it cannot be

heard to argue that a private owner has made the decision to discriminate. This contention, as I have indicated above, is a fairly easy one. But it is, to say the least, incomparably harder to argue that because most of the people of a state believe in racial segregation of restaurants (even if this attitude has been encouraged by the state), a restaurant owner's discrimination is not free and is therefore state discrimination. Indeed, I suggest (and will discuss at length below) that if this argument were actually made in Point III its total inadequacy would become obvious. It is far better, as a matter of effective advocacy, merely to refer back to what appears to be the parallel argument made in Point I.

In short, the problem how to argue Point I depends on whether we argue Point III. If we do argue Point III, it is undoubtedly most effective to attempt to bury as many of the weaknesses of our contention in the far stronger argument in Point I. If, however, we abandon, as I think we should, the argument in Point III, it would be far more effective to shorten and simplify drastically the argument in Point I.

3. Point II.--The argument made by the Solicitor General in Point II (pages 12-14) might be correct if the facts in the Louisiana case were as he assumes them to be. I have no doubt that if a state requires racial discrimination of public places by executive, rather than legislative, action, any conviction in a state court effectuating such action violates the Fourteenth Amendment. Consequently, if this is what the Solicitor General is saying, I agree completely. On page 13 he suggests that this is the basis of his argument by saying that the discrimination results from executive action and equating such discrimination to that which results when there is legislation requiring the discrimination. On pages 6 and 12, however, he states merely that executive officials "promoted" the segregation. I am not sure what "promoted" actually means. Surely, however, it does not have the same effect as a legislative requirement. I have very serious doubts whether mere state encouragement of segregation is sufficient to cause a private owner to lose his otherwise valid right to exclude Negroes from the restaurant. If the owner discriminates, not because of state action, but by his own choice, I do not believe that his decision becomes state action. The action of the state in promoting segregation violates the Fourteenth Amendment,1/ but this does not mean that every private decision consistent with the state policy, but not based on it, becomes the action of the state.

1/ The fact that there may be no judicial remedy for this particular violation of the Fourteenth Amendment is irrelevant. Many provisions of the Constitution cannot be enforced in the courts.

It is not necessary, however, to reach the difficult issue whether we can properly argue that state encouragement of segregation in restaurants renders these convictions in Louisiana unconstitutional. The Civil Rights Division's thorough analysis of this case shows that a significantly different set of facts actually exists. The record does not show that executive officials in Louisiana were promoting the custom of racial segregation. The restaurant manager called the police, and the police did not ask the sit-ins to leave or arrest them until after the manager had made clear that he wanted the sit-ins to leave and that the police should enforce this demand. The statements of the police chief and mayor[2] against sit-in demonstrations came after such demonstrations had already been held in New Orleans. If those demonstrations were illegal invasions of private property, these officials were acting entirely properly in opposing such demonstrations and indicating that participants in them would be arrested. None of these statements indicate that the city opposed such demonstrations because it wanted to keep restaurants segregated.

The sole evidence in the record, as shown in the Civil Rights Division's analysis, which suggests a state policy of segregation is the affirmative answer of the manager to the question whether he refused to serve Negroes because of "state policy and practice and custom in this area." The trial court refused to allow the manager to answer what his policy would have been if the state's policy had been different. Surely, the single affirmative answer of the manager alone is not clear evidence--justifying a finding by the Supreme Court--that a state policy and practice of racial segregation in private restaurants actually existed. This testimony shows only that a single restaurant manager believed that such a policy existed.

The question remains whether it is state action when a private person discriminates on the basis of what he erroneously (we must assume it is erroneous in the absence of adequate evidence) believes is a state policy. I think that we can fairly argue that when the discrimination is based not on private choice but on the policy of the state, whether accurately perceived or not, the conviction of sit-ins is likewise not the mere enforcement of a private decision to discriminate. Thus, the conviction can properly be considered as racial discrimination resulting from state action in violation of the Fourteenth Amendment.

2/ Mayor Morrison, as the Court will recognize, is a liberal and, in the absence of clear evidence, it is hard to believe that he was promoting a city policy of racial discrimination.

Alternatively, we can argue, as the Civil Rights Division has suggested, that the trial court improperly cut off inquiry into whether there was a city and state policy of racial segregation in restaurants. If there was such a policy which was the practical equivalent of a statute or executive order, I have no doubt that the discrimination must be considered as that of the state, just as under Point I. ~~It would seem, therefore, that we can argue that~~ Therefore, petitioners are entitled to a new trial on the ground that they had a right under the Fourteenth Amendment to present evidence that the discrimination was compelled by, or at least based on, state action.

4. Point III.--All that I have said above is merely prologue to what I consider the really important error in the Solicitor General's memorandum. I think that Point III is so weak an argument--whether it is called untenable, irrational, or something else--that it should not be presented or supported by the government in the Supreme Court.3/

A. I think that the Solicitor General's proposed contention is significantly weaker in at least one very important respect than the argument proposed by Professor Henkin and the Civil Rights Division. At least their argument does not distinguish between identical discrimination in the North and South. As formulated in the memorandum as what amounts to an irrebuttable presumption, the Solicitor General's position would mean that the same restaurant owner can discriminate against Negroes in the North but cannot discriminate in the South. The reason is that in the North there are not, and have never been, laws supporting racial discrimination generally. The Solicitor General has modified his position orally by suggesting that a restaurant owner could not discriminate even in the North if the custom of the particular Northern community is to discriminate. This formulation still leaves the sharp distinction between the North and the South essentially the same since few communities in the North have a general custom to segregate Negroes and whites in restaurants. In addition, this

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3/ The weakness of the Solicitor General's argument is suggested by contrasting his memorandum to a simple statement of his position. It seems superficially almost plausible to say that when a person acts in substantial part because of custom which has been promoted by the state, that his action may be treated as that of the state. But when this statement is expanded to a lengthy memorandum, its weaknesses become patent. The Solicitor General's memorandum itself virtually admits this by frequently stating at crucial points that his argument is incomplete or badly formulated. I think that these statements are unduly modest. The Solicitor General has formulated the custom theory as well as it can be. I doubt very much that any change of writing or additional arguments will help it. On the contrary, I suggest that expansion in a brief will make its inadequacies even more obvious.

modified formulation makes even weaker the argument, which I will discuss below, that action pursuant to community custom is in any sense the action of the state. Where the state has not passed any segregation laws, the community custom cannot possibly be considered the result of state action.

It might be argued that all civil rights cases involving Negroes have a greater effect on the South than the North. This is doubtless true because the South has racial discrimination resulting from state action to a far higher degree. But in all the decisions up to now the Southern states could comply with the judicial determinations by removing the state discrimination. Thus, after the decisions forbidding segregated state parks and swimming pools, the Southern states would readily integrate these facilities in the same way that they are generally integrated in the North. But if the Solicitor General's views are adopted by the Supreme Court, the Southern states cannot place themselves in the same position as most Northern states, where private restaurant owners will have continued freedom to discriminate. The former cannot remove a statute compelling segregation in restaurants because, in this part of the argument, we are assuming that no statute exists. Even if all segregation statutes in other fields are repealed, community custom, according to the Solicitor General's argument, will still for a considerable period be ~~based on custom which~~ is substantially the result of state action. And under the Solicitor General's modified view that custom alone is sufficient whether or not it results in any way from governmental action, restaurant owners will never be able to discriminate in the South until most Southerners no longer believe in restaurant segregation and therefore the custom no longer exists.

The distinction between the North and the South in the Solicitor General's argument is not likely to remain hidden in these cases. First, the Solicitor General himself admits in his memorandum that his contention would not allow us to argue for reversal in the Glen Echo case which arose in Montgomery County, Maryland. Maryland has few segregation statutes in related areas and there was probably no community custom in Montgomery County at the time of the incidents involved in the Glen Echo case of segregation in public places. The fact that the Solicitor General proposes to argue that his theory requires reversal in the Louisiana and possibly the North Carolina cases, but not the Maryland case, is certain to be interpreted as showing, as it does, that discrimination may continue in the North under his theory unmolested. Second, even if the embarrassment of the Maryland case is removed by its dismissal,[4] Justice Douglas has enunciated a contention

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4/ This possibility is discussed below.

similar to the Solicitor General's in his concurring opinion in the Garner case, which ~~specifically states~~ makes clear that the result would be to allow discrimination in the North but not the South. And third, it is clear from the face of the Solicitor General's argument that it applies differently in the North than in the South.

Ralph Spritzer has suggested a modified version of the Solicitor General's theory in hopes of preventing different treatment for different sections of the country. He suggests that the existence of a custom of racial discrimination in restaurants, which is produced in part by state segregation statutes, should not be conclusive that the owner has discriminated as the result of custom. Instead, he suggests that these facts should produce a rebuttable presumption which may be overcome by proof that the restaurateur made a free decision of his own to discriminate.

Mr. Spritzer's theory, however, does not remove the discrimination between North and South if it is applied to the formulation of the "custom" theory in the Solicitor General's memorandum. If a private determination based on custom is state action only when custom is in some way the result of state encouragement, a Northern restaurateur may specifically base his discrimination on custom in his community while a Southerner may not. The only reason for this distinction is that the custom in the North arose independent of state encouragement. As a consequence, Southerners lose the right possessed by Northerners to discriminate, and even when their state encouraged segregation in the past rather than the present.

Mr. Spritzer's suggestion would remove the discrimination between North and South only if it applied to the Solicitor General's broader theory, which has been orally expressed, that all private decisions to discriminate based on custom constitute state action. If this is so, it is unconstitutional for Northerners and Southerners alike to discriminate because of custom in their areas. But, as will be seen below, the formulation of the Solicitor General's argument, which does not depend on any governmental action to encourage the custom of discrimination, is even weaker legally and logically than the theory as advanced in his memorandum.

It seems to me that any position which in effect says that private discrimination may continue in the North but that it is unconstitutional in the South is intolerable. Whether or not this is a legal argument against the Solicitor General's position, it is to me an absolutely conclusive reason against advancing it. If we do make such an argument, I think that the South will be correct for the first time in claiming that the federal government, which is dominated by the North, is attempting to impose integration on the South when the North itself continues to discriminate. Similarly, the Supreme Court would justifiably be attacked as imposing what amounts to different standards on different sections of the country. The result, I believe, would be enormous harm to the prestige of the Court.

I think, however, that the Court is unlikely to have such poor practical judgment as to render a decision which has a substantially different effect on the North and the South. I think that few if any other Justices (and probably not even Justice Black) would go along with Justice Douglas. Indeed, I believe that most of the Court would consider the government's position as little short of preposterous. If I am right in this, the result would be great harm to the government's stature in the Supreme Court, which could well interfere with the effective presentation of future cases generally and ~~in the case~~ of civil rights cases in particular.

B. I have contended above that the practical effect of the Solicitor General's argument is so bad that the argument cannot be made. Independent of that weakness, I think that the argument is also legally and logically completely untenable.

(1). I believe that much of the problem with the Solicitor General's analysis results from his failure to analyze the problem in terms of state action, racial discrimination, and the connection between the two. The courts and the commentators have agreed that these three elements must be satisfied in order to find a violation of the Fourteenth Amendment. I can see no reason for abandoning this rational method of analysis in these cases. First, the language of the Fourteenth Amendment itself directly leads to this three-element analysis.

Second, as I have indicated, the cases and commentators all support this analysis. It is no argument to say that this is the first time that cases of this type have come before the courts. Fourteenth Amendment cases have been considered for almost a hundred years and standards have been laid down for their decision. There is no reason to change these standards merely because new factual considerations are involved. If the historical standards should be changed, we must show that they are wrong and that new standards should be applied.

Third, the Solicitor General has not suggested any alternative interpretation of the Fourteenth Amendment. Surely, if we are to approach the problem as lawyers, we must first identify the elements which are essential, in our view, to a violation of the Fourteenth Amendment. Otherwise, our argument amounts to little more than a statement that something bad in the field of racial discrimination has occurred and therefore it must violate the Fourteenth Amendment. Without any standards as a guide, there are virtually no limits to what different people with different feelings will consider bad and therefore unconstitutional.

(ii). The failure to consider this case in terms of the three-part analysis suggested above has led the Solicitor General to the argument (pages 15-16) that the convictions here were unconstitutional because the owner admitted the Negroes on the premises and merely refused to allow them into the restaurant. This contention, I submit, has absolutely nothing to do with whether the state has caused the racial discrimination in these cases, even if I could agree with the Solicitor General that the discrimination in these cases is more irrational or is otherwise worse than total exclusion from the premises. The distinction the Solicitor General suggests relates only to the kind of discrimination. But it seems absolutely clear that racial discrimination in public places is the very kind of discrimination at which the Fourteenth Amendment is aimed. The worst forms of racial discrimination, however, do not violate the Fourteenth Amendment unless they result from state action.

I know of only one argument which ~~relates unless~~ makes the existence of state action depends on the kind of racial discrimination involved. Conceivably, it could be argued that less state involvement need be shown when the racial discrimination is particularly bad. This contention is totally unsupported by any authority. Moreover, some showing that the discrimination resulted from state action must be made.

In any event, I can see no basis for believing that total exclusion from restaurants is somehow better than admission to a dime store but exclusion from its restaurant. From the standpoint of the harm to the Negro there is no rational basis for any distinction. Since in both cases the Negro has been excluded from a restaurant because of his color, both situations involve the clear imposition by a private business of a badge of inferiority. In one case the Negro has merely been admitted to a different kind of establishment, a dime store. It is said that the admission of Negroes to the store but their exclusion from the restaurant portion is particularly degrading because the business has consented to take his money and do business with him when he is standing but not when he is sitting and eating. But is it less or more degrading when the business refuses to deal with him at all by total exclusion from the premises? I doubt that Negroes feel any worse in one situation than another. While the Solicitor General apparently has a subjective reaction which is stronger in the situations involved in these cases, several other persons to whom I have talked have the contrary emotional feelings that total exclusion from the premises is worse or find no difference in the two situations.

I also see no difference between the two situations from the standpoint of the owner of the business. He has not acted any more irrationally in one instance than another. First of all, the Fourteenth Amendment is based on the premise that all racial discrimination is irrational. I

seriously doubt the wisdom of suggesting that some racial discrimination in public places is more irrational than other such discrimination. No matter how carefully this kind of argument is phrased, it will sound like the government has no really strong objection to excluding Negroes entirely from public places.

Second, if we assume the rationality of racial discrimination generally, businessmen who admit Negroes to their stores but not to the restaurant portion of the store are acting just as rationally as businessmen who run only restaurants and exclude Negroes entirely from the premises. The general custom in the South is not to hate Negroes or to have nothing to do with them. On the contrary, Negroes customarily work as maids in white homes where they cook food, care for the children, and otherwise associate with their white employers. Similarly, in many other situations Negroes associate closely with whites. The custom in the South is that Negroes may associate with whites but they must remain in an inferior and menial position. Consequently, assuming the rationality of racial discrimination generally, it is perfectly rational for a dime store to admit Negroes onto the premises to buy string or pencils, for example, at the same counters as whites. This is a completely economic relationship which does not imply social equality. On the other hand, since eating while seated implies a social as well as an economic relationship, integration of restaurants would imply social equality which is directly contrary to Southern racial customs. In short, if the same man owned both a dime store with a restaurant in it and a restaurant all by itself, he would quite rationally (if he had Southern views as to Negroes) decide to exclude Negroes from both restaurants but to admit them to the dime store.

The Solicitor General also suggests that the right of privacy is less involved when Negroes have been admitted to all the premises of a store except a restaurant, than when they have been totally excluded. I cannot agree. First, the Negroes in these cases were not admitted to the premises generally. As they well knew, they were being admitted to only part of the premises. White customers likewise are not admitted to all of a store's premises--they cannot go behind counters and into other areas reserved for employees. In short, no one receives a general license or right when he enters a store. The additional restriction placed on Negroes, as I have shown above, is no more irrational than is racial discrimination generally.

Second, the right of privacy does not mean the right to be alone and therefore only the right to control who can come on one's property. Instead, it means the right not only to control who comes on the property but their movements and conduct after they enter. Thus, when I allow a painter to enter my home, my right of privacy is directly involved when I ask him to leave or forbid him to enter certain areas of the premises. Similarly, if the right of privacy is involved when a store refuses to allow Negroes to enter the premises (this right is undoubtedly less protected than in the case of a homeowner), it is equally involved when a store asks Negroes to leave or refuses to allow Negroes to enter a certain part of the premises. This principle is firmly established in the common law. The common law clearly allows storeowners both to decide who may enter and to ask persons to leave the property for any reason whatsoever, no matter how irrational, and to use reasonable force if they refuse. Thus, it is clear that the owner of a store has a legally protected right of privacy to control his property as he wishes and that, therefore, when a person enters a store which is open generally to the public, he has no right to remain or to enter portions of the premises contrary to the wishes of the owner.5/

The limitation of the Solicitor General's argument to dime stores which admit Negroes generally but not to their restaurants also seems wrong on a practical ground. If the government can convince the Court of this novel theory, a possibility which seems to me remote, it seems strange to restrict so narrowly the scope of our victory--particularly when, as I have stressed above, there is no logical reason, inherent in the "custom" theory itself, for this limitation. Many of the dime stores in the South are already totally desegregated and many of the others

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5/ It is worth noting that the line suggested by the Solicitor General prevents any reliance on Marsh v. Alabama. This case could be cited for the proposition that all places open to the public generally are within the scope of the Fourteenth Amendment. Restaurants which exclude only Negroes are just as open to the public as businesses which allow Negroes in the store but not in the restaurant. Marsh would not be a different case if the town excluded Jehovah's Witnesses from entering since the exclusion of a particular delineated class of persons does not mean that a place is no longer open to the public.

In any event, as I have argued in an earlier memorandum, this interpretation of Marsh v. Alabama is much too broad. That case does not place all businesses open to the general public within the prohibitions of the Fourteenth Amendment, but only those unusual businesses, i.e., company towns, which have the powers and functions of a government. Since such businesses are the equivalent of a municipality, their activity is treated as that of the state.

will undoubtedly soon be desegregated regardless of the Court's decision in the sit-in cases. As to the other dime stores, I do not think we should even be suggesting that discrimination can exist in restaurants if Negroes are excluded from the entire premises. It would be extremely embarrassing if more segregation resulted from the theory we proposed. In addition, the far more important situation which will be involved in most of the cases in the future is that of the pure restaurant such as Howard Johnson's. I see no reason even to suggest a constitutional distinction between dime stores with restaurants and pure restaurants which would harm the sit-in efforts.

(iii) Turning to the heart of the Solicitor General's legal argument (as unmodified by Mr. Spritzer's suggestion), I cannot understand how the custom of the community, plus state segregation laws in other fields, can make state action out of a private decision to discriminate. Apparently, the argument is based on the notion that the state has promoted racial discrimination generally and that this has led, to some extent, to the custom of racial discrimination in restaurants. Consequently, when the owner says that he is discriminating because of the custom of the community, his decision is based on activities and beliefs resulting in part from state action.

There are at least two principal weaknesses in this argument. First, a very difficult sociological question is posed by the extent to which racial discrimination in the South--in the absence of an existing statute (or perhaps even in the absence of such a statute at any time in the past) compelling such discrimination in a particular activity--is the result of state laws. State laws requiring racial discrimination are themselves the product of such discrimination. Consequently, private racial discrimination almost certainly preceded the state laws. On the other hand, the state laws almost certainly helped to prolong and increase racial discrimination. The sociological controversy involves the extent to which this is so. 6/ Clearly, this controversy is not the kind of question which the Supreme Court can decide through judicial notice. Judicial notice of a far more obvious sociological fact in the Brown case has resulted in a storm of controversy. On the other hand, it is hard to imagine the Court remanding the case to the state court for a determination of the extent to which laws have produced racial discrimination in restaurants in the particular area. This would result in the two sides introducing conflicting sociologists as expert witnesses (and the two sides would have little difficulty finding sociologists who place great emphasis on the impact of law and those who say it has little effect). I doubt whether the fairest of courts could come to a very satisfactory decision when presented with such conflicting testimony. But, in any event, it is not hard to predict that the state courts would universally determine that state law has had little effect in producing the custom of segregation and this finding will be supported by evidence so that the Supreme Court will not be able to overturn it.

6/ It is interesting to consider the situation in Maryland. The same state code, which includes some segregation laws, exists throughout the state. Yet, the eastern shore is one of the most segregationist areas of the South, while some other areas have no real custom of segregation. The same is probably true even of states in the deep South. There are areas in the deep South where the custom of segregation is quite weak.

The Solicitor General has attempted to avoid making his finding of fact depend on the testimony of sociologists, by indicating that the extent to which the custom of segregation results from governmental action is entirely a question of law. Under this theory, it is apparently enough that there be significant statutes at the present time or in the recent past compelling racial segregation in other fields, and evidence of a present custom to discriminate in restaurants in the particular area. But this is in effect merely taking judicial notice, without explicitly saying so, that a certain pattern of state statutes produced the present custom of discrimination. As I have indicated, this is a completely unjustifiable use of judicial notice to decide facts which are in great dispute. Therefore, the only way in which the sociological problem can be surmounted is by asking the Supreme Court to decide that any state encouragement of segregation at any time is enough to make a restaurateur's decision to discriminate state action. This argument would be based on the ground that once a state encourages discrimination all subsequent private discrimination is to some degree the result of state action even if the degree is extremely small. But this is a ridiculous and extreme argument which the Solicitor General clearly does not mean, since he would not apply his theory to Maryland.

Second, the custom theory converts what everyone regards as his private decisions into those of the state. It is reasonable to argue, as the Solicitor General does in Part I, that when the state compels segregation, a private person cannot argue that he would have discriminated even if no law existed. In such a situation, it is fair to say that the private action, which is compelled by the state so that no discretion exists, is the action of the state. 7/ But, in the sit-in cases, the private person's decision to discriminate is not compelled by any direct action of the state but only by custom, which is itself to some extent the result of state action. While one can say that the decision to discriminate was not "unfettered," this label is of little importance. Few, if any, decisions are completely unfettered by custom. In fact, few, if any, private decisions are not influenced by custom which, to some extent at least, has been influenced by state action. Nevertheless, despite the limitations placed on our decisions by custom, the views of our friends and families, and other such influences, we commonly

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7/ It is unrealistic to say the private person is really not compelled since the statute is unconstitutional.

regard our decisions, when not compelled by the state, as free.

Furthermore, even if we consider a choice limited by custom (whether or not the partial result of state encouragement) as unfree, this is still a far cry from saying that the decision is unfree because of the state and therefore constitutes state action. Custom means the general values and rules of the community at large. But the community is composed of individuals and therefore the customs of the community are nothing more than the values of a majority of the individual citizens. It seems strange indeed to treat private decisions as those of the state whenever a majority of individuals in the community, even if encouraged by the state, have come to the same conclusion. 8/

This point can be easily demonstrated if we move from racial discrimination to another field. Suppose that General Motors refuses to hire a qualified automobile worker solely on the ground that it is contrary to custom to hire Communists. It can readily be shown that this custom is in very large part (probably more than racial discrimination in the South) based on federal and state statutes, investigations, and other governmental actions. Can it reasonably be said that General Motors' decision constitutes state action because it was based on custom which in turn was greatly influenced by the government? I submit that no one would call this state action. Yet, the determination whether the private decision constituted state action is surely the same whether discrimination based on Communism or race is involved. The only difference between the two areas is that conceivably the decision not to hire Communists does not violate the Fourteenth Amendment, even if the decision does constitute state action.

This second objection to the Solicitor General's theory becomes even stronger when applied to his oral suggestion that racial discrimination based on custom alone, uninfluenced by state statutes, is state action. Frankly, this argument is almost beyond my comprehension. Surely, "state," as used in the Fourteenth Amendment, and state action, as used in judicial decisions, means the government and governmental actions, respectively. But the government is not involved in any way when the community, meaning numerous individual persons, decides on common beliefs and ways of conduct without any

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8/ It is for this reason that we rebel instinctively against the hypothetical newspaper headline that "Solicitor General Urges Supreme Court to Outlaw Southern Customs." Yet this headline is substantially correct in describing the Solicitor General's argument.

participation by the government. It is strange, to say the least, to contend that the beliefs and activities of many persons, even if they act in concert, constitute the state. Marsh v. Alabama establishes no such proposition--it holds only that when a corporation has the powers and functions of the state, in a company town, it will be treated as the state under the Fourteenth Amendment. But a mere custom to discriminate by a majority of citizens is not in any way the equivalent of investing any private group with the powers of the state. 9/

(iv) Mr. Spritzer's modified version of the Solicitor General's theory has even worse legal problems than the unmodified argument. No one has yet formulated what standard should be applied in determining whether a particular private decision to discriminate

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9/ There are other extremely difficult questions posed by the "custom" theory besides those discussed above: (1) What is the appropriate geographical area for determining the existence of the custom? Customs differ widely within the same state, as Maryland demonstrates, or even within the same county. No standard for determining this question has been suggested. It could be determined arbitrarily as the city, county, or state. Alternatively, the proper geographical area could be found by determining the area in which the particular business draws customers. But this rule would be based on the assumption that the court is determining whether the particular business is in effect being coerced by the state into discrimination. This is consistent with Ralph Spritzer's modified theory which I will discuss below, but not with the Solicitor General's original theory.

(2) Should the determination be based not only on geographical area but on the custom of the particular kind of restaurant in the city or as a whole? Montgomery County, for example, apparently has no general custom of racial discrimination in restaurants but may have such a custom relating to very expensive restaurants.

(3) What kind of state action in related fields should be considered? Should we consider speeches by state officials? Should the principles taught for the previous half century in the public schools be considered? If racial discrimination is taught in the schools, this is far more likely than mere statutes in other fields to have influenced the custom of racial discrimination. Yet many of the values in our society are promoted by the public schools. Can it possibly be said whenever we vote, give money to the poor, or the like, our action is state action because it conforms to custom which, in turn, is directly influenced and encouraged by the state?

constitutes state action or not. Certainly, it is not enough to say that this issue will go to the jury. The jury must be given reasonably definite instructions in order to determine the question. Likewise it is not enough to say that we, and the Court, can formulate an appropriate standard at some later time. The problem is that I doubt that any standard makes sense. Unless a reasonable standard is at least tentatively suggested, there is no way to prove or disprove whether a rebuttable presumption is workable.

I will assume that the appropriate line is that discrimination constitutes state action when it is based on custom (whether or not this custom must result in part from state encouragement), rather than the restaurateur's own view of Negroes. Custom in this context must mean not merely the common attitudes of the community since even the staunchest advocates of natural law would admit that all beliefs and actions are greatly influenced by the community. Therefore, if custom means only the majority view, all or almost all decisions, consistent with the general beliefs of the community, would be based, to a considerable extent, on custom, and therefore would constitute state action. If Mr. Spritzer's rebuttable presumption is to mean much, it must mean that custom constitutes not only the views of at least a majority of people but also community pressure, whether direct or indirect, explicit or implicit, real or imagined by the restaurateur, which inhibits his free choice.

I assume that the standard to be adopted will also regard the restaurateur's discrimination as state action when it is based on fear of loss of business, social prestige, friends, or the like. For such motives are merely a more detailed description of why a person follows custom. Unlike in the case of unimportant decisions which follow custom in large part because of habit, important decisions are based on custom largely because of fear of some unpleasant consequence. This is true whether or not we analyze the reason why we follow custom, or even know that we are following it every time a decision is made. Therefore, it is untenable to say that, if a restaurateur bases his discrimination on custom, this constitutes state action, but if he bases the discrimination on fear of loss of profits, this is his individual decision. For a businessman fears loss of profits precisely because the custom of the community is segregation of Negroes and whites in restaurants.

Applying the above standard, the legal objections which I have discussed to the Solicitor General's theory apply substantially the same to the theory as modified. First, the evidentiary problem will still remain. If the original theory advanced in the Solicitor General's memorandum is followed, the state courts will still have the almost impossible sociological problem of determining the extent

to which the custom has resulted from state encouragement. Moreover, before that issue is even reached under Mr. Spritzer's modified theory, the state courts will now have the very difficult problem of determining whether a custom of discrimination exists at all. The area of the custom, under the modified theory, cannot be the entire city or state. Instead, it must consist of the particular customers of the restaurant, the restaurateur's friends, and the like. For even if the community at large may have no custom of segregation, the restaurateur's decision to discriminate is not free in the sense the Solicitor General and Mr. Spritzer use the term if he fears loss of his particular customers or friends. The trial will therefore consist largely of evidence concerning the moves of the businessman's particular customers and friends. 10/

Even if the problem of finding the existence of a custom and the fact that it is based in part on state law is solved, the jury will still have to determine the additional fact, not required in the Solicitor General's original unmodified theory, whether the restaurateur's decision was his own or was based on custom. I submit that this is an impossible determination. All our publicly known decisions are to some extent based on pressure from other persons. Perhaps it is possible to make a reasonable guess whether social pressure, i.e., custom, was dominant, but this would require, or at least allow for, psychiatric testimony. It takes little imagination to see that the modified theory would make a farce of state criminal trials. And again this theory would do little good. Few Southern businessmen would testify they discriminated because of pressure, instead of their own beliefs. For such testimony would likely harm their business almost as much as desegregation. And Southern juries would almost universally hold that any red-blooded Southern businessman himself agreed with the views of the community and discriminated because of his own beliefs, not because of pressure from others.

The second objection to the Solicitor General's theory applies as strongly to the modified theory. We regard our decisions which are influenced to some extent from outside pressure as essentially free. Indeed, the nature of freedom is not complete independence from the reasonable pressure of our friends and neighbors but rather the absence of state compulsion. If we consider decisions as unfree whenever they are restricted to some extent by community pressure,

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10/ If the restaurateur aspires to office in private or public organizations, is evidence necessary concerning the customs of persons in his Kiwanis Club, or his church, or city, or even state?

few important decisions are ever free.[11] And even if actions based on custom are not regarded as free, it is hard to understand how they can constitute state actions, whether or not that custom has been encouraged in some way by the state.[12]

In addition to the two objections which also apply to the Solicitor General's theory, there are two other extremely strong arguments against Mr. Spritzer's modified position. First, there is something basically wrong with a theory that rewards and encourages racism. A strong bigot under the modified theory would be able to discriminate because he personally hates Negroes, but a cowardly liberal or moderate who merely fears loss of his business or social ostracism could not. The rule thus encourages testimony that a businessmen personally dislikes and discriminates against Negroes. Worse, it puts a premium on businessmen refusing to make a joint effort to desegregate restaurants in a particular city. For such efforts would constitute evidence, if the desegregation had not yet occurred, that the businessmen did not personally want to discriminate against Negroes.

Second, there is a fatal, logical inconsistency in Mr. Spritzer's position. As I understand the Solicitor General and Mr. Spritzer, they would not allow sociological evidence on whether custom results in part from state encouragement. They apparently believe, contrary to my contention above, that this is a question of judicial notice based on state statutes and perhaps other similar evidence. This means in effect that there is an irrebuttable presumption that custom results in part from state action. But if there is an irrebuttable presumption that the views of other people in the community to discriminate is based in part on state action, it is completely illogical to say that the restaurateur alone may have formulated his views independent of the state. Since his

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11/ Indeed, complete freedom from community pressure or custom would not even be a good thing. Anarchy would almost surely be the result.

12/ In his more conservative days, Mr. Spritzer made the following comment concerning whether the Fourteenth Amendment protected the sit-ins (memorandum to the Solicitor General in the Boynton case):

> It should be recognized that this case is a borderline one and that, if the Government participates, critics will be quick to claim that an effort is being made to wipe out all meaningful distinctions between state action and private action. If we should participate, our position, it seems to me, should be grounded on the Commerce Clause and not on the Fourteenth Amendment. It should be made clear, I think, that we are not contending in this case that discrimination by private entrepreneurs, no matter how situated in relation to commerce, gives rise to state action merely because such discrimination is afforded assistance by state laws governing trespass.

decision to discriminate is just as affected by the state's encouragement as everyone else's, if there is an irrebuttable presumption that the custom resulted in part from state action, there must logically be a similar irrebuttable presumption that the restaurateur's decision to discriminate also resulted in part from state action. In other words, even if the restaurateur's seemingly independent decision to discriminate is not based on social pressure, it must be considered as resulting to some extent from state action.

(v) The Solicitor General's memorandum suggests, at one point, that the Civil Rights Division should insert all the authorities supporting the custom theory. This suggestion, I believe, is based more on hope than on reality. After considerable investigation of this field over the past year, neither I nor the staff of the Civil Rights Division know of any support in the history of the Fourteenth Amendment, judicial decisions interpreting it, or any other authorities which would even suggest that private action based on custom, whether accompanied by related state laws or not, violates the Fourteenth Amendment. And it is unlikely that the Civil Rights Division will come up with substantial authority in the more thorough research which it is now pursuing. It seems rather strange, to say the least, that no decision or commentator has suggested anything like the custom theory in the numerous decisions and law review articles in this field. The decisions and commentators have universally stated or clearly assumed that state action means governmental action, which is directly inconsistent with the proposition that custom without any accompanying state laws is enough. They have likewise assumed, in considering segregation in the South, that state action means more than custom which has been encouraged indirectly by the government.13/

A recent decision of the Fourth Circuit (Judge Sobeloff was on the panel) clearly shows this accepted interpretation of the Fourteenth Amendment. Williams v. Howard Johnson's Restaurant, 268 F. 2d 845 (C.A. 4). The court there distinguished from state action those acts which are "carried out by voluntary choice and without compulsion by the people of the state in accordance with their own desires and social practices." The court said that a Negro could not bring action against a restaurant for discrimination "unless these actions are performed in obedience to some positive provision of state law. * * * The customs of the people of a state do not constitute state action within the

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13/ I do not rely on the Civil Rights Cases for this statement. As the Solicitor General's memorandum suggests, those cases can easily be distinguished whether one is arguing the custom theory, Shelley v. Kraemer, or any other theory. For the Court explicitly stated several times in the Civil Rights Cases that it assumed that no state permitted racial discrimination in public places and that, if a state did permit such discrimination, a different case would be presented. Even though the belief that no state permitted racial discrimination in the 1880's is incredible whether viewed from the standpoint of today or that time, the explicit language of the Court specifically limits its holding. On the other hand, the Civil Rights Cases have been interpreted ever since to mean that direct governmental action is required to constitute state action under the Fourteenth Amendment in cases arising in the South where the custom of racial discrimination, supported indirectly by state laws, is obvious.

prohibition of the Fourteenth Amendment." This case involved Virginia, a state having a strong custom of segregation, which, under the Solicitor General's theory, is in considerable part the product of state laws.[14]

The only authority which the Solicitor General's memorandum cites is Shelley v. Kraemer. The memorandum argues that Shelley is based on the fact that restrictive covenants are the equivalent of municipal ordinances; that customs have essentially the same effect; and that therefore Shelley makes the custom theory part of the Fourteenth Amendment. I believe, however, that Shelley is of little, if any, help to the Solicitor General's argument. First, there is not a word in Shelley v. Kraemer or its successor, Barrows v. Jackson, which even suggests the notion that they are based on a custom of racial discrimination or the equivalent. On the contrary, these cases are explicitly based on an entirely different ground. Reading new and arguably better reasons into Supreme Court decisions is a far easier exercise for professors than for advocates before the Supreme Court itself, particularly when several of the present Justices voted for the Shelley and Barrows decisions as they were written.

Second, the theory that Shelley v. Kraemer is really based on the fact that restrictive covenants are the equivalent of municipal ordinances seems extremely dubious. Surely, the decision would not have been different if the particular covenant involved had covered only five houses and there was no other similar covenant in the particular city. Thus, it is clear that the decision in Shelley is not based on comparing covenants to municipal ordinances (or to custom).

Third, if Shelley had been based on the comparison of restrictive covenants to municipal ordinances, it would have been just as weak a decision as it actually is on the basis of the grounds which were actually expressed in the opinion. The actual

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14/ This case cannot be distinguished by simply stating that the Negro was asking for an injunction against discrimination and the state had not arrested or convicted anyone. The court of appeals' statement concerning custom was clearly directed to the accepted interpretation of the Fourteenth Amendment and was not limited to injunction actions. Furthermore, if discrimination by a private person is state action when it is based on custom which is in considerable part the result of state laws, I cannot see why Negroes are not entitled to an injunction. If Negroes are entitled to an injunction against state action in the form of a state statute requiring racial segregation, or, as in Burton v. Wilmington Parking Authority, against state action in the form of discrimination by a private restaurant on state-owned property, they should be equally entitled to an injunction against state action in the form of discrimination by a restaurateur whose decision was based on custom.

holding of Shelley that the enforcement by a state court of racial discrimination violates the Fourteenth Amendment is extremely broad and is unsupported by any historical or other authority. At least, however, it is logically sound. When the state enforces a private decision to discriminate, it can be said that the discrimination results from state action. A holding that a restrictive covenant is the equivalent of a municipal ordinance would be equally unsupported by authority and, in addition, would make little logical sense. Considering racial covenants as the equivalent of municipal ordinances has all the same basic weaknesses (discussed above) as stating that custom equals state action. The fact that the result of private action is as harmful to Negroes as state action cannot make private action into state action.

Fourth, even if we assume that Shelley v. Kraemer is sub silentio based on a comparison of racial covenants to municipal ordinances, this holding would have to be drastically extended to cover the sit-in cases, in a way which removes the sole basis for comparing restrictive covenants to ordinances. The only real comparison between a restrictive covenant and an ordinance is that both forbid willing buyers and sellers from transferring houses. Third parties, the state in one instance, the persons to whom the covenant runs in the other, are attempting to use the state courts to force discrimination on persons who are unwilling to discriminate. In the sit-in cases, however, the seller is not willing to deal with the buyer. On the contrary, it is the seller who tells the Negroes to leave, calls the police, and asks the police to arrest the Negroes or force them to leave. In short, it is the seller who wants to discriminate and the state, by enforcing its criminal law at the specific request of the seller, is not compelling him to discriminate. I realize that the Solicitor General is arguing that custom, which has resulted in part from state encouragement, or, according to his alternative theory, that custom alone has compelled the seller to discriminate. But this, even if it is compulsion at all, is certainly not the same kind of compulsion as under a restrictive covenant. The most that can be said is that the seller has to some degree been induced by outside pressures to discriminate. But, as I have argued extensively above, this is no different from almost all our decisions. Such indirect pressures are hardly the equivalent of a law or ordinance; they do not make the decision of the seller the action of the community, let alone the state.

C. The Solicitor General has suggested that one of the virtues of the custom theory in comparison to other theories which have been advanced on the behalf of the sit-ins is that the custom theory is considerably more narrow. I believe, on the contrary, that the Solicitor General's theory is virtually as broad as a theory based on the literal language of Shelley v. Kraemer.

I have shown above that it is illogical to limit the custom theory to dime stores which admit Negroes to most of the store but not the restaurant. Without this limitation, however, the theory is virtually as broad as the full application of Shelley v. Kraemer (and that theory too can be artificially limited by the same kind of extraneous rules unrelated to its logical scope). The custom theory would apply whenever there was a strong custom of racial discrimination plus state action at the present time or recent past to foster racial discrimination in related fields--which means the entire South--or, if the Solicitor General's oral statement of his theory is followed, wherever there is a strong custom of racial discrimination alone--which means the South, much of the border states, and probably some areas of the North. Logically analyzed, this means that all racial discrimination in these geographical areas is state action. The sole question remaining is, just as under Shelley v. Kraemer, whether the type of discrimination is the kind prohibited by the Fourteenth Amendment. The only difference under Shelley v. Kraemer is that all racial discrimination throughout the country is state action. Although this theory is in a geographical sense broader than the Solicitor General's, this uniform application throughout the country is, as I have argued above, a very great advantage.[15]

15/ The breadth of the Solicitor General's theory is illustrated by the following hypothetical case. Suppose a Negro comes to a lunch counter in the South and asks employment as a counterman. The owner refuses on the ground that the applicant is a Negro. The Negro then sits down at an appropriate place for persons applying for jobs and refuses to leave the premises. If the Negro is arrested and convicted for trespass, the situation is almost exactly the same as in these cases. The state court has enforced racial discrimination which, according to the Solicitor General's theory, was based on a combination of state law and custom, and, consequently, the discrimination was the result of state action. The only question is whether the discrimination is of the type proscribed by the Fourteenth Amendment.

D. My final objection to the Solicitor General's custom theory is based on political theory. The custom theory, in my view, is based on a statist, almost totalitarian, concept of the relationship between the individual and the state. These implications of the custom theory make it, in my opinion, far broader and more dangerous than any other theory which I have seen suggested on behalf of the sit-ins.

I suggest that the custom theory, in all the forms which have been suggested, rests on a complete misunderstanding of the relationship of the individual and the government within a democracy. If the Solicitor General's broader theory which depends on custom alone, regardless of any past or present state encouragement, is analysed, it becomes clear that it makes virtually all private actions those of the state. While the argument is not quite so all-encompassing when limited to custom which is in part the result of state laws, it still includes within state action a vast area of private decision-making not only concerning racial discrimination but also in many other fields where there are related state laws. Under either version of the theory, when a person acts consistent with custom, his action becomes that of the state. Nor does Mr. Spritzer's modification of the custom theory help much. Under that contention, every time a person bases his act in part because of custom, his act becomes that of the state.

If all decisions made by individuals which are not entirely independent are considered as those of the state, the result would be to reduce the scope given to individual determination to minuscule proportions. The logical result of a system which sees few decisions as based on individual choice is to reduce the freedom of individuals to make such decisions. This can be seen to some degree in these cases. If the Solicitor General's views are adopted, the freedom of property owners to choose, even arbitrarily, who comes on their property, is limited. Aside from the violence which this would do to our traditional concepts of law, this limitation on freedom does not seem serious because the right to discriminate on the basis of race is so distasteful. But the implications of the Solicitor General's theory extend far beyond this area. If the decision of a person to discriminate because of custom is state action, so then is any other decision based on custom. And if a decision may be considered as that of the state, then surely it can be regulated by the state. The logical result of the philosophy underlying the Solicitor General's argument is therefore the virtual end of any area of individual action free from governmental control.

I would like to restate in slightly different terms my contention that the Solicitor General has seriously and dangerously confused the relationship of the individual and the state in a free society. A democracy does not consist merely of isolated individuals and the government, so that all decisions not made with complete independence

can be treated as those of the government. A free, pluralistic society has between the individual and his government numerous other groups such as clubs, unions, corporations, churches, and the like. One of the clearest differences between democracy and totalitarianism is whether these groups are considered as arms of the state. 16/ The right to organize and join such groups may well be the most basic right in any democracy. For freedom of speech and belief is of little value if one cannot organize one's neighbors in a common endeavor. And when an individual decides to follow the rules of an organization, to which he has decided to belong, as to how to conduct his life, his decision cannot possibly be viewed as that of the state. This is so even if the organization's rules are enforced by pressures such as expulsion from the organization and loss of friends. I suggest that a decision to follow custom, even if that custom is enforced by some pressure, is just as clearly not a decision of the state. A custom is merely an unwritten rule of the community at large. The difference between the community and the organizations, which along with individuals compose it, is not very significant. 17/ When a person follows the customs or rules of his group, his decision is still free and independent; similarly, when a person follows the custom of the community, his actions cannot be considered those of the state.

I am not sure that I have successfully explained my objections on the basis of political theory to the Solicitor General's arguments. It may, however, be easier to state my position in terms of the history of the political theory which resulted in the American Constitution. John Locke, who is the political philosopher generally considered to have had the greatest influence on the founding fathers, stated as perhaps the fundamental tenet of his system that men lived without government until they decided to form one for the protection of themselves and their property; that they therefore delegated to government certain powers which could be recovered whenever the government violated the purposes for which it was created. While, of course, Locke's description of the precise way government started is not historically accurate, the basic point is that man, both individually and in groups, is superior to government and, more important for our purposes, independent of it. The founding fathers adopted these principles in the Constitution. They too saw government as the creature of the people having only those functions delegated to government by the people.

16/ In Nazi Germany and the Soviet Union all, or almost all, organizations are controlled by the state.

17/ This is so particularly when a particular organization is dominant in a particular community. An example would be the Catholic Church in large areas of Boston, or even in Boston as a whole. Query, is it state action when a Catholic in South Boston follows the custom of his community and goes to church on Sunday?

The real meaning of the Solicitor General's theory, I believe, is totally inconsistent with the principles underlying American democracy, and probably any democracy. The Solicitor General's position inverts the relationship between the government and the individual. Locke states that government has only the powers given to it by the people. Consequently, all actions which are not clearly within the power of the government are within the sole control of the individual. Obviously, individual decisions cannot be considered as those of the government merely because the decisions are consistent with the custom of the community. On the other hand, the Solicitor General's theory would mean that the realm of government swallows up nearly everything. The custom theory goes well beyond saying that the government has almost unlimited powers over all aspects of life; it says that, even when the government does not formally act and the individual seems to be acting totally independently, his acts are actually those of the state.

It might be said that I am arguing about labels, that the Solicitor General is not proposing a theory to draw a line between the power of the state and the power of the individual but is providing a label to be placed on particular kinds of actions. In short, it might be said that the Solicitor General is merely labelling private action according to custom as that of the state, not saying (except as to racial discrimination) whether the state can regulate such action. But a political theory cannot be kept in such sterile receptacles. The effect of the Solicitor General's argument--indeed, the heart of his argument--is to call the action of the state what has always been considered the independent choice of the individual. This concept, if adopted by the highest court of the land in interpreting the Constitution itself, will ultimately affect our entire approach to government in this country. I therefore believe that the custom theory is extremely dangerous to our basic concepts of freedom. It seems to me anomalous to argue such a theory, which is inherently opposed to freedom for everyone, in the name of freedom for Negroes.

E. I have argued at great length that the custom theory cannot in good conscience be presented or supported by the government. I have contended that it is totally impractical because it makes a different rule for the North and South, it is logically unsound, it is totally unsupported by history, judicial decisions, or commentators, and it is, in basic political theory, dangerous to American freedom. I do not think that I need state again at any length the great responsibility of the United States in this case to make only reasonable arguments. It is sufficient merely to say that the government has an obligation not to attempt to corrupt the law, even for so important a cause as this one.

It has been suggested, however, that the custom theory might well be adopted by the Supreme Court. I believe, on the contrary, that the chances are extremely slight--that the Court, at least if the issue is fully argued and explored, will think the custom theory is completely untenable. But, in any event, I strenuously object, in the suggestion that the role of the executive branch in general, and of the Solicitor General in particular, is limited to predicting what the Supreme Court will do. Throughout our history, presidents have rightly insisted that the executive branch has the same responsibility as the Supreme Court to interpret and uphold the Constitution. This means that regardless how the particular members of the Court are likely to vote (and the Court has made more than one mistake in the past), the Solicitor General must decide whether the Fourteenth Amendment should properly be interpreted on the basis of the custom theory. The answer to this question is plainly, I believe, that it should not be so interpreted.

In our original discussion of the sit-in cases, it was assumed that narrow grounds covered only five of the seven cases and that the custom theory would cover an additional case (the North Carolina case). Nevertheless, I thought (and still do) that the custom theory was so untenable that it could not be advanced, no matter how many cases depended on it. The Solicitor General, however, suggested that, if I objected to the custom theory, I must suggest another argument which would cover the North Carolina case. This, I submit, is unnecessary. It is just possible, and in my view the fact, that the sit-ins in the North Carolina case were legally wrong. I bow to no one in my dedication to Negro rights, but this does not mean that the Fourteenth Amendment protects every method used by Negroes to obtain what is undoubtedly their moral rights.

In any event, it has subsequently been discovered that the North Carolina case may come within the comparatively narrow argument in Point I of the Solicitor General's memorandum. 18/ If this is so, the custom theory is no longer necessary in any of the seven cases to be argued in order to support the sit-ins. At the least, it would seem that our narrow argument in the North Carolina case will be as strong as any argument applying the custom theory to that case, even if we assume that the Court will adopt the custom theory in general. For North Carolina has only two or so general segregation laws and does not have a really strong custom of segregation in public places.

18/ The North Carolina case does fall within Point I if the Court can take judicial notice of a municipal ordinance requiring segregation in restaurants. There is, however, considerable doubt whether the Supreme Court can take judicial notice of the ordinance. See the Memorandum of Mr. Berg of the Office of Legal Counsel.

This is perhaps most convincingly demonstrated by the fact that most lunch counters in the major cities of North Carolina were desegregated at about the time of the incidents involved in the North Carolina case. In Durham, where the case arose, the lunch counters were desegregated only a few months later.

It has been suggested that, even if we have a reasonable narrow ground in the North Carolina case, the custom theory can and should be argued as an alternative ground for reversal in the Louisiana and North Carolina cases. As I have indicated above, I believe, as does the Solicitor General, that there are several strong narrow grounds for reversal in the Louisiana case. Not only can the Louisiana case be decided on narrow grounds, but it is almost a complete certainty that if the case is decided for the sit-ins at all it will be on a narrow ground. Similarly, if there is a reasonable narrow ground for reversal in the North Carolina case, there is little necessity for arguing the custom theory in that case. It is very unlikely that the Supreme Court will reach out for a theory as broad as the Solicitor General's in cases which offer so much narrower grounds.

The only real reasons for suggesting the custom theory in the North Carolina and Louisiana cases are (1) to get the Court accustomed to the argument so that it will be more friendly to it in the future; (2) to see the reaction of the Court in order to decide whether to argue this theory in future sit-in cases; and (3) to commit the Department of Justice in future sit-in cases.

As to the first reason, the persuasive power of sheer repetition seems to be very slight. This is especially true if a theory's weaknesses become more apparent the more it is analyzed. I therefore believe that greater exposure to the custom theory will only reduce its very slight chances of being adopted.

The last two justifications for making the custom argument are, of course, contradictory--if we are making the argument as a test, we surely do not want to bind ourselves until we see the result. In any event, it is not very likely that we will be able to ascertain the views of any Justices concerning the theory by including it in our brief and oral argument. Little, if any, information was gained from making the broad argument in the Boynton case concerning that theory. Here, there is even less likelihood that we will gain much information since the Solicitor General will surely not be able to devote much of his oral argument (if he makes one) to one of three or so alternative grounds in one of six or seven cases. 19/

19/ It will, of course, help little to discover the views of those Justices whose views can be ascertained fairly accurately even now.

As to the last justification for arguing the custom theory at this time, I submit that it is entirely improper to attempt to commit the government, even in a weak moral sense, to a position which has meaning only in the future. The idea that we know more than future government officials is the most extreme sort of pride. If the broad contention in Boynton is viewed as an attempt to commit the government in future cases (though I doubt that this was the purpose), it failed. On the other hand, that argument has proved an embarrassment since the N.A.A.C.P., and perhaps even some Justices, have wondered why we are not continuing to argue that position.

The fact of the matter is that the government, like the Supreme Court, gains from avoiding having to take broad constitutional positions unless it absolutely must. It is far better for the government to put off the day when a decision has to be made for numerous reasons. Among the most important is that a decision may never have to be made or, if it must be made, subsequent circumstances may suggest a different result. The past decision, while not absolutely binding, is often an embarrassment in taking a new position.

In the Garner case last year, the government explicitly declined to take a broad position in its brief on the ground that there were narrow grounds requiring reversal and therefore any broad grounds should not be reached. The same situation is present here if Montgomery County can be persuaded to drop the Maryland case (see below). Even if the Maryland case remains, a substantially identical situation to that in Garner exists since the custom theory does not apply to the Maryland case in any event. Nevertheless, it is being proposed, in complete contradiction of our position in Garner, to reach out and make arguments which are totally unnecessary. This is particularly hard to understand since the broad argument we propose to make is irrelevant to at least four of the six cases which will probably be argued.

In short, I cannot understand why we are repudiating the well thought out position which we took last year to avoid making broad constitutional arguments until absolutely necessary. It seems to me that this consideration should preclude advancing the custom theory even if it were sound. There is all the more reason not to argue that novel theory when numerous people who have studied this field thoroughly believe, as I do, that the custom theory is, to put it mildly, untenable.

4. My conclusion is that the government, if it appears in these cases, should definitely not advance the custom theory or any modification of it which has yet been suggested. This is, of course, the really important issue covered by this memorandum. The other

questions concerning whether we file a brief, and what position we should take if we do, are comparatively unimportant if the custom theory is not argued.

If the Maryland case is not dropped, it would be embarrassing to take no position on it in the brief. If the Solicitor General appeared to argue the case orally, he would be forced to state, or at least suggest, that the sit-ins were wrong in that case. Consequently, in these circumstances it might be better for the government not to appear at all. 20/ A brief, however, would have the same excellent purpose as our brief in Garner. It would help the Court to decide the cases for the sit-ins on narrow grounds by concentrating on these arguments, by making them clearly (instead of mixing them with the broad arguments as the N.A.A.C.P. is likely to do), and by placing the considerable prestige of the Solicitor General behind the reasonableness of deciding all six cases for the sit-ins on narrow grounds. On balance, I think that the value of a brief would slightly outweigh the disadvantages. On the other hand, if the Maryland case is dropped, there seems no real reason for not filing a brief. If our decision to file a brief in the Garner case was correct, a similar decision would be correct here.

While I do not feel strongly about it, I do not think that the Solicitor General should appear on oral argument even if the Maryland case is dropped. His ability as an advocate and the additional prestige of his office would undoubtedly be of considerable help in persuading the Court as to the correctness of the narrow grounds. But, in my opinion, this gain is overbalanced by the fact that he will almost certainly be called upon by some Justices to comment on the N.A.A.C.P.'s broad arguments. I do not think that we should be taking a position on those arguments at this time, weak as I believe those arguments are. On oral argument, however, it is extremely difficult to avoid indicating a position in the face of insistent questioning.

Finally, as I have indicated before, I think that we should make every effort to have the Maryland authorities Petite this case--i.e., ask the Supreme Court to remand the case to the Maryland courts where the prosecutor can ask for dismissal of the indictment. This will be of great importance whether or not we appear in these cases. If we appear, the dropping of the Maryland case will allow us to avoid stating, or suggesting by silence in our brief, the weakness of the sit-ins' position in that case and on the broad grounds generally.

20/ I see no reason why we must appear in these cases. While some members of the Court--those prepared to vote for the sit-ins--would doubtless like us to appear in the expectation that we will favor their position, if, as I believe, there are important reasons for our not entering this case, I think we should have the courage to make the decision as to the government's interest by ourselves.

Furthermore, if the Solicitor General argues orally, the Maryland case allows the Court to press far more insistently for our views on the broad issues. In the other cases, the Solicitor General can at least say that he need not reach the broad issues since the narrow arguments are themselves ample grounds for reversal. But he can be easily made to look ridiculous if he refuses to take any position at all on one of the seven cases actually being argued.

Whether or not we appear in these cases, the dropping of the Maryland case will be valuable to the Court and the sit-ins. If, as I think is likely, a majority of the Court will not accept the broad sit-in arguments, the Court would probably like to decide as many cases for the sit-ins as possible on narrow grounds and decide as few against them. Dismissal of the Maryland case would leave one less case to decide probably against the sit-ins. More important, this would allow the Court to delay at least until next spring and maybe fall deciding the broad issues in the sit-in cases. Since the Court set for argument several different kinds of cases including two (Maryland and North Carolina) which it probably thought would require decision of the broad issues, the Court apparently has decided that it must face the broad issues at this time. But I still think that delay, for perhaps as much as a year, would be even more useful to the Court than the government. These are difficult issues which deeply affect the civil rights movement, basic concepts of constitutional law, and the prestige of the Court.

The sit-ins would almost surely be aided by dropping the Maryland case. Without that case the sit-ins are very likely to win six out of six cases. On the other hand, it is quite unlikely that the Maryland case would not be lost. It seems to me that it is important to the sit-ins that they win as many cases as possible before losing. Momentum is thereby built up which suggests that the sit-ins are basically right in their legal contentions. This is useful at least until the Supreme Court decides a case against them and probably to a lesser extent even thereafter.

I would think that we would have a good chance to have the case dropped. Since Montgomery County now has a public accommodation statute guaranteeing Negroes equal access to most public places and since Glen Echo is now desegregated, there is little reason for Montgomery County to continue to press these cases. I therefore think that a telephone call from the Attorney General, the Solicitor General, or Mr. Marshall would probably convince the proper Maryland authorities to agree to dismissal of the case.

Bruce J. Terris

Office of the Solicitor General
Washington, D. C.

August 3, 1962

MEMORANDUM TO ASSISTANT ATTORNEY GENERAL MARSHALL

Before leaving for San Francisco I want to add a few words of caution about the "sit-in" cases.

The comments of my staff, both those who have read the outline and those who have heard discussions of the basic theory, indicate (1) that they find grave deficiencies both in the theory itself when carried to the point beginning with the discussion of the North Carolina case and (2) that it is very hard to make the facts of the North Carolina case square with the general theories, even if the latter are sound.

I also have some indication that others don't think much of this approach, but figure that anything which will commit the government to supporting the "sit-ins" is better than opposition or nothing at all.

We should be very careful not to get committed to a theory which we think it would be bad constitutional law for the Supreme Court to adopt. If the propositions that we might present in support of the petitioners are meritorious enough to fall within the zone where it is 50-50 or 60-40 whether they should be adopted, it would seem proper to submit them. If they are outside that range, we should not. Whether they are within the range or outside it is still a very debatable question as far as I am concerned.

Archibald Cox

Office of the Solicitor General
Washington, D. C.

August 1, 1962

MEMORANDUM FOR ASSISTANT ATTORNEY GENERAL MARSHALL

Re: 1962 "Sit-in" Cases

I attach a very tentative outline to show the direction of my thinking in the current "sit-in" cases. The purpose of the outline is simply to give your staff some indication of how I think the brief should develop. It may not work out this way at all. However, I must confess that the structure and line of argument is taking shape in my mind, although I am not yet able to articulate it very clearly in precise words.

Perhaps I should make a few specific comments upon the outline to avoid misleading anyone.

1. Obviously, the detail in which I have developed various points is unbalanced. For example, I have sketched a rather complete statement of interest and introduction to the argument, whereas there are some headings which take only a few lines and are not followed by any argument where, in fact, there will have to be not only a substantial but sometimes a rather elaborate argument. I have dictated the outline only to provide guideposts. I did parts in more detail either because they were really part of the directions or else because my ideas had developed somewhat further and this seemed a good way to record them.

2. No one should attach any significance to my use of such words as "restaurant," "restaurant keeper," "restaurateur," or "public eating place." I have used the last term somewhat more carefully than the others. The choice of terms in the brief will have to be made with some care so as not to mislead anyone concerning our legal theories, but I could not think of an appropriate phrase immediately and judged it unnecessary to delay preparing

the outline while I chose a word that would cover the kind of eating places involved in these cases without necessarily extending to other kinds of restaurants. For example, it would be a mistake for anyone to infer from my use of "restaurant" or "restaurateur" that I think any of the arguments asserted with respect to lunch counters in stores which usually trade with Negroes emplies that the same arguments or doctrines are applicable to restaurants which are not part of a department or variety store and which are in no way open to Negroes. Some of the arguments may be applicable; others are not. The choice of words, I repeat, implies neither conclusion.

3. Obviously, I have not made any effort to work in the precedents which support us or those which might be cited in opposition.

4. I would like to keep in fairly close informal touch with those working on the brief. For example, if they don't mind and realize that I would not judge it as a final product, I would like to have copies of any drafts, even of single sections, for I expect to be continuing to think about the problem and perhaps to do some writing myself.

If anyone assigned to work on the case finds that there are points that can be clarified by me, of course I will be happy to try. I suspect that any vagueness or ambiguity is the result of uncertainty in my thinking.

Finally, needless to say, all this is tentative and no one should feel bound to follow it if he thinks he has a better way of developing the basic thesis we have been discussing.

Archibald Cox
Solicitor General

Attachment

NOTE

A good way to proceed might be for anyone who has time to submit a revision of all ór parts of this outline without awaiting the product of those charged with writing the first draft of the brief.

Destructive criticisms and comments posing specific problems would also be helpful.

A.C.

NOTES TENTATIVELY OUTLINING BRIEF FOR THE
UNITED STATES IN THE 1962 SIT-IN CASES

INTEREST OF THE UNITED STATES

Although other questions are presented, a fundamental constitutional issue running through these cases, albeit in several significantly distinguishable forms, is to what extent does the Fourteenth Amendment condemn as a denial of equal protection of the laws enforcement of racial segregation in places ~~of public entertainment~~ open to the general public when the owner of the establishment has adopted and requests the State to aid in carrying out the policy of racial segregation.

This pervasive problem affects the constitutional rights of many citizens. The activities resulting in petitioners' convictions were part of a widespread peaceful protest against the violations of human dignity and equality inherent in general segregation of Negroes in establishments serving the public at large. There are invoked in opposition to the petitions both the power of the States to preserve order and the freedom and responsibility of individuals to make their own decisions concerning the use of private property and the choice of associates. The problem lies on the frontiers of constitutional adjudication under the Fourteenth Amendment.

For both reasons, the United States has a substantial interest in this question.

The petitions for certiorari in each of ~~the seven~~ these cases submits other grounds for reversal. Since the primary interest of the United States is in the pervasive question, and the parties are competently represented by counsel, it will serve the public interest and, we believe, give greatest assistance to the Court to confine the brief on behalf of the United States to the analysis of that fundamental question. JA

QUESTIONS PRESENTED

1. When a municipal ordinance requires the owners of establishments serving food to the public to segregate according to race persons to whom food is served, does a judgment entered by a State court effectuating such racial segregation involve a denial of the equal protection of the laws in violation of the Fourteenth Amendment?

2. Where the State promotes a policy of racial segregation in public eating places through the action of police and other municipal officials, supported by statutory discrimination in related areas, does a judgment entered by a State court effectuating such racial segregation involve

a denial of the equal protection of the laws in violation of the Fourteenth Amendment?

3. Whether a judgment of a State court effectuating a community-wide custom of imposing racial segregation in the service of food, in places which are otherwise open to and deal with the public without regard to race or color, involves denial of the equal protection of the laws in violation of the Fourteenth Amendment.

STATUTES INVOLVED

No question of statutory interpretation is presented. The text of the State laws and municipal ordinances most directly relevant is set out in the Appendix.

STATEMENT

Herein we should summarize the facts either of all the cases or of all the cases upon which our theory has any bearing. Probably the latter course is preferable, which would mean that we leave out the case involving playing basketball in a city park. The statement of the facts should be oriented to the issue that we discuss and should make plain this limitation.

ARGUMENT

Introduction. The Fourteenth Amendment provides--

> . . . . nor shall any State . . . . deny to any person within its jurisdiction the equal protection of the laws.

In the Civil Rights Cases, 109 U.S. 3, decided shortly after the adoption of the Fourteenth Amendment, this Court held that the Amendment drew a fundamental distinction between a State's denial of equal protection of the laws and discrimination by private individuals however odious. "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the Amendment" (p. 11). During that period, it was also taken for granted that the Amendment imposes no obligation upon the State to prevent private discrimination.

For the next century these basic postulates have been consistently applied in the course of constitutional adjudication. For a State which makes it a crime for Negroes to eat in a public restaurant with whites to prosecute persons of both races who break bread together would violate the constitutional interdiction. Similarly, if a State imposed upon restaurants the common-law innkeeper's

duty to serve the public, it would be a denial of equal protection of the law to refuse Negroes a remedy against a restaurant which served only white citizens. But if a private landowner should invite all his neighbors to use his swimming pool at will and then request one to leave because of his race or national origin, the discrimination would be private and not unconstitutional. Furthermore, since in a civilized community where legal remedies have been substituted for force, private choice depends upon the support of sovereign sanctions, there would be no denial of equal protection if the State made its police and legal remedies available to the owner of the swimming pool against any person who came or remained upon his property over his objection. In such a case, the law would be color-blind and it could not be fairly said, we think, that the State had denied anyone the equal protection of its laws.

The latter principle is invoked in support of the judgments of conviction in this group of cases. We agree, for reasons indicated at more length below, that in the absence of other grounds for holding the State responsible the foregoing principle may be applicable to uninvited entrants upon business property, where the business is

neither subject to a legal duty to serve the public as in the case of inns and common carriers in common law nor owned and managed by one exercising sovereign functions. In our view, however, the principle is not uniformly applicable to the present cases. ~~We may lay to one side~~ immediately _____ v. _____ for the premises ~~were city property operated for public recreation~~. In the ~~South Carolina and Alabama~~ Gober and Peterson cases, municipal ordinances required racial segregation in public eating places. In the ~~Louisiana~~ Lombard case, there was no such ordinance but the petitioners were denied service because of a community-wide custom of maintaining racial segregation in public eating places; the custom was promoted by the police and municipal officials and supported by statutory discrimination in related areas. ~~In the North Carolina case~~, the owner of the premises in which petitioners were convicted of trespassing invited the public into ~~his~~ their stores without regard to race or color and accepted all persons as customers, save that ~~he~~ they yielded unwillingly to a custom imposed by the entire community and enforced racial segregation while serving food. The representatives of the owners testified that ~~his~~ their policy did not represent ~~his~~ their own wishes. The community custom was closely related to segregation enforced by the State.

Manifestly, there are differences in the degree of State responsibility in each of these cases which might lead to a difference in the application of the Fourteenth Amendment, but while recognizing the possible differences we submit that for the State to give legal effect to the maintenance of racial segregation in public eating places, under such circumstances, involves its denying Negroes equal protection of the laws. Under such circumstances the State law is not color-blind; the decision to exclude petitioners was not private and individual in any true sense. JB

I

WHERE A STATE LAW OR MUNICIPAL ORDINANCE REQUIRES THE OWNERS OF ESTABLISHMENTS SERVING FOOD TO THE PUBLIC TO MAINTAIN SEGREGATION OF THEIR PATRONS, ANY JUDGMENT ENTERED IN THE STATE'S COURTS EFFECTUATING SUCH SEGREGATION INVOLVES DENIAL OF EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT.

Immediately under this heading attention should be called to the municipal ordinances in the South Carolina and Alabama cases. They should be set out in connection with any relevant facts, especially any material bearing upon the owner's policy of segregation.

A. A State law or municipal ordinance which requires racial segregation in establishments where food is served to the public violates the Fourteenth Amendment.

The development of this argument is obvious and can be very brief indeed.

B. The State is not insulated from responsibility for the denial of equal protection of the law by the decision of the managers of an establishment to practice the kind of racial segregation required by State law.

1. It is too clear for argument that if a State enacts a law requiring segregation and the owner of an establishment requests Negroes to leave a lunch counter reserved for whites because, and only because, the State law requires it to maintain segregation, the prosecution of the Negroes for criminal trespass for refusing to leave would be an implementation of the discriminatory State statute and would therefore be the result of denial of equal protection of the laws. The relationship between the discriminatory statute and the prosecution is not broken by the participation of a private person acting pursuant to the State's command.

2. The case is no different when the record is silent as to whether the restaurant-owner acted only because of the discriminatory law. Under ordinary circumstances, neither the owner nor anyone else could truly say

how he would have acted in the absence of the statute. Even if he testified that he had never heard of the statute, his course of conduct would be shaped by the practices of those who had. There would still be a proximate relationship between the discriminatory statute and the prosecution for criminal trespass.

3. Nor could the State escape responsibility by calling the restaurant-owner to testify that his personal prejudice against Negroes was so strong or his customers' demand for segregation was so urgent that he would have enforced segregation even in the absence of the statute. The trustworthiness of such testimony would be highly uncertain. The owner himself could never tell how he would have acted if he and all others who catered to the public had been left free each to make his own private decision as to whom he would select as patrons and how he would seek them. It does not lie in the mouth of the State to assert that the laws which it enacts and enforces have had no affect upon the conduct of citizens who are complying therewith. To speculate about the independent decision of some restaurateur who was doing business under other than existing conditions would be to enter the realm of fancy.

4. None of the foregoing situations presents a case in which the State law is color-blind and merely safeguards a free private decision by the owner of the establishment concerning the conduct of his business or the use of his property. In each instance, the State law, through the segregation ordinance, put its finger on the scale by commanding a decision in favor of segregation. A judicial decree implementing a private decision made in accordance with the unconstitutional command must, therefore, be set aside as infected by the State's denial of equal protection of the laws.

C. <u>To apply the Fourteenth Amendment under these circumstances would curtail neither the power of a State to preserve public order nor the freedom of individuals to make true private decisions concerning their associations and property</u>.

1. The State action which amounts to a denial of equal protection in these circumstances does not rest simply upon the intervention of the police and the State court to remove and punish trespassers upon the private property of an owner who engaged in racial segregation. It is the State's segregation statute or ordinance which constitutes the critical denial of equality and fatally taints any other State action proximately related thereto.

2. Consequently, our contention does not deny the State power to protect private property while leaving the owners free to resort to self help. For the State to base any decision of its officials or in its courts, in public or private litigation, upon a restaurateur's decision to preserve segregation of the races while serving food, in accordance with the unconstitutional statute, would itself be invalid as an inseparable consequence of a legal system which denied equal protection of the laws. Specifically, if the owner forceably removed the Negroes and they sued for battery, the State courts could not constitutionally sustain the defense of privilege, not because the State courts cannot give effect to the discriminatory practices of a restaurateur who is entirely free to make his own decision, but because the State commanded the discrimination. Similarly, if State law afforded a remedy to white patrons who were refused service without proper justification, the State could not constitutionally deny the same remedy to a Negro who was refused service because the owner had a policy of segregation like that required b y State law.

II

WHERE THE STATE PROMOTES A POLICY OF RACIAL SEGREGATION IN PUBLIC EATING PLACES THROUGH THE EXECUTIVE ACTION OF THE POLICE AND MUNICIPAL OFFICIALS SUPPORTED BY LEGISLATIVE DISCRIMINATION IN RELATED AREAS, ANY JUDGMENT ENTERED IN THE STATE'S COURTS EFFECTUATING SUCH SEGREGATION INVOLVES DENIAL OF EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT.

The initial paragraphs directly under this heading should acknowledge that the Louisiana case is different from the South Carolina and Alabama cases because the landowner's policy of racial segregation which caused him to request the petitioners to leave the lunch counter was not required by a statute or municipal ordinance. But it is plain (the brief would continue) that the segregation in the Louisiana case was not simply the result of an exclusively private decision concerning the use of private property in the true sense of these words. Officials of the State of Louisiana were actively engaged in promoting the continuance of a custom stigmatizing Negroes as an inferior race. Then go on to develop, as forcefully as possible, three aspects of the case: (a) the extent of the activity by State and municipal officials and the local police; (b) the legislative action of Louisiana in related fields; and (c) the customary segregation of the races in eating places in Louisiana.

These circumstances, we would submit, are the equivalent for constitutional purposes of the municipal ordinances discussed under Point 1; and the conviction of the petitioners in the Louisiana case should therefore be reversed as stemming from a denial of equal protection of the law.

A. Discrimination resulting from executive action by municipal officers or the official action of the police constitutes, no less than discrimination under statute or ordinance, a denial of equal protection of the law.

The argument to be made under this heading would seem self-evident. You will note that it parallels the initial subheading and argument under Point 1.

B. The State is not insulated from responsibility for the denial of equal protection of the law by the decision of the managers of the establishment to practice the custom of racial segregation.

The argument here would closely parallel the ideas expressed under heading B in Point 1 but would not, I think, involve the same detailed breakdown into three kinds of cases.

C. To apply the Fourteenth Amendment under these circumstances would curtail neither the power of a State to preserve proper order nor the freedom of individuals to make true decisions concerning their associations and property.

The arguments would be much as in Point 1. I envisage a fairly sketchy treatment. Indeed, the real purpose of subheading C under both Points I and II is to set the stage for the very elaborate development of these ideas when we come to the North Carolina case. My desire is to get the Justices' minds running in this channel, even though I recognize that there is little need to argue the proposition under the first two headings.

III

A JUDGMENT OF A STATE COURT EFFECTUATING A COMMUNITY-WIDE CUSTOM OF IMPOSING RACIAL SEGREGATION IN THE PUBLIC SERVICE OF FOOD, IN AN ESTABLISHMENT WHICH OTHERWISE DEALS WITH THE PUBLIC WITHOUT REGARD TO RACE OR COLOR, INVOLVES A DENIAL OF EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT.

In _____ v. _____ the Supreme Court of North Carolina reasoned that since the law merely supported the decision of the owner of an establishment concerning the use of his property, regardless of what that decision might

be, the State had not denied petitioners equal protection of the laws by prosecuting them for their trespass. In our view, even though the principle invoked may be sound in the abstract, the court's analysis is inaccurate because it fails to take account of three factors having critical importance because they both show that the owner's decision not to serve food to Negroes was not a truly free individual decision concerning the use of the premises and also connect the State to the policy of racial discrimination as well as the prosecution and conviction for trespass.

1. Both the owner and manager of the Kress store consented to Negroes entering the premises and sought them as customers. The only restriction was the refusal to allow Negroes and white persons to break bread together. We submit that once Negroes have been invited into a store and accepted as customers generally, adherence to the custom of segregation in serving food is not the same, in any true sense, as an ordinary landowner's decision whether to grant or withhold consent to enter his premises as a social guest or business visitor. Requiring racial segregation in the service of food is part of a system of racial discrimination which intentionally stigmatizes Negroes as socially inferior. Therefore, when a store invites Negroes to patronize all its other

departments except the lunch counter, its action, viewed realistically, is to join in the imposition of a badge of supposed inferiority upon some who are licensed to enter. We do not suggest that the State is constitutionally responsible for private conduct which imposes a social stigma although it would not be responsible for the injustice done by some men to others in granting or withholding licenses to enter real estate. The true character of the department store's action must be kept clearly in mind, however, in determining the origin of the discrimination and whether the degree of State involvement is sufficient, when taken in conjunction with the prosecution and conviction, to deny equal protection of the laws. Furthermore, the true character of the discrimination demonstrates that there is no real substance to the argument that the case involves the constitutional rights of the owners of private property. Cf. Marshall v. Alabama, _____U.S._____.

2. The discrimination against petitioners in the Kress Department Store was imposed pursuant to a custom adopted and promoted throughout the entire community. This is important for two reasons. First, it makes it plain that Kress' decision not to serve Negroes was not simply that of

an individual or private business corporation. The manager testified that he did not apply the rule because he wanted to discriminate. The natural inference to be drawn from this testimony is confirmed by the fact (a) that Kress is a national chain which does not discriminate in other areas and (b) that even this Kress store sought Negro patrons in other departments. Second, discrimination by individuals or single business firms, acting alone and giving effect to their private prejudices and business judgments, raises entirely different problems, and has entirely different consequences, than a community-wide custom. Few people would think that an issue of public moment was involved if seven of the ten leading department stores in a community served all customers at their lunch counters while the tenth enforced segregation. Under those circumstances both the stores and the customers, Negroes and non-Negroes alike, would have an opportunity to act according to their preferences and prejudices and the consequences would be recognized as the result of personal decisions. Something more is involved when the whole community acts.

(We will have to do the best we can in pointing out the extent of the custom. I suspect that we have a record

made without adequate attention to the line of argument that we are now trying to present. We should keep our minds open to the possibility that we might have to suggest a remand of more evidence upon this question.)

3. Although the community-wide custom which led to petitioners being denied food in the Kress Department Store stems from many sources, one major source is the State legislation and municipal ordinances which formerly expressly required racial segregation in public places including eating establishments. (This should be built up for all it is worth.) Even though the statutory and municipal law has now been changed, the custom is still supported by related statutes requiring segregation in public places. (So should this.)

Under these circumstances the community-wide custom should be given the same significance for the purposes of constitutional adjudication as the municipal ordinances in the South Carolina and Alabama cases in the action of the city officials and policy in promoting segregation in the service of food in the Louisiana case. See opinion of Douglas, J. in Garner v. Louisiana. The State cannot fairly say that the decision to segregate was the personal choice

of the owners of the premises and under our analysis a prosecution for criminal trespass involves a denial of equal protection of the laws wherever the State, and not the private owner alone, may fairly be said to carry a share of the responsibility for the racial segregation. Whether the State is sufficiently implicated to be responsible cannot be reduced to a simple formula. See Burton v. Wilmington Parking Authority, ___U.S.___. In appraising the State's responsibility the fact that the stigma is imposed by the whole community does not become irrelevant merely because the community no longer formally embodies the community-wide custom, as applied to restaurants, in legislation adopted in the community's organized capacity, although the same custom, broadly speaking, is embodied in other laws. The arrest and conviction of the North Carolina petitioners, taken in conjunction with the community-wide custom supported by State legislation in related areas therefore amounts to a denial of the equal protection of the laws.

Our position is supported by Shelly v. Kraemer. We do not rely merely upon a mechanical application of the case that would say that there is State action for the purposes of the Fourteenth Amendment whenever a decision of the State's courts is drawn into question and then goes on to determine

by a process of balancing whether there was unconstitutional discrimination. Cf. Henkin v. University of Pennsylvania Law Review. We assume, with a majority of the commentators, that the real vice in Shelly v. Kraemer was that the State, far from simply giving effect to current private decisions, was interfering with the wish of the owner of real estate to sell it to a prospective purchaser willing to buy. For a State to enforce restrictive racial covenants which, it is well known, usually cover large blocks of land and are often written 10, 20 or 50 years earlier by persons who have left the neighborhood, is in substance to write a public zoning ordinance requiring racial discrimination; and of course such an ordinance would be manifestly unconstitutional. Similarly, a community-wide custom of requiring white and Negro customers to eat in separate places, when backed by the police and prosecutions for criminal trespass, is the practical equivalent of a segregation ordinance.

Nor is our analysis subject to the criticisms leveled at the more mechanical reading of Shelly v. Kraemer--that to hold that a judicial decree giving effect to unreasonable private discrimination violates the Fourteenth Amendment even though the State has no other share in the discrimination,

puts a premium upon self-help, and promotes disorder, by denying the States power to give the landowner a legal remedy for an acknowledged individual property right. As pointed out above, where a State statute requires property-owners to maintain segregation in the service of food in public places, any judicial action giving any effect, affirmative or defensive, to a landowner's decision to practice that kind of discrimination involves a denial of equal protection of the laws. See p. ___ above. A land-owner's decision pursuant to a community-wide custom, supported as here by a State policy of encouraging public segregation stands in no better posture; any judicial action giving effect to it would involve denial of equal protection of the laws. This view is supported by the dissenting opinions in Black v. Cutter Laboratories, _____ v. _____ and by the votes of four Justices in the Sioux City Cemetery case, but our position is significantly narrower for our con-clusion that there is State action in the North Carolina case rests not merely upon a court decision giving effect to private racial discrimination or to a private employer's interference with freedom of association, but upon the municipal ordinance, executive action or community-wide

custom nurtured by related governmental action from which the private discrimination stemmed.

There is nothing in our position inconsistent with the Civil Rights Cases, 109 U.S. 3. . . . (After making the distinction we should go on to deal as best we can with the meaning of "custom" in the post-Civil War period. Apparently it is not very helpful to our case. Perhaps a long footnote would be sufficient if we described all the historical evidence.)

Indeed, the analysis we suggest would not interfere with but, on the contrary, encourage individual freedom of decision with its concomitant personal responsibility. . . . (The argument would repeat some of what was said above about Kress' bowing to community pressure and then go on to show how invalidating decisions enforcing a community-wide practice or segregation in the case of premises open to Negroes without discrimination except for the serving of food would really increase the opportunities for varieties of individual choice. This would seem to be a critical part of the brief.)

Similarly, the case does not involve in any true sense the constitutional right of a owner of private property to decide whom he will receive as business visitors or social

guests. . . . (I think it worth repeating this point in somewhat different words although it would be made much earlier in this part of the brief.)

CONCLUSION

Where the State and not the private owner alone is fairly responsible for a practice of racial segregation enforced by the owner in premises otherwise open to the general public, any action by State authorities, including the courts, which gives effect to the policy of segregation involves a denial of the equal protection of the laws. The municipal ordinance in _____ v. _____ makes it plain that the decision to deny petitioners service because they were Negroes could not be entirely private. The arrest and conviction of petitioners, taken in conjunction with the discriminatory ordinance, therefore constituted a State denial of equal protection of the laws.

Our rationale seemly leads to the conclusion that _____ v. _____ should also be reversed. The Birmingham ordinance is indistinguishable from the South Carolina law. Assuming that the petitioners in this case were encouraging only peaceful demonstrations in places subject to the ordinance, they were not promoting violations of any

criminal or civil law. (We leave debate upon the validity of the assumption to the parties' briefs.)

The Louisiana case is harder because there was no ordinance, but we think it fairly plain that the State cannot disclaim responsibility for the discrimination where the Mayor and police promoted segregation in public announcements and activities applicable to all establishments without regard to the individual wishes of the owners, a policy obviously supported by related legislation.

The issue in _____ v. _____ is much closer. In our view, however, while a community-wide custom is not official government action like a statute or ordinance, or even the activities of State or municipal officials, nevertheless it should be given the same significance for constitutional purposes when taken in conjunction with the action of the State in supporting the custom by criminal prosecutions. (Obviously, this last sentence doesn't quite express the thought.) Accordingly, we submit that the judgment in _____ v. _____ should be reversed.

Our analysis would not lead, by itself, to reversal in _____ v. _____ (the Glen Echo case). Apparently, Negroes were not invited into the amusement park as customers.

We know of no community-wide custom in the Maryland case comparable to the North Carolina practice of segregation in public restaurants and luncheon counters; indeed, if judicial notice is available, common knowledge suggests that there is widespread variation in the area. We have not considered what other grounds may be available for reversal.

Respectfully submitted,

STANDARD FORM NO. 64

Office Memorandum • UNITED STATES GOVERNMENT

TO : Harold H. Greene
Chief, Appeals and
Research Section
Civil Rights Division

DATE: July 23, 1962

CAR:mcs

FROM : Charles A. Reich

SUBJECT: Sit-ins

I. The Fourteenth Amendment forbids a state to discriminate or to assist discrimination.

II. Nothing in the Fourteenth Amendment, however, deprives states of the power to assist in the maintenance of other social values such as the rights of private property.

III. Every case of discrimination by a private property owner involves an act which promotes both the objective of discrimination -- pure and simple -- and other values of private property which are the states' legitimate concern.

IV. Whether a state may assist discrimination by a private property owner, depends, therefore, upon whether the owner's act is primarily an act which promotes discrimination and no other property value or whether it is an act that promotes other values as well as discrimination.

V. The Supreme Court, therefore, must examine each state-assisted private act of discrimination to determine whether it carries with it the exercise of other substantial rights.

VI. For example, a home owner may refuse to invite a Negro to dinner solely because of a desire to discriminate against Negroes but the state may assist in this act because his act is inseparable from the exercise of dominion of a property owner.

VII. In the Avent case the following facts are of controlling importance:

(a) the owner has dedicated his property to the operation of a quasi-public institution (Marsh v. Alabama).

(b) the owner invites into his store all members of the public without discrimination.

(c) the owner discriminates among the customers within his store who seek to use lunch counter facilities not by his own choice but because of the dictates of the community.

It, therefore, appears that the owner's act of discrimination carries with it virtually none of the private property owner's exercise of domain. It is almost completely divorced from property rights and is virtually a "pure" act of discrimination. The court is left free to preserve the state's power to assist owners who refuse initial admission.

VIII. In any case where the court finds a state assisting a private act which is nothing more than discrimination the court must hold this to be a violation of the Fourteenth Amendment. It is thus the fact that private property rights are so completely attenuated in the Avent case that compels the conclusion that the state is doing no more than assisting discrimination.

IX. The Supreme Court is not being asked to draft a public accommodations statute. Its duty is to prevent states from assisting discrimination and the inquiry suggested is unavoidably necessary in order to determine the nature of the act which the state is assisting.

X. By "state assistance" is meant an affirmative act of the state, such as police intervention.

XI. In the case of self help, a state would "assist" discrimination if it denied a Negro the benefit of laws available to others similarly situated.

To: M. Marshall
From: Charles Reich

Re: SIT INS
Theory

CC To
H Greene

I. The Fourteenth Amendment forbids a state to discriminate or to assist discrimination.

II. Nothing in the Fourteenth Amendment, however, deprives states of the power to assist in the maintenance of other social values such as the rights of private property.

III. Every case of discrimination by a private property owner involves an act which promotes both the objective of discrimination -- pure and simple -- and other values of private property which are the states' legitimate concern.

IV. Whether a state may assist discrimination by a private property owner, therefore, depends upon whether the owner's act is primarily an act which promotes discrimination and no other property value or whether it is an act that promotes other values as well as discrimination.

V. The Supreme Court, therefore, must examine each state-assisted private act of discrimination to determine whether it carries with it the exercise of other substantial rights.

VI. For example, a home owner may refuse to invite a Negro to dinner solely because of a desire to discriminate against Negroes but the state may assist in this act because his act is inseparable from the exercise of ~~dominion~~ dominion of a property owner.

VII. In the Avent case the following facts are of controlling importance:

(a) the owner has dedicated his property to the operation of a quasi-public institution (Marsh. Alabama)

(b) the owner invites into his store all members of the public without discrimination.

(c) the owner discriminates among the customers within his store who seek to use lunch counter facilities not by his own choice but because of the dictates of the community. It, therefore, appears that the owner's act of discrimination carries with it virtually none of the private property owner's exercise of domain. It is almost completely divorced from property rights and is virtually a "pure" act of discrimination. The court is left free to preserve the state's power to assist owners who refuse initial admission.

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Burke Marshall
Assistant Attorney General
Civil Rights Division

July 25, 1962

Harold H. Greene
Chief, Appeals and
Research Section

HHG:bco

Sit-ins

As I understand it, the "community custom" theory relies essentially upon the existence of community pressures and customs (created, at least in part, by long-standing state legislation) to provide both state action and state discrimination. This theory distinguishes between places where there is a compelling community custom and places where there is no such custom, on a free choice rationale, and it uses a similar rationale to distinguish between large department stores open to the public in most of their departments and small individually-operated business establishments. What this means in practical terms is that there would be a conclusive or a rebuttable presumption that the large chain store located in a community with a long history of legally compelled and still existing racial segregation is acting pursuant to community pressure (because any other explanation would be irrational). No such presumption would exist with respect to a business establishment in an area where there are no compelling community pressures, nor would the presumption apply to an individually-operated store in a place where there are community customs of racial segregation. 1/

The alternative theory relies upon the fact of the police arrest to supply the necessary element of state action and goes on from there to determine whether there is a denial of equal protection, that is, whether there is state discrimination. Under this approach, the factors which determine whether there is state discrimination are

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1/ The latter exception would be justified on the ground that it is not necessarily irrational for the small proprietor not to serve Negroes, and that therefore no inference of lack of free choice can be drawn.

cc: Records
Chron.
Mr. Greene(3)

essentially identical to those which determine whether there is both state action and state discrimination under the first theory. Under the "police arrest" approach, one would say that state discrimination exists in addition to state action where the state could not reasonably be said to be enforcing the mere private rights of the owner, or at least not those of his rights which can be considered worthy of protection in terms of the interests that are involved. This, in turn, would be deemed to be so when (1) there is a community custom of segregation, brought about, at least in part, by a history of restrictive legislation, and (2) the owner's act appears to be largely irrational in terms of any interest the owner might have in privacy or freedom of association (such as where segregation is practiced in a small area of a large department store generally open to the public) 2/

It is thus apparent that the same factors underlie a finding of denial of equal protection under either of the two theories. The difference between them, in this view, lies solely in the origin of the element of state action: under one approach, state action comes from community customs, under the other it comes from police action.

This proposed merger of the two theories would provide us with the advantages of both without incurring the weaknesses of either. The principal weakness inherent in the "community customs" theory is that no one can be sure at this point that community customs can really be equated with state law and hence with state action. No such difficulty exists with respect to the police arrest approach. On the other hand, it has been suggested that the police arrest theory suffers from the defect that it is an open-end proposition to be limited only by individualized and elaborate balancing and weighing in each individual case. If, however, this theory is limited ab initio as suggested above, then it avoids this difficulty. What emerges is simply another very limited variation of Shelley v. Kraemer. The Solicitor General suggested in his Princeton

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2/ Again, inquiry into this issue could either be foreclosed by a rule of law or it could be made the subject of a rebuttable presumption.

speech that Shelley v. Kraemer merely stands for the proposition that it would be a denial of equal protection (i.e., state discrimination) for the state to give effect to a restrictive covenant inserted in a deed by a person not a party to the immediate transaction. Similarly, it could be said here that, as a matter of law, it would be state discrimination for the state to give effect to an attempt to use the trespass laws for discriminatory purposes where the discrimination did not really originate with the property owner seeking to eject the Negro but with outside factors, such as community pressures, which affect the owners free choice. 3/

Accordingly, I suggest that we might argue to the Court (1) that the essential factual elements in the Avent case are the admitted existence of community customs and the fact that the establishment was open to the public in almost all of its departments; (2) that the underlying state action can be found either in the community customs or in the arrests; and (3) that the factual elements referred to under (1) indicate that the state was not merely acting but was also acting discriminatorily in violation of the equal protection clause.

3/ In other words, Shelley v. Kraemer may be said to be limited to situations where the discrimination did not originate with the immediate parties to the transaction. In Shelley, the originator was a third -- the person who first inserted the covenant in the deed. Here it could be argued that, because of the various factors mentioned above, the discrimination is not, or at least not primarily, that of the store owner. It might reasonably be contended in support of a Shelley v. Kraemer rule so limited that state action does not become state discrimination if a party to the legal transaction involved in the litigation himself originates and supports the discrimination, because for many legitimate reasons the state may enforce individual notions concerning association, privacy, etc. On the other hand, if the state acts in enforcement of private discriminatory acts which are in reality caused elsewhere, the same state disclaimer of responsibility for the discrimination need not be accepted for the state would then be protecting, not so much the rights of the indivudal directly involved but outside discriminatory influences not entitled to state protection.

STANDARD FORM NO. 64

Office Memorandum • UNITED STATES GOVERNMENT

TO : Burke Marshall
Assistant Attorney General
Civil Rights Division

DATE: July 18, 1962

FROM : Harold H. Greene
Chief, Appeals and Research Section

HHG:mcs

SUBJECT: Methods to Overcome the Self-Help Dilemma

The dispute between the store owner and the Negro customer could arise in the following legal setting:

1. Criminal trespass prosecution by the state. This is what is involved in the seven cases now before the court. Presumably under Shelley v. Kraemer such a prosecution would be illegal.

2. Civil action by the owner for trespassing either to eject the Negroes or for damages. This would seem to be very much like the criminal trespass prosecution. There is probably at least as much state action inherent in a court order to eject the Negroes from the premises as there is when a criminal prosecution is brought.

3. Civil action by the Negroes for assault and battery upon their ejectment from the premises by the owner or his agents. This possibility seems to be the most troublesome. There are several alternative methods of dealing with it.

a. It could be argued that recognition of the owner's rights in this instance would be as much state enforcement of the private discrimination as in the cases cited above and would therefore likewise be prohibited. A number of reasons can be suggested why this is so:

(1) It could be contended that, analytically, either the state is precluded from enforcing private discrimination or it is not. If it is precluded from enforcing discrimination directly by criminal or civil action, it should also be precluded from doing so in some other, less direct way.

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(2) Self help does not exist in the abstract. It exists only where it is recognized as such by the courts. Thus, to give recognition to self help in the courts in any form is to do precisely what the state presumably cannot do.

(3) The Negroes cannot be deprived of their rights either directly or by "ingenious" subterfuge. To give recognition to self help in this situation would be equivalent to permitting the state and the property owner to do indirectly what they are forbidden to do directly.

(4) The state created the owner's property right. Those rights would not exist but for the protection which the state and its laws provide. This is particularly true in the case of a corporation which has no independent existence outside of state law. The state may not create and protect the owner's property right and his incident right to self help where to do so would be doing the forbidden act of enforcing racial discrimination.

b. It could be held that the state may protect the property owner if he has to use force to eject the Negro. It is not believed that, were the Supreme Court to adopt this approach, it would be extremely harmful. In the first place, the self-help problem is not likely to arise at all. Moreover, if it does, the Negro population probably has a sufficient number of extra-legal weapons (such as economic boycott, picketing, etc.) to deal with the situation. Thus, if it be deemed that the suggestion discussed under 3(a) supra is unacceptable, we could still adopt the broad position, inasmuch as the self-help problem could, alternatively, be dealt with as described in this paragraph.

c. There is another alternative, that is, to have the state leave the parties as it finds them, Under this approach, the state would be precluded from helping either the Negroes or the store owner. This alternative is unsatisfactory because of the premium it would put on the violence and disorder.

4. Action for an injunction or for a declaratory judgment by the Negroes to open to them the restricted portion of the premises. It would be very difficult to deny that to allow the Negro to maintain such an action would not be equivalent to holding that he has a constitutional right not merely as against the state but against the owner himself. Such a holding, however, would mean that the Civil Rights Cases would have to be overruled. While a decision based on this rationale would not necessarily be broader in its practical implications than the others discussed above (since the balancing test under the equal protection laws could still be employed to restrict the application), still, it would certainly be difficult to overcome anticipated Supreme Court reluctance to overrule the Civil Rights Cases.

5. The problem of self-help arises only where the necessary state action to invoke the Fourteenth Amendment depends upon some sort of court enforcement of the private discrimination. If the necessity for court enforcement could be eliminated, the problem of self-help would likewise disappear. What this means is that if some argument could be formulated which would equate the action of the store owner, without more, with state action, the difficulties inherent in the self-help problem would be avoided.

Marsh v. Alabama and the related cases (the shopping center case and the white primary cases) indicate that private conduct may under some circumstances be equivalent to state action. It is also fairly well established, under the Civil Rights Cases

themselves and under various civil rights statutes enacted shortly after the Civil War, that custom may be the equivalent of law insofar as state action is concerned.

What this may mean in the context of the present cases is that in an area where custom compels segregation and where the property owner performs a function which, because of various incidents (such as licensing, regulation, necessity, etc.) comes close to that performed in such cases as Marsh v. Alabama, state action exists, even if there is no intervention by such organs of the state as the police or state court.

A rule formulated along these lines can, of course, be restricted within desirable limits by means of the balancing test. Its virtue is that it completely avoids the troublesome question of self-help. But the approach is obviously very far-reaching and may for that reason be undesirable.

UNITED STATES GOVERNMENT

Memorandum

DEPARTMENT OF JUSTICE

TO : Burke Marshall
Assistant Attorney General
Civil Rights Division

DATE: July 18, 1962

FROM : Harold H. Greene
Chief, Appeals and
Research Section

HHG:bco

SUBJECT: Sit-ins

This is in further reference to the sit-in problem and more particularly to the case of Avent v. North Carolina.

As you know, the Avent case raises the "broad" issues inherent in the sit-ins in their most acute form, inasmuch as of all of the cases now before the Supreme Court, it is the one least likely to be reversed on narrow grounds. The Avent case is particularly interesting from the Department's point of view because it provides a good vehicle for the expression of the narrowest possible formulation of the broad grounds.

In its brief in Avent, the Department might well argue that a decision based upon Marsh-Shelley should be limited (1) to large establishments which are generally open to the public, as distinguished from small specialty shops which may be said to cater to a particular type of clientele, and (2) to areas of the country where racial discrimination may be said to stem not so much from individual decisions as from general community climate and community pressure.

1. It obviously is a far shorter step from a company town or a shopping center to a downtown store open in all departments but one to all comers than it is from company towns or shopping centers to a small specialty shop or tearoom.

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Realistically, the functions large department or dime stores perform in the community differ considerably from those performed by other, smaller establishments. Moreover, the law may well give greater weight to the rights of privacy and freedom of association of the individual owner of a small hot dog stand who waits on customers himself (or with his family) than to similar rights asserted by a giant corporation. 1/ And it is not inconceivable that, irrespective of the ramifications of local real property law, in striking a balance under the Fourteenth Amendment the federal courts could give weight to the fact that in the large establishments an overwhelming portion of the premises is open to Negroes who are on these premises by invitation.

2. Geographic limitation of a decision is defensible on both practical and legal grounds. First, the problem arises and the need exists where all white establishments are closed to Negroes. If one restaurant in Chicago refuses to serve Negroes, there are twenty others eager for the Negro trade. Not so, obviously, in Jackson, Mississippi. Second, the refusal of the owner in Chicago to serve Negroes is obviously his own decision and therefore entitled to great consideration. The same cannot be said of a similar decision by the Jackson outlet of a national chain of dime stores if the chain does not discriminate in its non-Southern branches. The decision in that case is based more on community pressures than it is on the real, free choice of the owner, and it would not be shocking if the courts were to give him less protection on the theory that some of his property rights are really being exercised for him by the community. Third, what really is at work here is "custom" as that term is employed in several of the old civil rights statutes and in the Civil Rights Cases. 2/ Custom was deemed by those who drafted the post-Civil War statutes and by the Court which decided the Civil Rights Cases to be the equivalent of state law. These men realized that in the South, insofar as the treatment of the Negro minority was concerned, custom was law. This, unhappily, is still true. Reliance upon this factor might well enhance whatever legal arguments might be presented by the Department in the Supreme Court.

1/ Such distinctions are not uncommon in the labor field.

2/ See 109 U.S. 3, at 16, 17.

3. The Avent case involves a department store in which approximately 50 counters serve whites and Negroes without racial discrimination. Only the basement sit-down lunch counter bars Negro clientele. The manager explained that the refusal to serve the Negroes was "dependent upon the customs of the community." Whatever might be the difficulties of proof concerning community customs and pressures in other cases, the problem in Avent is simplified by the manager's testimony.

If this approach were adopted, it might be desirable for the Department to file a brief amicus curiae only in the Avent case, pointing out that in our view the convictions in the other cases can be reversed on narrow grounds adequately briefed by the petitioners. We could further state that in our view no such grounds are available in Avent and that the Court should adopt the "narrow-broad" position outlined above.

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