Solicitor-General's Report: Background

Introduction and Summary of Argument

The fundamental issue in these cases is, under what circumstances and to what extent does the Fourteenth Amendment bar State enforcement of racial segregation in privately owned and operated places of public accommodation or entertainment. Millions of Negroes are subjected to racial discrimination in private businesses open to the general public. The "sit-in" demonstrations leading to these convictions were part of a widespread peaceful protest against the practice. Petitioners claim that the involvement of the States in their arrest, prosecution and conviction is enough to violate the Equal Protection Clause. Respondents, on the other hand, invoke the freedom and responsibility of individuals to make their own decisions concerning the use of private property and the choice of associates. In a civilized community, they say, where legal remedies have supplanted private force, private choice necessarily depends upon the support of sovereign sanctions, and consequently, when the State does no more than protect the owner against all unwanted and unprivileged intrusions, there is no denial of equal protection of the law.

In the Civil Rights Cases, 109 U.S. 3, 11, the Court drew a fundamental distinction between a State's denial of equal protection of the law and a private enterprise's discriminatory conduct, 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.

We fully accept the fundamental distinction. The key to the resolution of the present conflict lies, we believe, in a full appreciation of the nature and sources, in many States, of the practice of subjecting Negroes to the stigma of segregation in places of public accommodation and entertainment. For when the true nature and sources of the practice are understood, it becomes apparent that the convictions at bar should be reversed upon grounds fully consistent with the distinction supported only by color-blind State remedies between private discrimination and State denial of equal protection of the laws.

For some purposes, an isolated refusal to permit a Negro to sit at a lunch counter open to white members of the public can be fairly described in legal concepts as a private businessman's exercise of the right to choose his

customers, or as a property-owner's exercise of the rights to choose whom he will permit on his premises or in specified areas. In these terms the practice of racial segregation in places of public accommodation seems to be no more than a series of private choices concerning the use of private property and the conduct of private business, all running in the same direction but nonetheless non-governmental. For the purposes of the Fourteenth Amendment, however, such a description is as inaccurate as it is incomplete when applied to widespread customary segregation in virtually all places of public accommodation and entertainment in States which adopted and enforced policies of segregation in order to maintain the inferior status of the former slaves.

In the first place, segregation is enforced in places of public accommodation and entertainment as a stigma of inferiority--a badge of a subjection--the cruel function of which is to brand Negroes a caste not entitled to social or political equality with other people. The bare legal concepts are no more adequate to describe the truth of segregation in this context than chemical formulas to describe a man. Hitler's pogroms were more than assault, battery and

the malicious destruction of property. Auschwitz was not merely homicide.

Here, we are dealing with the most casual and evanescent of all business relationships. Places of public accommodation serve any orderly person, always and automatically, up to their capacity, except those branded as members of an inferior race. There is none of the continuity or selectivity that enters into employment; and none of the personal contact or need for mutual trust, confidence and compatibility that characterizes the doctor-patient and lawyer-client relationships. The virtual irrelevance of the legal concepts of private property and choice of customers is vividly demonstrated by the practice of many department stores. They solicit the patronage of Negroes, invite them onto the property and into the store, make sales in all departments but then deny them the privilege of breaking bread with other men. Manifestly, it is the stigma--the brand of inferiority that is important, not the use of the premises or choice of customers.

Second, the practice of segregation as a mark of inferiority was fostered and promoted by State action in the narrowest sense of the term. State statutes and municipal

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The operation of the Fourteenth Amendment is not shut off so easily. The 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. In such cases the State is involved both in creating the

discriminatory practice and in supporting it by the criminal prosecution. It cannot say that the State's only involvement has been color-blind.

Whether an individual's discrimination against Negroes is to be regarded as a proximate consequence of the State's earlier violations of the Fourteenth Amendment presents a question of degree that can be resolved only by consideration of all the relevant circumstances. That the immediate decision to discriminate is private is inconclusive; the Amendment is violated if the State in any of its manifestations is sufficiently involved. Thus, a State may not enforce, by injunction or damages, a restrictive covenant against the sale of a parcel of real estate to non-Caucasians even though the covenant was the product of voluntary negotiations. Shelley v. Kraemer, 334 U.S. 1; Barrows v. Jackson, 346 U.S. 249. Nor may a municipal corporation serve as trustee under a charitable trust the terms of which, as executed by the private settlor, call for discrimination against Negro children. In Burton v. Wilmington Parking Authority, 365 U.S. 715, the Court held that the Equal Protection Clause was violated when a restaurant, privately owned and operated, refused to serve Negroes in the space it

rented in a municipally owned and operated parking facility. In Lombard v. Louisiana, 373 U.S. 267, even though the law left restaurant owners freedom to choose, it was enough that the Mayor and Chief of Police issued statements condemning demonstrations against the practice of racial segregation.

The central fact here is that the States commanded segregation for many years on a wide front. Between State policy and the prejudices and customs of the dominant portions of the community there was a symbiotic relation. The prejudices and customs gave rise to State action. Legislation and executive action confirmed and strengthened the prejudices, and also prevented individual variations from the solid front. State responsibility under such conditions is too clear for argument even though segregation might be the proprietor's choice in the absence of legislation. Peterson v. Greenville, 373 U.S. 244.

State responsibility should not end with the bare repeal of laws commanding segregation in places of public accommodation. Having shared in the creation of a practice depriving Negroes of the kind of equality the Fourteenth Amendment was intended to secure, the State cannot turn its

back and deny involvement through the momentum its action has generated. The law is filled with instances of liability for the consequences of negligent or wrongful acts. Until the connection between the wrong and the consequences becomes too attenuated. [Citations.] Nor can the State claim to be like an innocent bystander. Even one who without fault puts another in danger of injury has a duty to act to prevent the danger from eventuating or to minimize the damage if harm occurs. [Citations.] One who makes an innocent misrepresentation must communicate the truth to the recipient as soon as he learns that the representation was false. [Citations.] Similarly, until time and events have attenuated the connection, the State continues to bear responsibility for the conditions it has shared in creating that result in branding Negroes as an inferior caste.

~~In deciding whether the connection is too attenuated it is relevant~~ There can be little doubt even today that the practice of maintaining racial segregation as a stigma of imposed inferiority is, in many States, a consequence of the State's antecedent action.

We recognize that treating the practice as a consequence of State action for the purposes of imposing a measure of

State responsibility will, to a corresponding extent, lessen the opportunities and/or protection for private choice. Judgments concerning "legal cause" and the resulting legal responsibility inevitably involve considerations of policy. Here it is relevant to consider that we are dealing with businesses essentially similar to the public callings traditionally subject to the duty to serve all members of the public without discrimination. Whether to impose the duty is a matter for State law, and we do not mean to suggest that wherever a State has power to regulate a business so as to eliminate racial discrimination, its failure to exercise the power violates the Fourteenth Amendment. Our point is the much narrower submission that in deciding whether to hold that discrimination is the product of earlier State action, which would to some extent curtail individual freedom, it is relevant to consider that these are all businesses already subject to detailed regulation in the public interest. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." Marsh v. Alabama, 326 U.S. 501, 506.

It is also relevant, we submit, that the only private right ~~xxxxx~~ invoked in behalf of these businesses that have voluntarily dedicated their property to public use is the right to impose a stigma of inferiority. As pointed out above, the relationship between restaurant and patron involves neither the continuity nor the mutual trust, confidence and compatibility of professional relationships. The operator makes none of the judgments concerning reliability, competence and personal acceptability formed by an employer in selecting employees. And surely it cannot be seriously argued that the operator has any desire to close his property to the use of Negroes except as a means of branding them an inferior people.

There can be little doubt of the power of Congress to legislate under the Fourteenth Amendment with respect to widespread racial discrimination in places of public accommodation. The Amendment was intended to grant power to enact broad civil rights legislation in situations in which the States had denied the freedom of 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. Section 5 of Amendment XIV(a),

like the "necessary and proper" clause in Article I, ~~must~~ carries authority to enact any measure suited to remedy unconstitutional State action even though it may have wider ramifications. The controlling principle was stated by Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 421:

"The sound construction of the Constitution must allow the national legislature that discretion, with respect to which the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

While the choice of an affirmative remedy may rest with Congress, a State which has fostered the practice of racial segregation in places of public accommodation as a stigma of racial inferiority, and which thus has created a condition in which Negroes are denied the equality with other members of the public that the Fourteenth Amendment was intended to

secure, may not, without further violating the Fourteenth Amendment, lend the aid of its law enforcement agencies and courts to the preservation of that unlawful condition. Whether the Negroes would have a direct action against such an establishment to secure the services of food or admission to entertainment need not be decided; possibly there would be no affirmative relief in the absence of congressional legislation. Our contention is simply that aState that has created this unworthy custom by earlier laws may not constitutionally take steps to preserve it when invoked by public establishments without the compulsion of earlier laws. By the same token, a State would violate the Fourteenth Amendment if it gave the owners of such establishments a privilege of self-help in ejecting the members of the public against whom they desired to impose the unlawful stigma.

Invitation to all members of the public under tort law

Tort liability of establishments open to the general public has been held not to depend upon the status or purpose of the particular person injured. All members of the public are owed the same duties. See, e.g.:

1. Campbell v. Weathers, 153 Kan. 316, 111 P.2d 72

Person who enters a cigar and lunch store does not lose status as an invitee merely because he does not make purchase; the public as a class constitutes "invitees." Court said (111 P.2d at 76):

> It is common knowledge that an open door of a business place, without special invitation by advertisement or otherwise, constitutes an invitation to the public generally, to enter. Shall courts say, as a matter of law, that such guests are not invitees until they actually make a purchase? We think the mere statement of the question compels a negative answer.

2. Carlisle v. J. Weingarten, Inc., 137 Tex. 220, 152 S.W. 2d. 1073

Lower court held that retail store not liable for injury to minor since minor had not entered with intention of purchasing. Supreme Court reversed and said (152 S.W. 2d at 1075):

> We think, however, that it is too strict a construction to say that the status of such a child depends entirely on whether it entered the premises with the intention of purchasing some of defendant's merchandise. Whether it intended to make a purchase is not the essential fact to be considered in determining whether

it was an invitee or a mere licensee. The most essential factor to be considered in determining this issue is whether the premises were public or private. If one uses his premises for private purposes, he has no reason to expect visitors other than those especially invited by him; and hence is under no obligation to keep his premises in a safe condition for the protection of those who may enter thereon without his invitation. . . . On the other hand, one who maintains a merchandise establishment, or other public place, to which, by reason of the business so conducted thereon, the public is impliedly invited to enter, necessarily expects visitors at all times. He knows that strangers may enter his place of business at any time, under the belief that, as members of the public, they have an implied invitation to so enter and inspect his merchandise, even though they do not then have a present intention to make a purchase. Since he knows that strangers may so enter his premises, he owes those who may enter the duty to exercise ordinary care to see that the premises are in a reasonably safe condition for their protection. It would not be a very humanitarian doctrine to say that a merchant could thus impliedly invite the public to his store, but that he was under the duty of exercising ordinary care for the safety only of

those who had an intention of buying his merchandise; and that as to others who accompanied their friends thereon, and especially children of tender years, he could with impunity allow the existence of hidden and concealed defects that might bring about their injury, so long as it could not be said that he had wilfully injured them or was guilty of gross negligence. (Emphasis added.)

Followed in Renfro Drug Co. v. Lewis, 149 Tex. 307, 235 S.W. 2d 609 (Person injured while using the drugstore as a shortcut; store held liable).

3. See also Restatement, Torts § 330(d): ". . . One who opens a shop thereby expresses his willingness to receive not only those who come to buy but also those who come to inspect goods with no present intention of buying;" § 332(b) ". . .the fact that a building is used as a shop gives the public reason to believe that the shopkeeper desires them to enter or is willing to permit their entrance not only for the purpose of buying but also for the purpose of looking at the goods displayed therein or even for the purpose of passing through the shop."

Question whether state should be held to regulation in "chunks" where it undertakes some regulation.

We were unable to find authority directly supporting this principle as a matter of agency law or under other principles of general applicability. The doctrine of apparent authority in agency law, which comes closest, would not help too much here since the claim could not very well be made that the public was misled by the amount of state regulation into believing that with respect to segregation and discrimination, too, state action was involved. Such an argument would be circular in any event, and would get us back to the main issue.

The following cases dealing with state involvement do offer some support, however, particularly the first.

1. Public Utilities Comm. v. Pollak, 343 U.S. 451, bears upon this question. The District of Columbia Public Utilities Commission had conducted an investigation of the bus company's installation of radio receivers and amplifiers on its busses. The Commission found the practice unobjectionable, but the Court of Appeals for the District of Columbia Circuit held it unconstitutional. As described by the Supreme Court (343 U.S. at 461):

> It was held by the court below that the action of Capital Transit in installing and operating the radio receivers, coupled with the action of the Public Utilities Commission in dismissing its own investigation of the practice, sufficiently involved the Federal Government in responsibility for the radio programs to make the First and Fifth Amendments to the Constitution of the United States applicable to this radio service. These Amendments concededly apply to and restrict only the Federal Government and not private persons
> . . . .

Continuing, the Court said (id. at 462):

> We find in the reasoning of the court below a sufficiently close relation between the Federal Government and the radio service to make it necessary for us to consider those Amendments. In finding this relation we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. We do, however, recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. 1/ We rely particularly upon the fact that that agency, pursuant to protests against the radio program, ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby.

1/ At this point in the opinion the court, in footnote 8, said:

> 'When authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by government itself.' American Communications Assn. v. Douds, 339 U.S. 382, 401. Cf. Smith v. Allwright, 321 U.S. 649; and see Olcott v. The Supervisors, 16 Wall. 678, 695-696.

* * * * *

> We, therefore, find it appropriate to examine into what restriction, if any, the First and Fifth Amendments place upon the Federal Government under the facts of this case, answering that the action of Capital Transit in operating the radio service, together with the action of the Commission in permitting such operation, amounts to sufficient Federal Government action to make the First and Fifth Amendments applicable thereto (emphasis added).

2. In the footnote mentioned supra appearing in the Pollak opinion the Court, as noted, cited Olcott v. The Supervisors, 83 U.S. (16 Wall.) 678, 695-696. In that case, the Court decided that taxation to aid in the building of a privately-owned railroad was taxation for a "public purpose." At the pages cited by the Court in Pollak the Olcott Court said this:

> Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the state. Though the ownership is private the use is public. So turnpikes, bridges, ferries, and canals, although made by individuals under public grants, or by companies, are regarded as publici juris. The right to exact tolls or charge freights is granted for a service to the public. The owners may be private companies, but they are compellable to permit the public to use their works in

the manner in which such works can be used. That all persons may not put their own cars upon the road, and use their own creative power, has no bearing upon the question whether the road is a public highway. It bears only upon the mode of use, of which the legislature is the judge.

3. In Burton v. Wilmington Parking Authority, 365 U.S. 715, a public corporation leased space to a private entrepreneur in which to operate a restaurant within the public facility. The court held that the lease carried with it, by necessary implication, a requirement of non-discrimination. It might be said that the Court in effect ruled that when the public facility delegated to the private corporation the authority to operate a restaurant, and regulated that operation in other respects, it could not lawfully fail to regulate the restaurant viz a vis discrimination as well. See also Derrington v. Plummer, 240 F.2d 922 (C.A. 5); Boman v. Birmingham Transit Co., 280 F.2d 531 (C.A. 5) (segregated seating rule of common carrier authorized by State law and enforced by State).

Applicability of Shelley v. Kraemer in
a suit against vendor who becomes unwilling

The question is whether the decisions of the Supreme Court in Shelley v. Kraemer, 334 U.S. 1 and Barrows v. Jackson, 346 U.S. 249, holding that a covenantor may not either sue to enforce a racially restrictive covenant or sue to collect damages for breach of one, also prohibit an unwilling vendor from raising a racial covenant as a defense to an action by a vendee (who is of the excluded race) to enforce a contract of sale.

In a case decided shortly after Shelley, a state court had no trouble holding that under Shelley a restrictive covenant (prohibiting sale to persons of Mexican descent) may not be used as a defense to a cross-action on a trespass to try title. Clifton v. Puente, 218 S.W. 2d 272 (Tex. Civ. App.).

In another state case, involving an action by Negro lot owners in a white-only restricted area to declare null the restrictive covenants on all of the lots, the court held the Negroes' lots to be free of the covenant, thus quieting their title, and stated that "no rights, duties or obligations can be based" on racially restrictive covenants. Capitol Federal Savings & Loan Assn. v. Smith, 316 P. 2d 252 (S. Ct. Colo.).

The only Supreme Court case on this point is Rice v. Sioux City Cemetery, 245 Iowa 147, 60 N.W. 2d 110 affirmed by an equally divided court, 348 U.S. 880 (1954) and certiorari denied as improvidently granted, 349 U.S. 70 (1955). There a widow sued a cemetery for damages based on mental suffering caused by the cemetery's breach of contract in refusing to bury her husband, a Winnebago Indian, because the contract also provided that "burial privileges accrue only to members of the Caucasian race." The Supreme Court of Iowa held that Shelley v. Kraemer, supra, did not require a state court to ignore such a provision in a contract when raised as a defense and in effect to reform the contract by enforcing it without regard to the clause. The Supreme Court of the United States granted certiorari (347 U.S. 942) but split 4-4 on whether to affirm or reverse, thus affirming the Iowa Court. The next year the U. S. Supreme Court reheard the case and this time denied certiorari as

improvidently granted, on the grounds that a newly enacted Iowa statute prohibiting discrimination in cemeteries solved the problem for the future and thus robbed the case of the "special and important reasons" for granting certiorari. Thus, as far as the Supreme Court is concerned, the question remains open, it would seem.

Harvard Law Review, Vol. 2, p. 358 (1888-1889)

Article by E. Irving Smith on "Legal Aspect of the Southern Question" discusses the 13th, 14th, and 15th Amendments and states:

> The new regime gave to the Negro civil and political rights equal to those of other citizens. * * * The term "civil rights" properly includes all rights not political; but with reference to discussions of the Southern question it has a much narrower meaning. What is meant seems to be those rights which affect the social status of the Negro. Other civil rights, however fundamental, such as the right to acquire and hold property, the right to appear in court as witness or party, have occasioned little controversy.

The article goes on to discuss the Civil Rights Cases of 1883 and the consequent inability of federal law to reach social discrimination. It points out that states often prohibit such discrimination. "Common carriers, innkeepers, and proprietors of places of public amusement are under a duty to serve the whole public alike, and it is clearly within the power of a State to enforce that duty."

Cooley, Constitutional Limitations
4th Edition, (1878) p. 742

Regulation of Civil Rights and Privileges.

Congress, to give full effect to the fourteenth amendment to the federal Constitution, passed an act in 1875, which provided that all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land and water, theatres and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude. As the general power of police is in the States, and not in the federal government, the power of Congress to make so sweeping a provision may possibly be brought in question; but as the States have undoubted right to legislate for the purpose of securing impartiality in the accommodations afforded by innkeepers and common carriers, and as the proprietors of theatres and other places of public amusement are always subject to the license and regulation of the law, a corresponding enactment by the State would seem to be competent, and has been sustained as a proper regulation of police.

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T. 12/31/63
Harold H. Greene, Chief
Appeals and Research Section
Civil Rights Division

December 31, 1963

DS:RR:icb

David Rubin
Sattle Rankin

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.

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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.
>
> 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 dazzling 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 slaveholders' 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 uproots 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 8, 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 poiated out that slavery necessarily resulted in the abolitioo 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. 1423):

> "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.

Salsbury, p. 1443):

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

> 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 consequences, 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. 3/

3/ 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 on-side 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 for 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. 531), 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.
>
> * * *
>
> . . . 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 78 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):

> * * * 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. 2941). 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 agsinst 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. 2939):

> 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, <u>equality before the law</u> 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. 2939):

> 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 33. 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). 1/ He predicted a glorious future for the country if 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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1/ 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, guaranteed 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]

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[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 ever 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] shall be 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 bless" (Lobe, p. 200). Congressman McBride undertook to rebut the argument that emancipation meant enfranchisement (Lobe, 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 13, 1865, Representative Smith of Kentucky, Cox of Ohio, Woodbridge of Vermont, and Thayer of Pennsylvania debated the question of state rights (Globe, pp. 235-240). 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. 240):

> 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 //_/ 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, 483, 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.)

//_/ 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.)

8. 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." [1]

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-

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[1] 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, 317, 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 servide (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 these 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 these 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 3, 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).[44] 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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[44] 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 decalred 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. 94). 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 he 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.

1. 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 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. p. 21)

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

> "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."

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. 1/

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.

* * *

1/ 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.)

5. 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).

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. 313.)

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, 1866, 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 <u>status</u> 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 <u>status</u> 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 price less 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 not less so. We just 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, mere 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 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. 685). 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 these 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 lengthy 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.

4 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. 134); 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 debates 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 these 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, most of the States will determine that under these words the power of voting is given. * * *
>
> * * *
>
> 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 modified 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 Thomson 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 inaliemable 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 could 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. 1366-1367.) 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.)

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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 despoiled 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. 157.)

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.)

In his book "The Adoption of the Fourteenth Amendment", Flack discusses the reaction of the press to the Civil Rights Act of 1866. He states (pp. 4)

> The press, even more than members of Congress, gave a broad and liberal meaning to the bill, saying that under cover of "full and equal rights" state laws forbidding amalgamation would be set aside and that negroes could not be kept out of theaters, churches, etc. [citing the New York Herald, March 29, 1866]. The Cincinnati Commercial, a conservative Republican paper, thought that the bill was unconstitutional in that it would open the schools, hotels, churches, theaters, concert halls, etc., to Negroes on the same terms with white people, and that it would make it a crime to refuse them these rights. [citing the Cincinnati Commercial of March 30, 1866].
>
> This was also the opinion of the National Intelligencer of Washington, the so-called Administration organ.
>
> * * *
>
> It was also asserted that the measure carried Federal interference into privacies into which even the most local laws never entered, for the customs of a community were made amenable to Federal authority--an authority entirely foreign to the community. At a public sale of church pews, it was declared Negroes could not be prevented from purchasing, while a white man could if he were objectionable to the church or the customs of the church, since such refusal would not be made on account of color. The same would be true, it was urged, in

> regard to hotels and other places of accommodation, for if a negro was refused admittance, the proprietor would be subject to both fine and imprisonment while a white man could only recover civil damages however wrongfully he might have been refused accommodations. [citing the National Intelligencer]
>
> A mass meeting of the citizens of Carroll County, at Westminster, Maryland, May 19, 1866, adopted a series of resolutions, one of which was a declaration that the Civil Rights Bill was unconstitutional, and that if carried into effect would up heave the foundations of social order. These resolutions were sanctioned both by the Republicans and Democrats. [citing the N.Y. Herald, May 26, 1866]

Flack concludes that (Id. at 44-47):

> The belief that the bill conferred upon the negroes the right of attending churches and theaters was not limited to the so-called loyal States, for this opinion was also held in the South, and the desire was expressed that, if it was to be enforced in this respect, it be first enforced in Boston. "What that city has so effectually sowed," it was declared, "let it reap!" The view was also held in the South that the Civil Rights Bill not only infringed, but that it destroyed, the rights of the States concentrating all power in the Central Government, by making the state judiciary amenable and subservient to Federal authority, and by conferring upon Congress powers unknown to the original law of the country. [citing Charleston Courier, April 2, 1866] A view of the bill not generally taken by the Southern press was that

taken by the Mobil Register. This journal did not think that the bill would interfere with the regulations and customs of steamboats, railroads, street cars, theaters, or other places of public resort. [citing the Cincinnati Commercial, April 21, 1866]

It is apparent, from this examination, that many of the leading papers of the country, including some of the principal Republican papers, regarded the Civil Rights Bill as a limitation of the powers of the States, and as a step towards centralization, in that it interfered with the regulation of local authorities or by custom. This opinion was held in the North as well as in the South. There also seems to have been a general impression among the press that negroes would, by the provisions of the bill, be admitted, on the same terms and conditions as the white people, to schools, theaters, hotels, churches, railway cars, steamboats, etc.

affairs which had hitherto been regulated by

The bill enumerated certain specific rights, such as the right to testify, to sue, be sued, etc., but it was generally felt that more than these enumerated rights were conferred, and that under its provisions negroes could not be kept out of the jury-box, and that they were to have equal rights with the whites in every respect, even to the right of intermarriage. The right of intermarriage, however, was not so generally held to be conferred by the bill, but the other opinions, it seems, were clearly warranted, both by the context of the bill and by the declarations of some

of its supporters.

What the papers gave as their opinion must necessarily have been the opinion of large numbers of the people. There is much evidence to substantiate this conclusion, for almost immediately after the passage of the bill over the President's veto, efforts were made by the negroes to secure these rights.

About two weeks after the bill had passed Congress, two so-called freedmen, in order to see whether the bill had really benefited them in a practical way, went to a sleeper and demanded accommodations as a train was about to leave Washington for New York. The demand was refused them at the request of the other passengers (all said to be New Englanders), who threatened to leave the car if the Negroes were admitted. The negroes thereupon threatened prosecution under the Civil Rights Bill and took their departure. [citing Cincinnati Commercial, April 30, 1866] Two or three incidents occurred in Baltimore at an earlier date. A negro asserted the right to ride in a railway car on the York Road among the other passengers, and when compelled to go to the front platform where colored persons were allowed to ride, noted the number of the car, probably to bring suit, and departed. On the same night, another negro, James Williams, appeared at the ticket office of the Holliday Street Theater, and asked for a ticket, which was of course refused. The next night another negro went to a public house and asked for a

drink, and on the refusal of the proprietor to sell him the liquor, went away to file complaint at the station, claiming that "as a citizen he was entitled to the same privileges as white men." [citing the National Intelligencer April 24, 1866 and the Baltimore American, April 16, 1866] Before the middle of May the Baltimore & Ohio Railroad Company had a suit pending against it for refusing to sell a negro a first-class ticket. It was also stated that several suits had been brought in Baltimore and other parts of the country against persons refusing to admit negroes to entertainments from which they were at that time excluded by state or minicipal laws. [citing from National Intelligencer, April 24, 1866 and Baltimore American, April 16, 1866] The editor of the National Intelligencer, commenting upon these facts, observed that if the bill was constitutional it would be difficult to see how negroes could be debarred, except at the risk of a suit, from going into hotels, theaters, restaurants, billiard rooms, or any licensed house where men have a legal right to accommodations. Towards the last of April the negroes of New York began to "feel their civil rights" - four or five going into a fashionable restaurant, sitting down among white ladies and gentlemen, and appealing to the Civil Rights Bill to protect them from ejectment. [citing the N.Y. Herald, April 28, 1866] The editor referring to this incident said the same game would probably be tried at the churches, theaters and other resorts, but that after some annoyance and inconvenience, the negroes would be quietly regulated by the public opinion. It was also

> stated [citing the Atlanta Intelligencer, April 18, 1866.] that the negroes of Boston proposed to contest the power of theater managers, church wardens, etc., to exclude them from mingling with the whites in an "equality" of position. They evidently carried out their intentions, but were excluded from the theaters, since only a nominal fine was imposed by the law which had been passed on that subject. [citing the Cincinnati Commercial, May 2, 1866] There were several occurrences in the North and West where negroes claimed the right to attend places of amusement to the discomfiture of white ladies. The editor added that the South would have to endure the same thing, though not responsible for it. [citing the Stlanta Intelligencer, April 26, 1866]

Citing McPherson's Scrap-book, "The Civil Rights Bill", pp. 120-136, Flack points out that in September 1866, a judge of the Civil Court of Detroit, Michigan--reputed to be a Democrat--decided that negroes could not be prevented from enjoying any privilege they chose and could pay for. In that case, a theater doorman had refused to admit a negro and his companions to the main body of a theatre, directing them instead to a galler. __/ Flack also cites a decision of the United States Commissioner, at Mobile, Alabama, of June 26, 1867, that the railway company of that city could not prevent Negroes from riding in the same cars with white persons, since to do so was in violation of the law, "evidently referring to the Civil Rights Bill, for the counsel for the negro asked that the president of the company be bound over to the Federal Court under that bill, which was done." (Flack, p. 53).

__/ Flack implies, but does not say specifically, that the Civil Rights Act of 1866 was a factor in the decision.

Citing incidents "to show the view generally taken of the bill," Flack points to two Negro women of Portsmouth, Virginia, who tried to enter the cabin on a ferryboat intended for ladies [citing the New York Tribune, May 18 and 21, 1867]. He also points to a similar incident in Baltimore as to a waiting room set apart for ladies at one of the depots [citing McPherson's Scrap-book, "The Civil Rights Bill", p. 109].

Flack states, without citation, that "there were other instances more or less similar" to the foregoing, in which attempts were made by negroes to enjoy the same privileges accorded to white persons "There were doubtless a number of similar incidents," he states, "which did not receive public notice, as well as many which we have not observed." (Flack, p. 53). In his view, however, the cited instances were apparently sufficient to justify the conclusion that the belief prevailed generally-north, east, west and south-especially among the Negroes, that the Civil Rights Bill gave the colored people the same rights and privileges as white men as regards travel, schools, theaters, churches, and the ordinary rights which may be legally demanded. . ."

D. THE FOURTEENTH AMENDMENT

The legislative history of the Fourteenth Amendment itself is preceded by summaries of two other proposals for constitutional amendments introduced earlier in the first session of the Thirty-ninth Congress. These proposals were: a constitutional amendment reducing the congressional representation of any state which denied citizens suffrage on the basis of race or color (the Stevens "apportionment" amendment); and a constitutional amendment empowering Congress to enact legislation to guarantee equal rights to all persons (the Bingham "equal rights" amendment). These proposals were the immediate precursors of sections one and two of the Fourteenth Amendment.

1. The Stevens "apportionment" Amendment

On December 5, 1865, Representative Thaddeus Stevens introduced in the House a joint resolution proposing an amendment to the Constitution, providing for apportionment of representatives among the States on the basis of their respective legally-qualified voters. It was referred to the Judiciary Committee. (Congressional Globe, 39th Cong., 1st Sess., p.10)./

At the second meeting of the Joint Committee on Reconstruction, on January 9, 1866, Stevens submitted the same resolution to that body./ On January 12, 1866, it was referred, along with other proposals, to a subcommittee consisting of Messrs. Fessenden, Stevens, Howard, Conkling and Bingham. (Committee Journal, pp. 9-10.) On January 20, 1866, the subcommittee reported, and, after further amendments, the Joint Committee approved, by vote of 13 to 1, the following proposed article of amendment:

/ All references to the Congressional Globe in this Section are to the 39th Congress, 1st Session.

/ Journal of the Joint Committee on Reconstruction, S. Doc. No. 711, 63d Cong., 3d Sess.,p.7, hereafter cited as "Committee Journal."

> Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed; provided that whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation. Committee Journal, p.13.)

Representative Stevens introduced this proposed amendment, embodied in a joint resolution (H. J. Res. 51), on January 22, 1866. (Globe, p.351.) He indicated that he wished to have it passed "before the sun goes down." However, after objections by Representatives Rogers of New Jersey and Chanler of New York indicating a minority view, Stevens agreed to postpone the vote, and debate commenced. (Globe, pp. 352-353.)

Representative Rogers, a member of the Joint Committee, presented the minority report of that body on the proposed amendment. He stated that the amendment contemplated a change in the fundamental principle that taxation and representation should always go together. Its object, he asserted, was to force Negro suffrage, in this indirect way, upon an unwilling population in order to prevent deprivation of its rightful representation. Whereas formerly, a state was entitled to three-fifths representation for its Negro slaves, now, under this amendment, the state would receive no representation at all for that class of population, if any kind of suffrage qualification were imposed on even one Negro. (Globe, p.356.) He pointed out that the former slaves would now receive full representation under the Constitution although not enfranchised at all. This would enable the Southern states to claim 28 more representatives in Congress. In effect, there would be, he said,

> Twenty-eight votes, to be more or less controlled by those who once betrayed

> the Government, and for those so destitute, we are assured, of intelligent instinct as not to be fit for free agency. (Globe, p.357.)

To remedy this situation, Conkling stated, the Committee had considered the possibility of a proposal to to deprive the states of the power to disqualify or discriminate politically on account of race or color. However, this plan had been rejected because it trenched upon the principle of state sovereignty, denying to the people of the several states the right to regulate their own affairs in their own way. (Globe, p.358.) The pending proposal had been adopted because it left every state free to extend or withhold the elective franchise on such terms as it pleased, and this without losing anything in representation if the terms were impartial as to all. But if any race "is so vile or worthless that to belong to it is alone cause of exclusion from political action, the race is not to be counted here in Congress," (Ibid.)

Representative Jenckes of Rhode Island objected to the amendment because an essential element of injustice was infused in it. By this express constitutional authorization,

> We yield to States the power to exclude an entire race living among them, which has hitherto been a class by themselves, but who must now be counted as citizens. They may exclude not only that race, but people of other races who immigrate to this country, and thus contravene the long-settled policy upon which we open our ports to immigrants from all climes, and of all nations and races, and seek here to build up a nation which will not rest upon the basis of any narrow or clannish origin, but which will embrace the best blood of the whole human race. (globe, p.386.)

On January 24, 1866, Mr. Lawrence of Ohio expressed a desire that the Constitution be amended to apportion representation on the basis of citizens of the United States who were male adult voters. (Globe, p.404.) He believed that if any class

> is unfit to be an element of political strength, it is unjust to clothe a favored class with political power on its behalf. Whatever protection it demands should be entrusted equally to all the Representatives of the people. (Ibid.)

Representative Shellabarger of Ohio objected to the amendment because it would be a declaration sanctioning the deprivation of political rights from a whole race of men, providing only that they be not represented in the government. As such, it would violate the basic principle of our government, require different constructions of other Constitutional clauses, and spoil the free spirit and sense of the Constitution. (Globe,p. 405.) Representative Kelley of Pennsylvania echoed this objection, and urged that the Congress follow

> a rule of action which, if adhered to, will settle all our difficulties and establish the fact that there is on earth a Republic founded upon the imprescriptible rights of man, in which the humblest man, when he recounts his political rights, sets forth all that the strongest, the wisest, and the proudest may claim. Social inequalities there will be, and natural inequalities are ordained of God; but when our fathers gave us the Constitution, they meant that within the wide limits of our country the measure of one man's political rights should ascertain the extent of those of every other man dwelling beneath that dome which is the fit canopy of a continent, the Constitution of the United States. (Globe,pp.408-409.)

On January 25, 1866, Representative Bingham of Ohio expressed his belief that the proposed amendment was desirable, and reminded those who found various faults with it, that it was not the only amendment under consideration. Others would bolster this one, and remedy its defects.

He informed the House that the Joint Committee

> has under consideration another general amendment to the Constitution which looks to the grant of express power to the Congress of the United States to enforce in behalf of every citizen of every State and of every territory in the Union the rights which were guaranteed to him from the beginning,/ but which guarantee has unhappily been disregarded by more than one State of this Union, defiantly disregarded , simply because of a want of power in Congress to enforce that guarantee. (Globe, p.429.)

It was Bingham's belief that every slave when emancipated became a "free citizen" in the words of the old Articles of Confederation, and a "free person," a term which embraced all citizens, in the words of the Constitution. He thus became equal before the law with every other citizen of the United States. (Globe, p. 430.) Therefore, Bingham asserted,

> I want the American people by adopting such amendments to declare their purpose to stand by the foundation principle of their own institutions, the absolute equality of all citizens of the United States politically and civilly before their own laws.
>
> That is the issue involved in the amendment presented by the committee. (Globe, p.431.)

/ Bingham was referring to his own "equal rights" amendment. See infra, [illegible]

Congressman Raymond of New York, on January 29, 1866, spoke at length on the nature of the constitutional relation of the Southern states to the Union. (Globe, p.483.) In the course of his remarks he stated that he "put no great faith in these so-called guarantees of the Constitution for objects which can only rest upon the public conscience and the public will." (Globe, p.491.) Representative Julian of Indiana urged the adoption of an amendment which would directly prohibit the disfranchisement of anyone on account of race or color. (Globe, Appendix,pp.56-58.)

On January 30, 1866, the joint resolution was recommitted without instructions to the Joint Committee on Reconstruction. (Globe, p.508.) At a meeting of the Committee on the following day, Thaddeus Stevens moved to amend it by striking out the reference to direct taxes. This motion was agreed to, and in that amended form the joint resolution was ordered to be reported back to the House. (Committee Journal,pp. 15-16.)

Stevens reported the resolution to the House on the same day, January 31, 1866, and urged its passage. (Globe, p.535.) The joint resolution was then passed by a vote of 120 to 46, more than the necessary two-thirds. (Globe, p.538.)

Consideration of the joint resolution in the Senate began on February 6, 1866, with a speech in opposition by Senate Sumner. (Globe,p.673.) He regarded it as "another Compromise of Human Rights," introducing "discord and defilement" into the Constitution (ibid.), and a renunciation of all power under the Constitution to apply a remedy for a grievous wrong, when the remedy was available. (Globe, p. 674.)

He felt that Congress had ample power to establish the right of suffrage for the Negro, even without any further constitutional amendment. Enfranchisement in his view was the complement to Emancipation, and was justifiable under the constitutional amendment which ordained the latter. (Globe,p.675.)

> But the Senate has already by solemn vote asserted this very jurisdiction. You have, sir, decreed that colored persons shall enjoy the same civil rights as white persons; in other words,that, with regard to civil rights, there shall be no Oligarchy, Aristocracy, Caste, or Monopoly, but that all should be equal before the law without distinction of color. And this great decree you have made as "appropriate legislation" under the Constitutional Amendment "to enforce" the abolition of slavery. Surely you have not erred in this act. Beyond all question the protection of colored persons in civil rights is essential to complete the abolition of slavery; but the protection of colored persons in political rights is not less essential; and the power is as ample in one case as in the other. (Globe, p.684.)

Senator Fessenden, Chairman of the Joint Committee, opposed Sumner on February 7, 1866, arguing the necessity of the proposed apportionment amendment, although he admitted that he himself would prefer

> a distinct proposition that all provisions in the constitution or laws of any State making any distinction in civil or political rights, or privileges, or immunities whatever, should be held unconstitutional, inoperative, and void, or words to that effect. (Globe,p.704.)

But any such proposition was probably too extreme to secure the concurrence of the states. (Ibid.)

On February 14, 1866, Senator Clark of New Hampshire agreed that the real question was the guaranty of political rights--suffrage--for the Negro (Globe, p. 831), since enfranchisement was one of the basic rights of every free man. (Globe, p. 832.) A similar analysis was presented by Senator Yates of Illinois, on February 19, 1866. He stated that the rights granted by the Thirteenth Amendment included both the civil and political rights of every free man. (Globe, Appendix, p. 100-101.) By the Amendment, the Negro "became a part of the people" and, as such, "entitled to the same rights and privileges with all the other citizens of the United States." (Globe, Appendix, p. 101.)

The vote on the joint resolution was taken on March 9, 1866. The constitutional amendment was defeated, for, although it received a majority vote of 25 to 22, it lacked the constitutional two-thirds. (Globe, p. 1289.)

2. The Bingham Equal Rights Amendment.

On January 12, 1866, the Joint Committee on Reconstruction received two proposals for amendment of the Constitution. (Committee Journal, p. 9.) The first, by Bingham, provided:

> The Congress shall have power to make all laws necessary and proper to secure to all persons in every State within this Union equal protection in their rights of life, liberty, and property.

The second, by Thaddeus Stevens, Chairman of the House group of the Committee, was a simpler declaration:

> All laws, State or national, shall operate impartially and equally on all persons without regard to race or color.

Both were referred to the subcommittee on the apportionment of representatives in Congress, which included both Bingham and Stevens. (Ibid.)

A week later, on January 20, 1866, the subcommittee reported a proposal which, although obviously patterned after Bingham's insofar as civil rights were concerned, also contained language to insure equal political rights, i.e., suffrage:

> Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty, and property. (Committee Journal, p. 12.)

This proposal was held in the Committee until after the apportionment proposal had passed the House, although the Committee continued to consider it actively. At the Committee meeting on January 24, 1866, there were efforts by Messrs. Howard and Boutwell to amend the

proposal [illegible] expressly to give Congress the power to enfranchise the negro. The measure was then referred to a special subcommittee consisting of Bingham, Boutwell of Massachusetts, and Andrew Jackson Rogers of New Jersey. (Committee Journal, p. 14.) This subcommittee reported the proposal back on January 27, 1866, in a form more closely akin to Bingham's original proposal:

> Congress shall have power to make all laws which shall be necessary and proper to secure all persons in every State full protection in the enjoyment of life, liberty, and property; and to all citizens of the United States, in any State, the same immunities and also equal political rights and privileges. (Committee Journal, pp. 14-15.)

This form, however, did not meet with the Committee's entire approval (ibid.), so Bingham proposed a substitute on February 3, 1866:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States (Art. 4, sec. 2); and to all persons in the several States equal protection in the rights of life, liberty, and property (5th amendment). (Committee Journal, p. 17.)

This was adopted by a narrow margin, 7-6, and agreed on for report to Congress. (Ibid.) Commenting on this final wording, Flack suggests that it was probably intended to exclude political rights; also, although there was no clause declaring who were citizens of the United States, it is evident from the House debates on the resolution that "citizens" was intended to include freedmen. (Flack, The Adoption of the Fourteenth Amendment, pp. 63-64.)

The "equal rights" amendment proposal (H. J. Res. 63) was reported to the House on February 26, 1866. (Globe, pp. 813, 1033.)

Bingham made it clear that his purpose in proposing the Amendment was to give an express grant of power to the Congress. In bringing the Amendment before the House, he said:

> Sir, it has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements of the Constitution. (Globe, p. 1034)

If the privileges and immunities and due-process clauses, the "immortal bill of rights embodied in the Constitution," had not rested on the fidelity of the States, but had been within the power of Congress to enforce, there would have been no rebellion. (Ibid.)

Representative Rogers of New Jersey answered that the addition of congressional enforcement power to Article IV of the Constitution, such as proposed, would be the "embodiment of centralization" and the "disfranchisement" of "sacred and immutable state rights" (Globe, Appendix, p. 133). If this amendment were necessary, he asked, what authorized the enactment of the Civil Rights Act? (Ibid.)

He though the legislation of the States should look to "the protection, security, advancement, and improvement, physically and intellectually, of all classes, as well the blacks as the whites." (Globe, p. 134). Although he approved of having the channels of education opened to Negroes and thought they should be allowed to be witnesses, to sue and contract, and to do "every act or thing that a white man is authorized by law to do", he thought it dangerous to give Negroes the right to vote, hold office, and marry whites. (Ibid.)

Furthermore, he was opposed to empowering Congress to legislate in this area, declaring that the effect of the amendment would be

> to take away the power of the States; to interfere with the internal police and regulations of the States; to centralize a consolidated power in this Federal Government which our Fathers never intended should be exercised by it. (Ibid)

On February 27, 1866, Representative Higby of California expressed himself in favor of Reconstruction and equality for the Negro, agreeing with Bingham that the purpose of the amendment was to supply a power of enforcement to provisions of the Constitution that lacked vitality without it. (Globe, p. 1054.) By virtue of this power Congress would "hold this very subject of slavery that will grow up under the exception to the late amendment entirely within our power, and we will thereby be enabled to banish really and forever the institution of slavery from the limits of this country." (Globe, p. 1056.)

Congressman Kelly of Pennsylvania felt that the proposal was really unnecessary, as in his view "privileges and immunities" of citizens included a right to have a government in which all citizens were equal. (Globe, p. 1057-1059.)

That same day a dialogue occurred between Representatives Hale and Stevens over whether the amendment would grant Congress a general power of legislation in civil rights matters. Mr. Hale submitted that the proposal was in effect a

> provision under which all State legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen, may be overridden, may be repealed or abolished, and the law of Congress established instead. I maintain that in this respect it is an utter departure from every principle ever dreamed of by the men who framed our Constitution. (Globe, p. 1063.)

To which Stevens replied:

> Does the gentleman mean to say that, under this provision, Congress could interfere in any case where the legislation of a State was equal, impartial to all? Or is it not simply to provide that, where any State makes a distinction in the same law between different classes of individuals, Congress shall have power to correct such discrimination and inequality? Does this proposition mean anything more than that? (Ibid.)

Mr. Hale then answered that in his judgment it went much further than Mr. Stevens suggested. According to Hale, the language and grammatical construction of the amendment indicated the proposal was

> a grant of the fullest and most ample power to Congress to make all laws 'necessary and proper to secure to all persons in the several States protection in the rights of life, liberty, and property,' with the simple proviso that such protection shall be equal. It is not a mere provision that when the States undertake to give protection which is unequal Congress may equalize it; it is a grant of power in general terms--a grant of the right to legislate for the protection of life, liberty, and property, simply qualified with the condition that it shall be equal legislation. (Globe, p. 1063-1064).

Mr. Eldridge then suggested that the proper interpretation was that "Congress shall have power to assimilate or equalize" all state legislation to a common standard. (Globe, p. 1064)

Mr. Hale then stated that "probably every state in the Union fails to give equal protection to all persons within its borders in the rights of life, liberty, and property." Although a reformation might be desirable, he stressed it should come from the States and not be forced upon them by the centralized power of the Federal Government. (Globe, p. 1064.) Hale also suggested that Mr. Bingham state where Congress and the courts would stop in the powers they could arrogate to themselves under the general language of the proposal. (Globe, p. 1065)

Hale concluded by remarking that a decentralized government protected the rights of individuals and asked if the Congress should not seek "to strengthen the liberties of the States and the rights of the States as well as liberties of the citizens." (Ibid)

On the following day, February 28, 1866, Representative Davis of New York also expressed concern over the upset of the federal-state balance. (Globe, p. 1083.) The Thirteenth Amendment, while freeing the Negro,

> gives to Congress full power to enact all laws which shall be essential to their protection. They must be made equal before the law, and be permitted to enjoy life, liberty, and the pursuit of happiness. (Globe, p. 1085.)

Davis argued that Congress had already "planted the seeds of universal freedom and equality" which would flower in time and that the radical measure proposed would antagonize race relations. (Globe, p. 1087.) He, too, thought that the amendment was a grant for "original legislation" by Congress:

> If Congress may give equal protection to all as to property, it is itself the judge of the measure of that protection . . . .

> Under such a power the constitutional functions of State legislatures are impaired, and Congress may arrogate those powers of legislation which are the peculiar immunities of State organizations, and which cannot be taken from the States without a radical and fatal change in their relations.
>
> I will, sir, consent to no centralization of power in Congress in derogation of constitutional limitations, nor will I lodge there today any grant of power which may in other times, and under the control of unprincipled political aspirants or demagogues, be exercised in contravention of the rights and liberties of my countrymen. (Ibid)

He suggested that the power which the federal government would exercise would be toward "the establishment of perfect political equality between the colored and white populations of the South." (Ibid)

It should be noted that like Mr. Hale, with whom he shared the view that the amendment would give Congress a general power to legislate, Mr. Davis was a Republican. Both had voted for the Freedmen's Bureau Bill and later voted for the civil rights bill.

Mr. Woodbridge then spoke of the new social and political relations which came about when four million chattels became "living, thinking, moving, responsible beings." He urged that if Congress did not act, conditions would be worse than before emancipation, for the accumulated prejudices of centuries would culminate upon the heads of the freedmen. (Globe, p. 1088.) Woodbridge thought that the Amendment was

> intended to enable Congress by its enactments when necessary to give to a citizen of the United States, in whatever State he may be, those privileges and immunities which are guarantied to him under the Constitution of the United States. It is intended to enable Congress to give to all citizens the inalienable rights of life and liberty, and to every citizen in whatever State he may be that protection to his property which is extended to the other citizens of the State.

He stated that although he believe most of this could be done by legislation under existing authority, "the experience of this Congress in that regard has been most unfortunate." Referring to the Presidential vetoes, he suggested that constitutional doubts as to Congress' authority be removed by this proposed Amendment. (Globe, p. 1088.)

Mr. Bingham then took the floor again for his proposal. To him,

> The proposition pending before the House is simply a proposition to arm the Congress * * * with the power to enforce the bill of rights as it stands in the Constitution today. (Globe, p. 1088.)

The proposal did not invade reserved State rights, for no State could claim to have reserved the authority to withhold privileges or impose burdens on a citizen contrary to the provisions of the Constitution. (Globe, p. 1089.) While he conceded the bill of rights was in terms only a limitation on national powers, it was nonetheless a recognition that the rights enumerated were a part of the rights of a citizen. (Globe, p. 1090.) If a State

official denied rights therein declared, he invaded the privileges and immunities of a citizen and thereby violated his oath to uphold and preserve the Constitution. (Globe, p. 1094.) The Constitution, moreover, provided or declared:

> that no man, no matter what his color, no matter beneath what sky he may have been born, no matter in what disastrous conflict or by what tyrannical hand his liberty may have been cloven down, no matter how poor, no matter how friendless, no matter how ignorant, shall be deprived of life or liberty or property without due process of law--law in its highest sense, that law which is the perfection of human reason, and which is impartial, equal, exact justice * * *. (Ibid.)

To make it possible that every man in the country would be secure in the "equal protection of his personal rights" through the medium of national law, the proposed amendment was required. (Ibid.)

Mr. Hale then asked Bingham

> whether in his opinion this proposed amendment to the Constitution does not confer upon Congress a general power of legislation for the purpose of securing to all persons in the several States protection of life, liberty, and property, subject only to the qualification that that protection shall be equal. (Ibid.)

The following dialogue then occurred:

> Mr. BINGHAM. I believe it does in regard to life and liberty and property as I have heretofore

stated it; the right to real estate being dependent on the State law except when granted by the United States.

Mr. HALE. Excuse me. If I understand the gentleman, he now answers that it does confer a general power to legislate on the subject in regard to life and liberty, but not in regard to real estate. I desire to know if he means to imply that it extends to personal estate.

Mr. BINGHAM. Undoubtedly it is true.

Mr. HALE. The gentleman misapprehends my point, or else I misapprehend his answer. My question was whether this provision, if adopted, confers upon Congress general powers of legislation in regard to the protection of life, liberty, and personal property.

Mr. BINGHAM. It certainly does this: it confers upon Congress power to see to it that the protection given by the laws of the States shall be equal in respect to life and liberty and property to all persons.

Mr. HALE. Then will the gentleman point me to that clause or part of this resolution which contains the doctrine he here announces?

Mr. BINGHAM. The words 'equal protection' contain it, and nothing else. (Ibid.)

Congressman Hotchkiss of New York expressed dissatisfaction with the measure because it did not accord sufficient protection for the equal rights of citizens. To him, the provision that Congress should guarantee the equality of protection would mean that the protection given would depend upon the caprice of a majority of the Congress. (Globe, p. 1095.) Equal protection should instead be made a

> constitutional right that cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation. (Ibid.)

He expressed instead the desire that

> the very privileges for which the gentleman is contending shall be secured to the citizens; but I want them secured by a constitutional amendment that legislation cannot override. (Ibid.)

At that point, a motion to postpone consideration was agreed to by a vote of 110 to 37. (Globe, p. 1095.) No further action was taken thereafter on this separate proposal.

3. The Fourteenth Amendment

On April 21, 1866, Thaddeus Stevens laid before the Joint Committee on Reconstruction an overall plan for reconstruction. (Committee Journal, p. 28.) He stated that the plan was not original with him, but was one which he would support. Included in the plan was a constitutional amendment, combining the principal proposals for amendment previously introduced. It contained a guarantee of civil rights and suffrage, and provisions for apportionment revision, repudiation of the Confederate debt, and congressional enforcement power.

Section 1 of the proposed amendment read:

> No discrimination shall be made by any State, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude. (Ibid.)

Representative Bingham moved to amend this section by adding:

> Nor shall any State deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation. (Committee Journal, p.29.)

The committee rejected this amendment, and accepted the original language. (Ibid.) Later, Bingham obtained Committee approval of a new section, in addition to the section 1 already in the proposal, in these words:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

> person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. (Committee Journal, p. 30.)

On April 25, this section was deleted from the proposal, but at the next meeting, on the 28th, it was voted back in to replace the original section 1. (Committee Journal, pp. 35, 39) That same day, April 28, 1866, a final draft of the proposed amendment, containing Bingham's section 1, was adopted for formal report to both Houses. (Committee Journal, pp. 43, 44.) The proposal was received in both Houses on April 30, 1866, without written report, and, in the House, as H. J. Res. 127, it was made a special order for May 8. (Globe, pp. 2265, 2286.)

On that day, the discussion of section 1 commenced with some brief remarks by Stevens on behalf of the Joint Committee. He stated that the provisions of the section

> are all asserted, in some form or other, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes. Now different degrees of punishment are inflicted, not on account of the magnitude of the crime,

> but according to the color of the skin. How color disqualifies a man from testifying in courts, or being tried in the same way as white men. I need not enumerate these partial and oppressive laws. Unless the Constitution should restrain them those States will all, I fear, keep up this discrimination, and crush to death the hated freedmen. Some answer, "Your civil rights bill secures the same things." That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed (Globe, p. 2459).

Representative Finck of Ohio was opposed to the amendment, but his only remark about section 1 was that

> if it is necessary to adopt it, in order to confer upon Congress power over the matters contained in it, then the civil rights bill, which the President vetoed, was passed without authority, and is clearly unconstitutional (Globe, p. 2461).

James A. Garfield of Ohio replied to Mr. Finck, as follows:

> I am glad to see this first section here which proposes to hold over every American citizen, without regard to color, the protecting shield of law. The gentleman who has just taken his seat [Mr. FINCK] undertakes to show that because we propose to vote for this section we therefore acknowledge that the civil rights bill was unconstitutional. He was anticipated in that objection by the gentleman from Pennsylvania [Mr. STEVENS]. The civil rights bill

> is now a part of the law of the land. But every gentleman knows it will cease to be a part of the law whenever the sad moment arrives when that gentleman's party comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it. For this reason, and not because I believe the civil rights bill unconstitutional, I am glad to see that first section here. (Globe, p. 2462.)

Representative Thayer also stated that, while this section contained the "principle of the civil rights bill," it was included not because "that law cannot be sustained as constitutional," but to insure that

> that provision so necessary for the equal administration of the law, so just in its operation, so necessary for the protection of the fundamental rights of citizenship, shall be forever incorporated in the Constitution of the United States. (Globe, p. 2465.)

Representative Boyer of Pennsylvania, an opponent, declared that (Globe, p. 2467):

> The first section embodies the principles of the civil rights bill, and is intended to secure, ultimately, and to some extent indirectly, the political equality of the negro race. It is objectionable also in its phraseology, being open to ambiguity and admitting of conflicting constructions.

The next day, May 9, 1866, Representative Broomall of Pennsylvania stated his impatience with those who believed that the civil rights bill was unconstitutional, but on "so vital a point I wish to make assurance doubly sure." (Globe, p. 2498) Mr. Raymond of New York commented on the "somewhat curious history" of the "principle" of the first section, "which secures an equality of rights among all the citizens of the United States":

> It was first embodied in a proposition introduced by the distinguished gentleman from Ohio [Mr. Bingham], in the form of an amendment to the Constitution, giving to Congress power to secure an absolute equality of civil rights in every State in the Union. It was discussed somewhat in that form, but encountering considerable opposition from both sides of the House, it was finally postponed, and is still pending. Next it came before us in the form of a bill, by which Congress proposed to exercise precisely the powers which that amendment was intended to confer, and to provide for enforcing against State tribunals the prohibitions against unequal legislation. (Globe, p. 2502.)

Even though the new proposal would amend the Constitution to confer on Congress the power to pass the bill he had twice voted against, he favored the proposal, for he was "heartily in favor of the main object which that bill was intended to secure." That object, he said, was to secure "an equality of rights to all citizens of the United States." All that he had sought was to have this done by constitutional means. (Ibid.) Subsequently, Mr. Raymond stated that the legislatures which would ratify the section would be conceding "an equality of civil rights" (Globe, p. 2503).

Mr. Eldridge of Wisconsin, an opponent, suggested that the section constituted an admission that the "civil rights bill" was unconstitutional (Globe, p. 2506).

Representative Miller of Pennsylvania, however, supported section 1. In his view,

> it is so just . . . and so clearly within the spirit of the Declaration of Independence of the 4th of July, 1776, that no member of this House can seriously object to it. (Globe, p. 2510)

Representative Elliot of Massachusetts supported the first section:

> because the doctrine it declares is right, and if, under the Constitution as it now stands, Congress has not the power to prohibit State legislation discriminating against classes of citizens or depriving any persons of life, liberty, or property without due process of law, or denying to any persons within the State the equal protection of the laws, then, in my judgment, such power should be distinctly conferred. I voted for the civil rights bill, and I did so under a conviction that we have ample power to enact into law the provisions of that bill. But I shall gladly do what I may to incorporate into the Constitution provisions which will settle the doubt which some gentlemen entertain upon that question. (Globe, p. 2511)

On the following day, May 10, 1866, the debate in the House was concluded. Representative Randall of Pennsylvania was the first speaker. Opposing section 1, he claimed:

> The first section proposes to make an equality in every respect between the two races, notwithstanding the policy of discrimination which has heretofore been exclusively exercised by the States, which in my judgment should remain and continue. They relate to matters appertaining to State citizenship, and there is no occasion whatever for the Federal power to be exercised

> between the two races at variance with the wishes of the people of the States. For myself, I would wish that the colored race should be placed in the same political condition as it occupies in Pennsylvania; but I would leave all this to the States themselves, just in the same manner as the elective franchise is permitted. If you have the right to interfere in behalf of one character of rights -- I may say of every character of rights, save the suffrage -- how soon will you be ready to tear down every barrier? (Globe, p. 2530)

Another Pennsylvanian, Representative Strouse, continued the opposition, inquiring what necessity there was at the present time that demanded the change which this Amendment called for:

> I am answered that the necessity grows out of the war, that the South is vanquished, the negroes are liberated, and that therefore the organic law must be so amended that the emancipated slave shall in all respects be the equal of the white man. (Globe, p. 2531)

Representative Rogers of New Jersey asserted that "the first section of this programme of disunion is the most dangerous to liberty" (Globe, p. 2538) This section, he said

> is no more nor less than an attempt to embody in the Constitution of the United States that outrageous and miserable civil rights bill which passed both Houses of Congress and was vetoed by the President of the United States upon the ground that it was a direct attempt to consolidate the power of the States and to take away from them the elementary principles which lie at their foundation.
>
> What are privileges and immunities? Why, sir, all the rights we have under the laws of the country are embraced

> under the definition of privileges and immunities. The right to vote is a privilege. The right to marry is a privilege. The right to contract is a privilege. The right to be a juror is a privilege. The right to be a judge or President of the United States is a privilege. I hold if that ever becomes a part of the fundamental law of the land it will prevent any State from refusing to allow anything to anybody embraced under this term of privileges and immunities. (Ibid.)

Representative Farnsworth of Illinois stated that most of the first section was harmless surplusage, except for the provision that no person should be denied the equal protection of the laws (Globe, p. 2539). As for that provision, was it not, he asked

> the very foundation of a republican government? Is it not the undeniable right of every subject of the Government to receive "equal protection of the laws" with every other subject? How can he have and enjoy equal rights of "life, liberty, and the pursuit of happiness" without "equal protection of the laws"? (Ibid.)

To Senator Bingham, it was necessary to secure "the equal rights of all the people under the sanctions of inviolable law" (Globe, p. 2542). The necessity of the first section was "one of the lessons that have been taught . . . by the history of the past four years of terrific conflict" (Globe, p. 2542). It would supply the want in the Constitution of a

> power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and

> never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State. (Ibid.)

This proposition would not involve taking any rights from the states, for

> No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. (Ibid.)

Finally, he asserted, the section would satisfy the great want of the Constitution in protecting citizen and stranger, "protection by national law from unconstitutional state enactments" (Globe, p. 2543).

After Stevens' final speech dealing generally with reconstruction, the vote was taken, and on May 10, 1866, the Amendment passed the House by a vote of 128 to 37, more than the necessary two-thirds (Globe, p. 2545).

In the Senate, the proposal was first brought up on May 23, 1866, nearly two weeks after the House action. (Ibid., p. 2763.) Senator Howard of Michigan made the report for the Committee, in lieu of the Chairman, Senator Fessenden, who was unable to do so because of illness. (Globe, p. 2764.) Howard commented on section one in great detail, particularly with reference to the privileges and immunities of United States citizenship. (Globe, p. 2765.) Among those privileges and immunities he included the rights enumerated in the Bill of Rights. __/

Because the rights enumerated in the Bill of Rights and secured by Article 4, Section 2 were limitations only upon the Federal Government, they could not, he said, be enforced against the States by the national government. (Ibid.) He continued (Globe, p. 2766):

__/ Howard also quoted from the opinion of Judge Washington in Corfield v. Coryell, 4 Wash. C.C. 380:

> The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental, which belong of right to the citizens of all free Governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent, and sovereign. What these fundamental principles are it would, perhaps, be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole.

> The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees. How will it be done under the present amendment? As I have remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end. This is done by the fifth section of this amendment, which declares that "the Congress shall have power to enforce by appropriate legislation the provisions of this article." Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution.

With respect to the last two clauses of Section 1, Howard stated (Ibid.):

> The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. Is it not time, Mr. President, that we extend to the black man, I had almost called it the poor privilege of the equal protection of the law? Ought not the time to be now passed when one measure of justice is to be meted out to a member of one

caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States, both bound to obey the same laws, to sustain the burdens of the same Government . . . .?

Discussing the first section in conjunction with the fifth, Howard remarked (Ibid.):

> [S]ection one is a restriction upon the States, and does not, of itself, confer any power upon Congress. The power which Congress has, under this amendment, is derived, not from that section, but from the fifth section, which gives it authority to pass laws which are appropriate to the attainment of the great object of the amendment. I look upon the first section, taken in connection with the fifth, as very important. It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction. It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty. That, sir, is republican government, as I understand it, and the only one which can claim the praise of a just Government. Without this principle of equal justice to all men and equal protection under the shield of the law, there is no republican government and none that is really worth maintaining.

Subsequently, Howard stated with respect to the fifth section (Globe, p. 2768):

> It gives to Congress power to enforce by appropriate legislation all the provisions of this article of amendment. Without this clause, no power is granted to Congress by the amendment

> or any one of its sections. It casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no State infringes the rights of persons or property. I look upon this clause as indispensable for the reason that it thus imposes upon Congress this power and this duty. It enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment.

Senator Wade of Ohio followed Howard to propose an amendment (Globe, 2768). He commented upon the lack of any exact definition of the term "citizen of the United States." While he had "always believed that every person, of whatever race or color, who was born within the United States was a citizen of the United States," and felt that any real doubt on the subject had been settled by the civil rights bill, still

> by the decisions of the courts there has been a doubt thrown over that subject; and if the Government should fall into the hands of those who are opposed to the views that some of us maintain, * * * they may construe the provision in such a way as we do not think it liable to construction at this time, unless we fortify and make it very strong and clear. (Ibid.)

He therefore proposed to fortify section 1 by inserting in the first clause, in lieu of "citizens of the United States," the words "persons born in the United States or naturalized by the laws thereof." (Ibid.)

On May 24, 1866, Senator Stewart of Nevada spoke more generally on the proposal as a plan of reconstruction (Globe, p. 2798). However, he referred to the purposes of section one in his discussion of the principal point of difference between the Congress and the President. In his view, the President's restoration plan "ignored the rights and excluded from constitutional liberty four million loyal citizens guilty of no offense"--

the freedmen (Ibid.). The difficulty, as Stewart saw it, was that mere restoration of the Southern states would permit the people of these states to continue "to apply the theories of slavery to a condition of freedom," a dangerous evil; yet

> They were educated to believe that a negro was a slave, possessing no rights that a white man was bound to respect, and they believed it still, and they are astonished at the inconsistencies of the world and its tendency to recognise the rights of man. (Globe, p. 2799)

Senator Stewart said that Negro suffrage was the only final answer to "slavery and the inequality of human rights," rather than the guarantees afforded by the proposal (Ibid.).

Following Senator Stewart's speech, further debate was postponed (Globe, p. 2804). Consideration of the constitutional amendment was not resumed until five days later, on May 29, 1866.(Globe, p. 2868). At that time, Senator Howard offered various amendments to the proposal, as he stated, "after consultation with some of the friends of this measure" (Globe, p. 2869). All but the enforcement section were to be amended. In section one the following declaration of citizenship was to be inserted as an opening sentence:

> All persons born in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside. (Ibid.)

On the following day, Senator Howard began the discussion on these new amendments. He asserted that the purpose of the first amendment, a "great desideratum," was to settle the "great question of citizenship" and to remove "all doubt as to what persons are or are not citizens of the United States" (Globe, 2890).

Senators Cowan of Pennsylvania and Doolittle of Wisconsin objected that this phraseology would include within the group classified as citizens, Gypsies, Chinese and Indians not taxed (Globe, pp. 2890, 2892). __/ Senator Conness of California, however, remarked that he "was very glad indeed that we have determined at length that every human being may relate what he heard and saw in a court of law when it is required of him" (Globe, p. 2892). He noted that the Chinese "were robbed with impunity, for if a white man was not present no one could testify against the offender" (Ibid.). He declared his readiness "to accept the provision proposed in this constitutional amendment that the children born here of Mongolian parents shall be declared by the Constitution of the United States to be entitled to civil rights and to equal protection before the law with others" (Ibid.).

Subsequently, a discussion took place throwing light upon the relationship of section 1 to the civil

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__/ Senator Cowan said (Globe, p. 2890):

> The honorable Senator from Michigan has given this subject, I have no doubt, a good deal of his attention, and I am really desirous to have a legal definition of "citizenship of the United States." What does it mean? What is its length and breadth? I would be glad if the honorable Senator in good earnest would favor us with some such definition. Is the child of the Chinese immigrant in California a citizen? Is the child of a Gypsy born in Pennsylvania a citizen? If so, what rights have they? Have they any more rights than a sojourner in the United States? If a traveler comes here from Ethiopia, from Australia, or from Great Britain, he is entitled to a certain extent, to the protection of the laws. You cannot murder him with impunity. It is murder to kill him, the same as it is to kill another man. You cannot commit an assault and battery on him, I apprehend. He has a right to the protection of the law; but he is not a citizen in the ordinary acceptation of the word.

rights bill. When Senator Doolittle suggested that Mr. Bingham and others on the Joint Committee proposed section 1 because they had doubts as to the constitutionality of the civil rights bill, Senator Fessenden of Maine declared (Globe, p. 2896):

> I will say to the Senator one thing: whatever may have been Mr. Bingham's motives in bringing it forward, he brought it forward some time before the civil rights bill was considered at all and had it referred to the committee, and it was discussed in the committee long before the civil rights bill was passed. Then I will say to him further, that during all the discussion in the committee that I heard nothing was ever said about the civil rights bill in connection with that. It was placed on entirely different grounds.

Senator Doolittle asked Senator Fessenden why, if "the Constitution . . . without amendment, gives all the power you ask, . . . do you put this new amendment into it on this subject? (Ibid.) (apparently referring to the amendment to section 1). __/ Senator Howard replied (Ibid.):

> I was a member of the same committee, and the Senator's observations apply to me equally with the Senator from Maine. We desired to put this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond the legislative power of such gentlemen as the Senator from Wisconsin, who would pull the whole system up by the roots and destroy it, and expose the freedmen again to the oppressions of their old masters.

__/ Senator Doolittle insisted that he had labored as hard as Senator Howard had "to secure the rights and liberties of the freedmen, to emancipate the slaves of the South, and to put an end forever not only to slavery but to the aristocracy that was founded upon it . . ." (Globe, p. 2897).

The amendment to section 1 was agreed to without a roll call (Globe, p. 2897). Consideration of section 1 was resumed on June 4, 1866 (Globe, p. 2938).

Senator Hendricks of Indiana called the proposed amendment a matter of party politics, a mere "party programme." (Ibid.) He thought it unthinkable that United States citizenship should be degraded by application to a "mixed population, made up of races that ought not to mingle." (Globe, p. 2939). The whole proposal, in his view, was merely a centralization of "absolute and despotic power." (Globe, p. 2940). The last section, moreover,

> * * * provides that Congress shall have power to enforce, by appropriate legislation, the provisions of the article. When these words were used in the amendment abolishing slavery they were thought to be harmless, but during this session there has been claimed for them such force and scope of meaning as that Congress might invade the jurisdiction of the States, rob them of their reserved rights, and crown the Federal Government with absolute and despotic power. As construed this provision is most dangerous. (Globe, p. 2940).

On the following day, June 5, 1866, Senator Luke Poland of Vermont spoke in favor of the Amendment (Globe, p. 2961). He asserted that the privileges and immunities clause of section one of the proposal was largely a restatement of the provision in the original Constitution. The restatement was necessary, he said, because, "by and for the protection of the peculiar system of the South," there had been a "practical repudiation of the existing provision on this subject" (Ibid.). The war and the Thirteenth Amendment, however, made it "eminently proper and necessary that Congress should be invested "with enforcement powers with respect to this provision (Ibid.). Poland thought that the remainder of section 1 was unobjectionable, for "the whole people of the nation stand upon the basis of freedom," and it was merely in keeping with the very spirit and inspiration of our system of government," as "declared in the Declaration of Independence." However, he said,

> we know that State laws exist, and some of them of very recent enactment, in direct violation of these principles. Congress has already shown its desire and intention to uproot and destroy all such partial State legislation in the passage of what is called the civil rights bill. The power of Congress to do this has been doubted and denied by persons entitled to high consideration. It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States . . . . (Ibid.)

Senator Timothy Howe of Wisconsin, after stating the need for radical reconstruction policies, replied to Senator Hendricks' contention that state rights were invaded by the proposal. (Globe, Appendix, pp. 217, 219.) He felt that no state had a right to have "an appetite so diseased as seeks to abridge these privileges and these immunities, which seeks to deny to all classes of its citizens the protection of equal laws." (Globe, Appendix, p. 219.) It was a known fact, he asserted, that, except for federal authority, the Southern states would have "denied to a large portion of their respective populations the plainest and most necessary rights of citizenship," the right to own land, to collect wages by legal process, to appear in courts, to give testimony. (Ibid.) Most of these states had abandoned their attempts to deny these basic rights, but

> these are not the only rights that can be denied; these are not the only particulars in which unequal laws can be imposed. (Ibid.)

He stated that he did not wish to delay the Senate by referring to more than a single instance of unequal laws--"a statute enacted by the Legislature of Florida for the education of her colored people." He asserted that this was reputedly the first Southern state to attempt the work of educating the children of her colored population:

> And now, sir, I ask the attention of the Senate to the provision which that Legislature made for the education of their colored population. They make provision for the education of their white children also, and everybody who has any property there is taxed for the education of the white children. Black and white are taxed alike for that purpose; but for the education of colored children a fund is raised only from colored men. It amounts to one dollar a head upon all colored males between the ages of twenty-one and fifty-five years. There were in 1860 between twelve thousand three hundred and twelve thousand four hundred colored males between the ages of

twenty and fifty-five in Florida, so that that fund would yield about twelve thousand dollars dedicated to the work of educating the colored children of Florida--not a magnificent endowment, one would think. But how is it to be expended? First, there is to be a superintendent of colored schools for the State to be paid out of it, and he is to receive a salary of $2000. That reduces it essentially. Next, there is to be an assistant superintendent of colored schools for each county at $200 a year. There are in the State of Florida, I believe, thirty-nine counties, which would give $7800 to the assistant superintendents. Add that to the salary of the State superintendent, and it takes $9800 from the school fund to pay the superintendents, leaving $2200 to pay the teachers. But the fund is not left quite so destitute as that; they require each one of the teachers to pay five dollars to the fund to get a license to teach. They are to be examined, their fitness ascertained, and if permission is given them to teach they are to pay five dollars, and that goes to the fund. That swells it; when that license is purchased they can set up a school. Into that school, however, it is worthy of remark that no child can go without permission of the superintendent or his assistant, and no child can stay a day without the permission of the superintendent or his assistant, and the teacher who has paid five dollars for the permission to teach cannot hold that permission a day longer than the superintendent or assistant superintendent sees fit to allow, for the statute expressly authorizes the superintendent or assistant superintendent to vacate or annul the certificate whenever he shall see fit for incompetency or 'other good cause'--any cause which seems good to the superintendent or assistant superintendent. (Globe, Appendix, p. 219.)

Senator Howe then asked if, in view of this statute, touching "one of the great interests not only of this colored population but of the State itself," there could be any hesitation in putting into the Constitution a "positive inhibition upon exercising this power of local government to sanction such a crime as I have just portrayed." (Ibid.)

On June 7, 1866, when consideration of section 1 was resumed, Senator Garrett Davis of Kentucky stated that the majority were playing a "bold and desperate political game," (Globe, Appendix, p. 238), and that he was opposed not merely to the language of the proposal, but to the whole spirit and purpose of such an amendment. (Ibid.) As for the citizenship amendment to the first section, its

> object
> real and only/* * * is to make negroes citizens, to prop the civil rights bill, and give them a more plausible, if not a valid, claim to its provisions, and to press them forward to a full community of civil and political rights with the white race, for which its authors are struggling and mean to continue to struggle. (Globe, Appendix, p. 240.)

To Senator Davis, the "perpetual howl for justice and protection to 'the loyal citizens of African descent' * * *" was mere machinery of the radicals for "their continuance in office and power." (Globe, Appendix, p. 243.)

On June 8, 1866, the last day of the Senate debate, consideration of the proposed amendment commenced with a speech by Senator Henderson of Missouri. (Globe, p. 3031.) Speaking in favor of the proposal, he stated (Globe, p. 3031):

> I propose to discuss the first section only so far as citizenship is involved in it. I desire to show that this section will leave citizenship where it now is. It makes plain only what has been rendered doubtful by the past action of the Government.

> If I be right in that, it will be a loss of time to discuss the remaining provisions of the section, for they merely secure these rights that attach to citizenship in all free Governments.

Discussing what the South had done to the Negro, Senator Henderson declared (Globe, p. 3034):

> The South saw its opportunity and promptly collected together all the elements of prejudice and hatred against the negro for purposes of future party power. They denied him the right to hold real or personal property, excluded him from their courts as a witness, denied him the means of education, and forced upon him unequal burdens. Though nominally free, so far as discriminating legislation could make him so he was yet a slave.

The Southern states

> not only denied him the ballot, but denied him the commonest rights of human nature. If this thing were to be continued there was no hope left for his future amelioration. He must be a degraded outcast. The only change made was in the name; he was once a slave, and men called him a slave; men now mocked his condition by calling him a freeman.

Senator Henderson observed that (Globe, pp. 3034-3035):

> In this condition of affairs Congress convened. The first thing, of course, was to close the doors of Congress against this rebel invasion. The next was to do a simple act of justice to the negroes and poorer whites of the South, who had been always loyal to the Government. For that purpose,

> 'the act to establish a Bureau for the Relief of Freedmen and Refugees,' called the 'Freedmen's Bureau bill,' and the 'act to protect all persons in the United States in their civil rights,' called 'the civil rights bill,' were presented to Congress and adopted. Whatever may be said against these measures, and much has been said, their sole object was to break down in the seceded States the system of oppression to which I have alluded. Their only effect was, after feeding the starving white and black, to give the right to hold real and personal estate to the negro, to enable him to sue and be sued in courts, to let him be confronted by his witnesses, to have the process of the courts for his protection, and to enjoy in the respective States those fundamental rights of person and property which cannot be denied to any person without disgracing the Government itself. It was simply to carry out that provision of the Constitution which confers upon the citizens of each State the privileges and immunities of citizens in the several States. These measures did not pretend to confer upon the negro the suffrage. They left each State to determine that question for itself. Their highest aim was to secure what the lawyers call civil rights to every person within the jurisdiction of the Government.

The Southern argument that the Negro was "inferior to the white man" when it came into conflict with the "opposite idea of man's equality * * *, carrying with it equal rights and equal privileges" had been the cause of the war. (Ibid.) It was necessary therefore "to consider whether the cause of disease should be removed entirely or be left in the system to fester again." (Ibid.)

Henderson stated that section 1 of the proposed amendment, in its declaration of citizenship of the United States, and of the States as well, was

really unnecessary to overrule the Dred Scott case. (Globe, p. 3032.) By the reasoning used in that case itself, the Thirteenth Amendment had made the freed slaves an indistinguishable part of the "people of the United States." (Ibid.) This section, however, in leaving "citizenship where it now is," made plain "what has been rendered doubtful by the past action of the Government." (Globe, p. 3031.) This being clear, he said, there was no further need to discuss the remaining parts of section one, "for they merely secure the rights that attach to citizenship in all free Governments." (Ibid.)

Senator Yates also stated that, under the Thirteenth Amendment, the Negro was a citizen already, for

> that amendment did not confer freedom upon the slave, or upon anybody, without conferring upon him the muniments of freedom, the rights, franchises, privileges that appertain to an American citizen or to freedom, in the proper acceptation of that term. (Globe, p. 3037.)

Senator Henderson thought that:

> Within the scope of State jurisdiction there is no such thing as equality in the law. The State courts are already deciding the "civil rights bill" to be unconstitutional. The validity of all laws must depend at last upon human judgment. Judges, even in the highest courts, are but mortals. Should the Supreme Court of the United States affirm the judgment of these inferior tribunals, the present period would be no better for the rights of the negro than that when the Supreme Court once before supposed he had no rights which the white man was bound to respect. Should such be the action of this tribunal, the problem would at once be presented, whether four million people can be peacefully held nominally free, but actually slave. (Globe, p. 3035.)

Senator Yates "took the ground laid down in the decision of the Supreme Court in the Dred Scott case," that when the Thirteenth Amendment passed "the freedman was no longer a member of a subject race" (Globe, p. 3037), that by virtue of that amendment, the freed slave had become "one of the people, one of the body-politic, and entitled to be protected in all his rights and privileges as one of the citizens of the United States." (Ibid.) He repeated (Globe, p. 3037):

> I took the ground that the former slaves in every State of the United States, being made free by this amendment, occupied precisely the same position with any other part of the body-politic, that a son of a colored man born in the State of Wisconsin under the broad aegis of this amendment to the Constitution, had the same rights that my son had. I maintained that by this amendment to the Constitution, and by the promises of Abraham Lincoln made in his proclamation of emancipation, the former slave should be maintained in his freedom; that being like any other man, and not unlike him in any respect, under this amendment to the Constitution, he had the same right, the same inherent, if you choose, God-given right, and further, if he had not that right naturally or civilly or politically, he, by his heroic valor, his prowess upon many a glorious battle-field, where he had fought side by side with our own brave sons and brothers, had become entitled to it.

Senator Yates referred to the possibility that adoption of the proposed amendment might conceivably be held to restrict the broad operation of the Thirteenth Amendment. He felt that the proposal should contain a declaration that it should not be construed to impair or in any wise affect the rights, privileges or franchise conferred by the Thirteenth Amendment. (Globe, p. 3037.) This was not propounded, he stated, from a belief that it was really necessary, but merely

> so that there shall not be even a color for any judicial decision proposing to deprive men of rights which are already guaranteed by the recognized law. (Ibid.)

Senator Fessenden then moved to insert the phrase "or naturalized" in the first sentence of the first section, so that it should read: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside." The amendment was adopted. (Globe, p. 3040.)

After an attempt to have the sections of the proposal submitted as separate articles (Globe, p. 3040), and to strike out the privileges and immunities clause for vagueness (Globe, p. 3041), the final vote was taken. (Globe, p. 3042.) The amendment then passed the Senate, on June 8, 1866, by a vote of 33 to 11, more than the necessary two-thirds. (Ibid.)

In the House, the proposal was called up by Stevens on June 13, 1866. He pointed out that since the Senate amendments were slight, there was no purpose in discussing the proposal again at length. Therefore, he stated that he would call the previous question at three o'clock. (Globe, p. 3144.) The brief discussion that ensued was without specific application to any particular part of the proposal. (Globe,pp. 3144-3148.) Finally, at three, the House concurred in the Senate amendments by a vote of 120 to 32, and the proposed Fourteenth Amendment was declared passed by the Thirty-ninth Congress. (Globe, p. 3149.)

Form No. DJ-96a
(Rev. 7-17-63)

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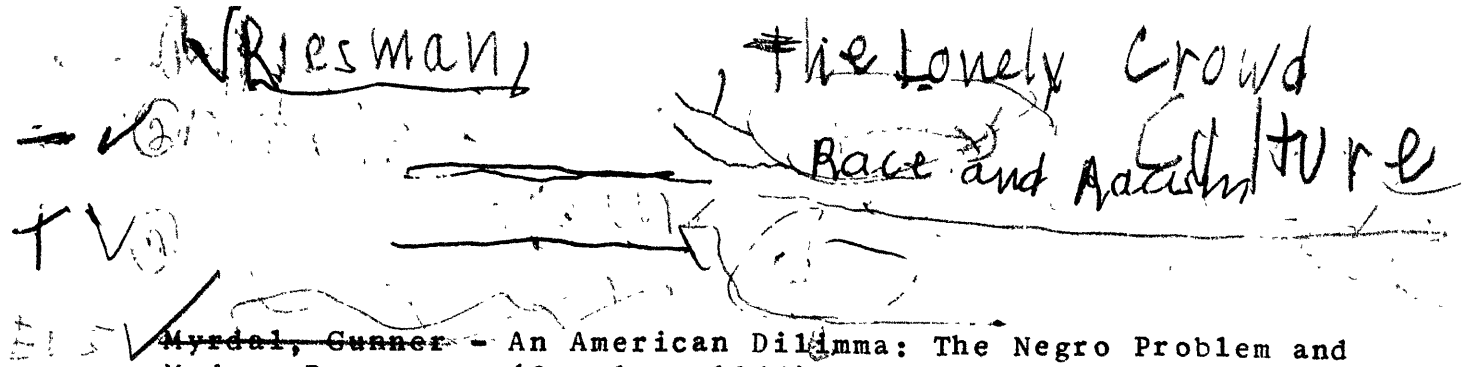
REMARKS

Isabel - This is a list of books which was compiled in connection with the sit-in briefs. I think it should be in your files rather than mine.

FROM: NAME	BUILDING, ROOM, EXT.	DATE
B. Rankin		



~~Myrdal, Gunner~~ - An American Dilimma: The Negro Problem and ~~Modern~~ Democracy (2 vols., 1944)

Franklin, John Hope - From Slavery to Freedom (1947)

Woodward, C. Vann - Origins of the New South, 1877-1913 (1951)

Wharton, Vernon L. - The Negro in Mississippi, 1865 -1890 (1947)

Tindall, George B. - South Carolina Negroes, 1877-1900 (1952)

~~Mangum, Charles S.~~ - The Legal Status of the Negro (1940)

~~Johnson, Franklin~~ - The Development of State Legislation concerning The Free Negro (1919)

~~Murray, Pauli~~ - State Laws on Race and Color (1952)

Doyle, Bertram W. - The Etiquette of Race Relations in the South (1937)

Raper, Arthur F. - The Tragedy of Lynching (1933)

~~Frazier, E. Franklin~~ - The Negro in the United States (1949)

Green, Fletcher M. - Essays in Southern History, The James Sprunt Studies in History and Political Science, vol. 31 (1949)

[illegible]um, Howard W. - Race and Rumors of Race (1944)

[illegible]illard - Caste and Class in a Southern Town

Heinrich - The Psychology of a Suppressed People

Johnson - Patterns of Negro Segregation

Allport - The Nature of Prejudice (1954)

Suchman, Dean, & Williams - Desegregation - Some Propositions and Research Suggestions (1958)

Simpson & Yinger - Racial and Cultural Minorities (rev. ed. 1958)

Saenger - The Social Psychology of Prejudice (1953)

Ashmore - An Epitaph for Dixie (1957)

Dabbs - The Southern Heritage (1958)

Peters - The Southern Temper (1959)

Malinowski, Bronislaw - The Dynamics of Cultural Change

Hartmann - Racial and Religious Discrimination by Innkeepers in U.S.A. 12 Modern L. Rev. 449 (1949)

Loth & Fleming - Integration North and South (1956)

Martin John B. - The Deep South Says "Never" (1957)

[redacted]

President's Comm. on Civil Rights, To Secure These Rights (1947)

F. 205 Cash - Mind of South

Darner V. Tousaw

Burke Marshall
Assistant Attorney General
Civil Rights Division

Harold H. Greene
Chief, Appeals and
Research Section

HHG:AGM:bco

Response to several questions asked by Solicitor General concerning the sit-in problem

1. Relevance of the fact that stores are generally open to Negroes although restaurants within the stores are segregated

The meager authority on this question may be briefly stated. Insofar as tort liability of store proprietors is concerned, the rule is that:

> The special obligation toward invitees exists only while the visitor is upon the part of the premises which the occupier has thrown open to him for the purpose which makes him an invitee. This "area of invitation" will of course vary with the circumstances of the case. * * * it extends to all parts of the premises to which the purpose may reasonably be expected to take him, and to those which are so arranged as to lead him reasonably to think that they are open to him. Prosser, Torts 458 (1955).

Whatever the relevance of tort law to the "sit-in" problem, it seems obvious that Negroes do not fall within the category of persons who might "reasonably * * * think" that "white" lunch counters are open to them.

However, the common law rule as to innkeepers is that they are required to serve persons residing in a hotel at every facility within the hotel, including restaurants. Odom v. East Avenue Corp., 34 N.Y.S. (2d) 312, 173 Misc. 363 (Supreme Ct.), affirmed mem., 37 N.Y.S.

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(2d) 491, 264 App. Div. 985 (1942). In Odom the Negro plaintiffs had obtained rooms in a Rochester hotel. Thereafter, they "each went to the dining room owned and operated by [the hotel] in said hotel and requested that they be served with food in the dining room * * *," but they were refused service "solely upon the ground that plaintiffs belonged to the colored or Negro race." The court, holding that "once the relationship of innkeeper and guest is obtained, the innkeeper must * * * provide such facilities as the character of his inn will afford * * *," sustained the complaint upon the facts stated above as against a motion to dismiss for failure to state a cause of action. Cf. LeFevre v. Crossan, 84 Atl. 12 (Del. Sup. Ct. 1912). The Odom court did, however, note that the rule it applied would not govern restaurants wholly separated from an inn. However, may it not be said that Odom means that once an innkeeper, acting under whatever reasonable standards he may employ, 1/ decides to accept a person as a guest in the hotel, it would be unreasonable to allow him to apply a different standard -- one based on color -- to facilities other than rooms which he operates within the hotel? There is surely no basis for finding that such a discrimination is any more reasonable with respect to lunch counters located within department stores open to Negroes generally. The Odom case, then, supports an argument as to the unreasonableness of such a distinction and may afford some judicial authority for this view should the Supreme Court care to distinguish Avent from, for example, the hot dog stand from which the proprietor excludes Negroes entirely.

1/ It is true that at common law an innkeeper, unlike department store proprietors, is restricted in his choice of guests to whom he will let rooms -- but some freedom of choice is nonetheless left to him to refuse rooms to "objectionable" persons.

There is also an expression of opinion by the United States Supreme Court which suggests the irrationality of allowing entrance generally but then restricting one area of a store. In Henderson v. United States, 339 U.S. 816, 825 (1950), the Court said, in holding segregated dining facilities a violation of the Interstate Commerce Act (49 U.S.C. §3(1)):

> The curtains, partitions and signs emphasize the artificiality of a difference in treatment which serves only to call attention to a racial classification of passengers holding identical tickets and using the same public dining facility. Cf. McLaurin v. Oklahoma State Regents [339 U.S. 637 (1950)], decided today (emphasis added).2/

2/ In McLaurin the Court held invalid under the separate-but-equal doctrine a rule of the University of Oklahoma segregating in manifold ways a Negro student who had been admitted to the University. In both Henderson and McLaurin, of course, the Negroes had to be admitted to the facilities involved -- the railroad and the University were both forbidden to exclude them, the railroad under 49 U.S.C. §3(1) and the University by Court order, 87 F. Supp. 526.

2. Once evidence of a state custom of discrimination is introduced, the owner should not be entitled to rebut the presumption that his decision to discriminate was coerced by the custom

We believe that, once evidence of a general custom of discrimination in lunch counter service in the area is introduced, the owner or the state should not be allowed to rebut the inference or presumption that the owner's decision to refuse service to Negroes was coerced, at least in some substantial degree, by the "custom."

In the Peterson and Gober cases, where a city ordinance requiring racial discrimination exists, we would argue that the mere existence of the ordinance interferes with the free choice of the owner. Cf. Thornhill v. Alabama, 310 U.S. 88 (1940). In Avent, in the absence of such an ordinance, the argument would be that the mere existence of a widespread custom of discrimination in lunch counters must, as a matter of law, be held to interfere with the owner's freedom of choice, while the degree of that interference may vary from case to case but would not be legally relevant.

This argument assumes that "custom" is the equivalent of state action. On that assumption, there would seem to be no logical difference between treating a state law as a coercive element and treating "custom" as such an element. If the presumption is conclusive in the one case, it should be in the other. In some cases a state law will doubtless exert greater pressure than would custom, but in others that may not be true. In any event the exertion of any amount of state pressure, by law or custom, is decisive. And there is analogous authority for the view that as a matter of law certain pressures inevitably result in a decision not freely made. Cf. Mallory v. United States, 354 U.S. 449 (1957) (confession obtained in violation of Federal Rules of Criminal Procedure inadmissible); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (situation "inherently coercive").

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We think that this argument avoids some difficulties which would be inherent in a decision making the presumption rebuttable.

First, the result of a rebuttable presumption rule would be that the greater and more intractable the bigot, the more likely it is that the police may be able to lawfully enforce his prejudice. For example, such a rule would give a Klansman operating a store an opportunity to argue that he made his decision on the basis of "free choice" to a greater degree than a person without strong feelings of racial antagonism. While there may be some truth to such an argument, the result itself is obviously undesirable.

Second, the problems of proof and weight of the evidence which would arise if the presumption is rebuttable are manifold. It would be quite difficult for a state or federal court to weigh the conflicting testimony about the degree of pressure exerted by the "custom" (assuming that evidence on this point is available) against elusive psychological factors concerning, among other things, the owner's "free will", the sources of his prejudice, his fear of community censure, and his desire for profit. Assuming that these are matters of fact which upon resolution by the state courts are binding on Supreme Court, it is not difficult to envision which way the state courts will rule. If, on the other hand, the ultimate facts to be inferred from the "evidence" are subject to Supreme Court review, the Court would be placed in the impossible position of sorting through a mass of psychological testimony to deduce "ultimate" psychological "facts". Of course, the Court does something like this in the coerced confession area. E.g., Watts v. Indiana, 338 U.S. 49. But in dealing with confessions the Court at least weighs various elements of the pressure which are tangible: the length of time the interrogation proceeded, the physical conditions under which it was conducted, the age and educational level of the defendant, and the probable impact of such pressures upon the defendant involved in a field where the pressures themselves

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are fairly well understood and the resistance of at least the ordinary man can be evaluated with some degree of accuracy. In the sit-in area, on the other hand, the pressures themselves are little understood and the resistance any individual might have to them even less so. For all of these reasons we doubt the feasibility of imposing upon any court the burden of weighing such "evidence" and reaching any rational solution.

Third, a rebuttable presumption would not settle the sit-in question, even for department stores. Each case would have to be determined on its own psychological facts. A decision grounded upon such a rebuttable presumption would thus not contribute to a definitive solution of the sit-in problem but might embroil the federal court in endless factual adjudications.

3. Application of the "custom" argument to the Glen Echo case

Little evidence of discriminatory custom is reflected in the statutes of Maryland. See, e. g. Greenberg, Race Relations and American Law 372-400. The only statutes presently in effect in which race is considered appear to be Ann. Code Md. Art. 27 § 398, (intermarriage prohibited), and Ann. Code Md. Art. 16 § 78, (petition for adoption must disclose race). Intermarriage statutes exist in Northern as well as Southern states; and the adoption statute may well be reasonable and defensible under the Fourteenth Amendment. In addition, there is evidence--the Baltimore and Montgomery County public accommodations laws--reflecting governmental "custom" in favor of integration.

As to the degree of custom reflected in private actions, it is interesting to note that sufficient political pressure has developed in Maryland to induce the Governor to endorse a public accommodations bill (which, however, failed of enactment). On the other hand, as is well known, many restaurants (but again, not all) on Route 40

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discriminate. And on the eastern shore segretation is apparently quite general. In a recent decision, it is said, however,

> Such segregation of the races as persists in restaurants in Baltimore is not required by any statute or decisional law of Maryland, nor by any general custom or practice of segregation in Baltimore City, but is the result of the business choice of the individual proprietors catering to the desires or prejudices of their customers. Slack v. Atlantic White Tower System, 181 F. Supp. 124, 127-8 (1960)

In sum, the custom of segregation is not reflected in Maryland law; at least two counties require restaurant integration; some restaurants do serve Negroes on an integrated basis; and many others -- probably most -- do not. On this evidence it would be difficult to argue that the proprietor of Glen Echo Amusement Park, located adjacent to the District of Columbia where such a custom does not exist and in Montgomery County, a notably liberal community, and drawing its customers from these localities among others, was "coerced" by a "community custom" of discrimination.

In conclusion, we do not think that the "custom" argument is applicable to the Glen Echo case. This view is, however, subject to further exploration to ascertain whether earlier Maryland laws or practices might furnish some support for the custom argument. In addition, the question of whether the Glen Echo Amusement Park can be analogized to the company town in Marsh v. Alabama, or whether the convictions might be reversed on some other theory, deserves further consideration.

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REMARKS

Attached is a copy of Bruce Terris' critique of the Solicitor General's outline in the sit-in cases. Bruce believes that the forcefulness of his arguments might result in another meeting to reconsider our position in the cases.

Return:
I am not overwhelmed.
BM

FROM NAME	BUILDING, ROOM, EXT.	DATE
Howard Glickstein		

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 I.--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~~ 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 area~~ 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 Johnsons. 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, 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 to 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 are 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 me 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

Solicitor General

July 13, 1962

Burke Marshall
Assistant Attorney General
Civil Rights Division

Avent et al. v. State of North Carolina, No. 11; ~~Griffin et al. v. State of Maryland, No. 26~~; Lombard et al. v. State of Louisiana, No. 58; Gober et al. v. City of Birmingham, No. 66; Shuttlesworth et al. v. City of Birmingham, No. 67; ~~Wright et al. v. State of Georgia, No. 68~~; Peterson et al. v. City of Greenville, No. 71.

STATUS OF CASES

These are the seven "sit-in" cases in which the Supreme Court has granted certiorari. The tentative briefing schedule requires the petitioners' brief to be filed on September 22, 1962.

Pursuant to your request, we have studied the records in each of these cases and are presenting the relevant facts in this memorandum. We have also identified in each case the so-called "narrow" grounds that might be advanced for urging reversal and have expressed our views on the merits of each of these grounds. We have attempted, within the limits of the time at our disposal, to develop the "narrow" arguments. We recognize of course, that, were we to file a brief advancing any one of these "narrow" arguments, the discussion we have included in this memorandum would have to be further reviewed and developed.

cc: Records
Chron.
Greene(2)
Glickstein
Marer

No. 26: Griffin et al. v. State of Maryland

1. The Statute Involved: The petitioners were convicted of violating Article 27, §577 of the Maryland Code (1957) which provides:

> Any person . . . who shall enter upon or cross over the land, premises or private property of any person . . . after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor . . . provided [however] that nothing in this section shall be construed to include within its provisions the entry or crossing over any land when such entry or crossing is done under a bona fide claim of right or ownership of said land, it being the intention of this section only to prohibit any wanton trespass upon the private land of others.

2. The Facts: This case involves a sit-in demonstration at Glen Echo Amusement Park in Montgomery County, Maryland. On June 30, 1960, about forty persons, including petitioners, picketed outside of Glen Echo urging that Negroes be permitted to use the Park's facilities. After a while, petitioners, young Negroes students, entered the Park through the main gates. No tickets of admission were required for entry into the Park.1/ Petitioners, with valid tickets that had been purchased for them by white supporters, took seats on the carousel. But the carousel was not put in operation. Rather, Francis J. Collins, employed by the Glen Echo management as a "special policeman" under arrangements with the National Detective Agency and deputized as a Special Deputy Sheriff of Montgomery County, on the

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1/ Tickets are purchased at the particular concessions within the park.

request of the Park management, promptly approached petitioners. 2/ Collins was dressed in the uniform of the National Detective Agency and was wearing his Montgomery County Special Deputy Sheriff's badge. Collins directed petitioners to leave the Park within five minutes because it was "the policy of the Park not to have colored people on the rides, or in the park." Petitioners declined to obey Collins' direction, remaining on the carousel for which they tendered tickets of admission. A white person who accompanied petitioners testified that she was also asked to leave but did not. Collins then arrested the petitioners (but not the white person accompanying them) for violating Article 27, Section 577 of the Maryland Code, supra. A crowd gathered during the interval between the warning and the arrest and there was some heckling. There is nothing in the record to indicate that petitioners were disorderly in any manner. Glen Echo's policy of excluding Negroes extends to all Negroes no matter how they are dressed or how they conduct themselves.

Collins variously described his reason for arresting petitioners. At one point in his testimony, this colloquy occurred:

> Q. If you had seen [other Negroes] . . . would you have arrested them?
>
> A. Yes, sir.
>
> By Judge Pugh: Do you mean just because they were Negroes?
>
> A. Due to the fact that the park is operated on a segregated policy.

2/ Lt. Collins testified that after seeing the students on the rides he "went up to Mr. Woronoff [the park manager] and asked him what he wanted me to do. He said they were trespassing and he wanted them arrested for trespassing, if they didn't get off the property." Mr. Woronoff testified that he "instructed Lieutenant Collins to notify them that they were not welcome in the park, and we didn't want them there, and to ask them to leave, and if they refused to leave, within a reasonable length of time, they were to be arrested for trespassing."

By Judge Pugh: Would you tell them to get off the property?

A. No. I would notify them they were on private property, and it was not the policy of the park to have Negroes in the park.

Collins also testified as follows:

Q. Exactly why did you arrest these five defendants?

* * * * *

A. They were trespassing and refused to leave the property.

By Judge Pugh: Not because they were Negroes? I thought you testified, on cross-examination, that you arrested them because they were Negroes. Is that why you arrested them?

A. They were Negroes and refused to leave the property.

By Judge Pugh: Do you want to change your testimony on cross-examination now?

A. No, sir.

By Judge Pugh: Well, what did you mean when I asked you if you arrested them just because they were Negroes? Is that the sole reason?

A. No, sir; they wouldn't leave the property.

By Judge Pugh: There were other reasons then?

A. Yes. 3/

3/ The petition for certiorari emphasizes Collins' statement that he arrested petitioners "because they were Negroes" and does not refer to the clarifying testimony quoted above.

Glen Echo co-owner Abram Baker described his directions to Collins in these words:

Q. And what specific instructions did you give him with respect to authority to order people off the park premises?

A. Well, he was supposed to stop them at the gate and tell them that they are not allowed; and if they come in, within a certain time, five or ten minutes -- whatever he thinks, why he would escort them out.

Q. In the event they didn't see fit to leave at his warning, did you authorize Lieutenant Collins to have these people arrested?

A. Yes.

Q. On a charge of trespass?

A. On a charge of trespass.

Baker also testified that:

Q. Would you tell the Court what you told Lieutenant Collins relating to the racial policies of the Glen Echo Park?

A. We didn't allow Negroes and in his discretion, if anything happened, in any way, he was supposed to arrest them if they went on our property.

Q. Did you specify to him what he was supposed to arrest them for?

A. For trespassing.

Q. You used that word to him?

A. Yes; that is right.

Q. And you used the word 'discretion' -- what did you mean by that?

A. To give them a chance to walk off; if they wanted to.

Q. Did you instruct Lieutenant Collins to arrest all Negroes who came on the property, if they did not leave?

A. Yes.

Q. That was your instructions?

A. Yes.

Q. And did you instruct him to arrest them because they were Negroes?

A. Yes.

Q. In other words, your instructions as to Negroes was to arrest them if they came into the park, and refused to leave, because they were Negroes; and your instructions was to arrest white persons if they were doing something wrong?

A. That is right. JC

At the Montgomery County Police precinct house, where petitioners were taken after their arrest, Collins preferred sworn charges for trespass against the petitioners. One warrant read as follows:

> William L. Griffin late of the County and State on the 30th of June 1960 at the County and State aforesaid did unlawfully violate Article 27 section 577 of the annotated code of Maryland 1957 edition to wit: Did enter upon and pass over the land and premises of Glen Echo Park (Kebar) after having been told by the Deputy Sheriff for Glen Echo Park, to leave the property, and after giving him a reasonable time to comply, he did not leave. 4/

4/ The warrants are not all identical. Some describe the conduct of the particular defendant as "wanton."

Petitioners were tried in the Circuit Court of Montgomery County on September 12, 1960, and were convicted and fined for wanton trespass. On appeal -- in addition to contending that their convictions were unlawful under the Fourteenth Amendment and under 42 U.S.C. §1981 and 1982 -- the petitioners argued that the Maryland statute had not been complied with in three respects. Petitioners contended that (1) there had been no showing of wantonness;[5] / (2) they had not been given proper notice not to enter upon the property in that they freely entered the gate to Glen Echo, there were no signs around the Park indicating any discrimination against Negro patrons, and that in all its press, radio and television advertising in the District of Columbia area the management invited "the public generally" without distinction of race or color;[6] / (3) they were

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[5] / The trial court, in its oral opinion after noting that "wanton has been defined in our legal dictionaries as reckless, heedless, malicious; characterized by extreme recklessness, foolhardiness and reckless disregard for the rights or safety of others, or of other consequences" said: "One of the definitions of wanton is 'foolhardy' and this surely was a foolhardy expedition; there is no question about that when forty people get together and come out there, as they did, serious trouble could start."

[6] / The trial judge rejected this argument and said: ". . . the defendants have trespassed upon this corporation's property, not by being told not to come on it, but after being on the property they were told to get off. . . . It is wanton trespass when he refuses to get off the property, after being told to get off."

acting under a bona fide claim of right in that they were relying on the Park's advertising addressed to "the public generally" and they had tickets for the carousel ride. 7/

The Maryland Court of Appeals affirmed the convictions. Petitioners federal constitutional and statutory objections were rejected and the court found the case to be "one step removed from State enforcement of a policy of segregation." The court also found that there had been compliance with the Maryland statute and disposed of each of the petitioner's objections on these grounds: (1) Petitioners had due notice. They gathered to protest segregation. Consequently, "it would not be unreasonable to infer that they had received actual notice not to trespass on the park premises even though it had not been given by the operator of the park or its agent." In any event, the notice petitioners received once they seated themselves on the carousel was due notice. The court said:

> Having been duly notified to leave, these appellants had no right to remain on the premises and their refusal to withdraw was a clear violation of the statute under the circumstances even though the original entry and crossing over the premises had not been unlawful. State v. Fox, 118 S.E. 2d 58 (N.C. 1961). Cf. Commonwealth v. Richardson, 48 N.E. 2d 678 (Mass. 1943), words such as 'enter upon' or 'cross over' as used in §577, supra, have been held to be synonymous with the word 'trespass.' See State v. Avent, 118 S.E. 2d 47 (N.C. 1961).

7/ To argue that petitioners were acting under a bona fide claim of right requires some straining. Before petitioners entered the Park, they had been demonstrating in protest against segregation which -- some of them testified -- they thought existed. It seems quite clear that petitioners knew that Glen Echo did not admit Negroes and that they had no invitation to enter.

(2) The trespass was wanton since the evidence supports the conclusion that petitioners entered the Park knowing that they were violating the property rights of another; 8/
(3) Since petitioners' carousel tickets were obtained surreptitiously in an attempt to integrate the park, petitioners did not occupy their seats on the carousel under a bona fide claim of right. 9/

8/ The court adopted, from earlier Maryland decisions, this definition of "wanton": "characterized by extreme recklessness and utter disregard for the rights of others." The court said: "We see no reason why the refusal of these appellants to leave the premises after having been requested to do so was not wanton in that their conduct was in 'utter disregard of the rights of others.'"

9/ The court held: "While the statute specifically excludes the 'entry upon or crossing over' privately owned property by a person having a license or permission to do so, these appellants do not come within the statutory exception. In a case such as this where the operator of the amusement park -- who had a right to contract only with those persons it chose to deal with -- had not knowingly sold carousel tickets to these appellants, it is apparent that they had no bona fide claim of right to a ride thereon, and, absent a valid right, the refusal to accept the tickets was not a violation of any legal right of these appellants."

3. The "Narrow" Grounds

a. In the state courts petitioners argued, on various grounds, that their convictions violated state law in that all of the elements required to constitute a violation of Article 27, §577 of the Maryland Code had not been established. 10/

First. Petitioners argued that their conduct was not shown to be wanton, as required by the statute. The trial court accepted "foolhardy" as an appropriate definition of wanton and concluded that the demonstration at Glen Echo followed by petitioners' attempt to ride the carousel was certainly foolhardy. The Court of Appeals concluded that petitioners' conduct was wanton since the evidence demonstrated that they had entered the Park knowing they were violating the property rights of others. 11/ In one sense, the Court of Appeals' definition of wanton assumes as a fact the ultimate issue in these cases -- whether sit-in demonstrators actually violate property rights of others. To dispute that aspect of the definition of the Court of Appeals would, of necessity, require reaching the "broad" questions in these cases. Absent the question of violation of property rights, the definition of "wanton" adopted by the Maryland Court of Appeals is not so clearly erroneous as to provide a respectable basis for urging that petitioners have not been shown to have violated the Maryland statute.

Second. Petitioners argued that they did not receive proper notice not to enter the Park, relying upon the absence of discriminatory signs and on advertising directed to the general public. The trial court concluded that once petitioners were in the Park they were told to leave and, not having done so, were guilty of trespass. The Court of Appeals accepted this interpretation of the statute and added that petitioner's conduct, in coming to Glen Echo to

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10/ In their petition for certiorari, petitioners do not raise similar contentions.

11/ The Court of Appeals defined as "wanton" conduct that is in "utter disregard of the rights of others."

protest against segregation, was also a basis for inferring that they had actual notice not to trespass.

These conclusions appear to be clearly correct. It is undeniable that petitioners were aware of the policy of Glen Echo and realized that their patronage was not desired. Moreover, after they had entered the Park, petitioners were directed to leave. Petitioners' argument that it was then too late to order them out since the trespass statute only applies to initial entries is similar to the argument advanced in the Avent case which we have discussed in detail in our consideration of Avent. 12/

Third. Petitioners claimed that they were acting "under a bona fide claim of right." The Court of Appeals held that petitioners had obtained their carousel tickets surreptitiously and, therefore, could not claim to be acting under a bona fide claim of right. But even if petitioners had purchased their own tickets, there would be no basis for attacking the conclusion of the Court of Appeals. In Marrone v. Washington Jockey Club, 227 U.S. 633 (1913) the Supreme Court noted that a ticket for admission to a race track did not create an irrevocable right of entry but was a license subject to be revoked. 13/ Furthermore, the bona fide nature of petitioners' claim is highly suspect in view of petitioners' complete awareness of the policies of Glen Echo. 14/

12/ The Maryland Court of Appeals relied on Avent in concluding that petitioners' conduct constituted a trespass even though their original entry and crossing over the premises had not been unlawful.

13/ Cf. the decision of the Court of Appeals (35 App. D.C. 82) in Marrone noted that there might be a difference between a case where the license is revoked before the holder takes the seat called for by the ticket and where he is given notice or revocation and rejected after he has occupied the seat.

14/ In connection with the Avent case, we also have discussed various ramifications of the "bona fide claim of right" defense.

We conclude, therefore, that the rulings of the Maryland courts preclude an argument that petitioners' convictions did not comply with state law.

b. There is one unique feature in this case which might serve as an adequate "narrow basis for urging reversal of the convictions. Here petitioners were ordered to leave the amusement park by Officer Collins, a Deputy Sheriff of Montgomery County. 15/ It was their refusal to obey this order that constituted the "crime" and resulted in their arrests and convictions. 16/ In other words, petitioners offense was their refusal to obey a state officer -- not a private person. It does not appear to require any undue extension of the concept of "state action" to argue that where a state officer -- clothed with the indicia of his authority -- orders Negroes to refrain from a particular activity -- merely because they are Negroes -- and then arrests the Negroes for failure to obey his order, the action of the officer is the type of "state action" that the Fourteenth Amendment proscribes. In such a situation, the state officer participates in the act of discrimination rather than merely enforcing the wishes of a private person. As Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961) teaches, where "the State has so far insinuated itself into a position of interdependence with [the "private" party]

15/ Collins was employed by Glen Echo as a "special policeman" under arrangements with the National Detective Agency. At the time he approached petitioners, he was dressed in the uniform of the National Detective Agency and was wearing his Montgomery County Special Deputy Sheriff's badge.

16/ The petition for certiorari notes that it was Collins request that actually made petitioners conduct a crime. The petition states (p. 8, n. 4): "Indeed, Deputy Sheriff Collins 'made the crime' of which petitioners were convicted. Collins' direction to leave was a necessary prerequisite of the trespass charge, for petitioners could not have been so charged (and were admittedly lawfully on the premises) until Collins, a state officer, directed them to leave."

that it must be recognized as a joint participant in the challenged activity, [then the activity] cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." Here the insinuation, the position of interdependence, and the joint activity seem to be sufficient to meet the Burton test.

The fact that an otherwise private person has been invested with authority by the state has been considered a significant factor in many cases. For example, in Watkins v. Oaklawn Jockey Club, 86 F. Supp. 1006 (W.D. Ark. 1949), affirmed, 183 F. 2d 440 (C.A. 8, 1950) -- an action for damages under 42 U.S.C. 1983 -- the plaintiff claimed that two of the defendants, a sheriff and a deputy sheriff, were acting "under color of law" at the time they ejected him from a race track. The two defendants, however, claimed that at the time of the ejection they were acting as agents of the Jockey Club -- by whom they were employed and by whom they were instructed to eject plaintiff -- and not acting in their official capacities. There is nothing in the case to indicate whether the defendants were wearing badges but there was testimony that they usually carried their pistols. The plaintiff claimed he would not have left the premises if he had not known that the deputy sheriff was a duly appointed, acting and qualified deputy sheriff. Although the district court found that in the circumstances of this case, the defendants were not acting under color of law, the considerations which led the court to this conclusion are highly relevant here. The Court said (86 F. Supp. at 1018):

> Certainly, every act done by one, who is in fact an officer of the law is not an official act done under color of or by virtue of his authority as such an officer. . . . In effect, all the plaintiff has shown is the act itself, and neither the act nor the circumstances surrounding it are in any manner inconsistent with the explanation offered by the defendants. Defendant Fulton [the deputy sheriff] did not tell the plaintiff

> that he was under arrest, merely stated to plaintiff that he was ejected; Fulton did not use his gun in effecting the ejection; Fulton did not use excessive force, and in fact, used no actual force at all; Fulton did not take him to jail; and escorted him only to the gate; nor did defendant Fulton do anything that was in any inconsistent with what any agent of the Oaklawn Jockey Club would have done when carrying out orders to eject a person from the premises. Under these facts and circumstances whatever evidentiary force the mere showing of the act, that is, the ejectment by one who was in fact an officer, may have had in establishing the act as an official one is conclusively, and indeed, completely refuted. [Emphasis added]

A somewhat similar case in Valle v. Stengel, 176 F. 2d 697 (C.A. 3, 1948) -- an action under 42 U.S.C. 1983 -- where the court held that a police officer who assisted the proprietor of an amusement park in ejecting Negroes who attempted to use a pool was acting "under color of law" even though that officer's conduct was contrary to a state public accommodations statute. Cf. Flemming v. South Carolina Electric and Gas Company, 224 F. 2d 752 (C.A. 4, 1955), appeal dismissed, 351 U.S. 901, also a 42 U.S.C. 1983 action -- where a bus driver, acting pursuant to a South Carolina Segregation law, required a passenger to change her seat. The court noted that a section of the segregation statute made drivers police officers and, therefore, when the driver acted in this case his act was "under color of state law." To the same effect is Baldwin v. Morgan, 251 F. 2d 780 (C.A. 5, 1958) where the court held that where a state statute gave private persons the right to enforce discriminatory laws the actions of these persons were covered by the Fourteenth Amendment. See also Boman v. Birmingham Transit Company, 280 F. 2d 531, 535-36, (C.A. 5, 1960); Baldwin v. Morgan, 287 F. 2d 750 (C.A. 5, 1961). In short, the significant element in this case is that the actions of Officer Collins -- from the time he asked petitioners to leave,

and thus committed the act of discrimination, to the time of the arrest -- may be deemed to be "under color of law" and, accordingly, vitiates petitioners convictions.

To be sure, the argument that the officer's discriminatory act is independent of the private owner's communicated policy is not as convincing here as in Garner. There it appeared that the property owners did not ask the police to make arrests, and in two of the three cases the Negroes were not even asked to leave. Here, it is quite apparent that Officer Collins was not merely carrying out his own, or the state's policies. The officer had been instructed by Glen Echo co-owner Abram Baker some time prior to the incident to order Negroes to leave and to arrest for refusing to do so, and immediately before the incidents in this case he had been given similar instructions by Glen Echo manager Woronoff. In view of this, it might be argued that the situation is no different than if manager Woronoff had telephoned the county police and requested them to arrest petitioners. There is one difference, however, which may be significant. Here the chain of events leading to the "crime" and the arrests was initiated by the police officer. It was officer Collins who noticed the Negroes on the carousel and asked for directions from Mr. Woronoff. It is arguable that if Officer Collins, as the representative of the state, had not been present and had not singled the Negroes out, the force of law would never have been invoked against petitioner. Moreover, and perhaps more significantly, it may well be held that, irrespective of factual speculations, as a matter of law an agent of the state, clothed with the indicia of his authority, may not as such initiate a discriminatory practice (as distinguished from merely neutrally enforcing trespass laws whatever the motive of the landowner).

On that basis it is possible to make a valid distinction between the situation where a private party calls a law enforcement officer to enforce his private discrimination and the situation, here, where a law enforcement officer asks a private party whether he

wishes the force of law to be applied.[17]

17/ The petition for certiorari does not rely on Collins' position as a Deputy Sheriff as an independent ground for urging the illegality of the arrests and convictions. Rather, the petition cites this factor as one element demonstrating the presence of "state action" in this case. The petition quotes extensively from the brief of the United States as amicus curiae in Boynton v. Virginia and presents the Government's "broad" argument in that case as an adequate theory to justify reversal in this case.

No. 58: Lombard, et al. v. State of Louisiana

1. Statute Involved

The Louisiana statute under which petitioners were convicted is L.S.A. - R.S. 14:59(b) which provides:

> Criminal mischief is the intentional performance of any of the following acts: ****
>
> (b) Taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of said business or portion of such business had ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business. 18/

2. The Facts

On September 17, 1960, the petitioners, three Negroes and one white person, sat down at counter seats at the "white" refreshment counter at McCrory's Five and Ten Cent store located in New Orleans, Louisiana. There were no signs indicating that any racial restriction as to service was in effect at the counter. Upon observing their presence, Mr. Graves, the restaurant manager, "went behind the counter and faced them and said to them, I am not allowed to serve you here. We don't serve you here. We have to sell to you at the rear of the store where we have a colored counter." The petitioners did not reply, and Mr. Graves proceeded to close the counter, posting a sign which said that the counter was closed. He "displayed the sign to each [petitioner] and said this counter is closed, and then we cut off the lights ****." Nevertheless, the four petitioners "sat there".

18/ The statute declares that "whoever commits the crime of criminal mischief shall be fined not more than five hundred dollars, or imprisoned for not more than one year, or both."

Mr. Graves first notified the store manager [Mr. Barrett] and then called the police "as a matter of routine procedure," 19/ although he had "no particular plan" for the handling of sit-ins. Petitioners were not creating a disturbance and were not saying anything. In response to counsel's query as to whether "the only reason you closed the counter was that these defendants were Negroes and they were sitting there, Mr. Graves responded that "I considered it an unusual circumstance and I closed it, I considered it a reason for closing the counter."

Shortly thereafter several police officers arrived. Captain Cutrera conferred with the store manager, Mr. Barrett, 20/ and Mr. Barrett told the Captain that "he wanted the people out of the place, * * * * away from the lunch counter." Captain Cutrera then "asked [Mr. Barrett] if he had ordered them away and would he do so in our presence." The Captain told him that the police "must witness his statement to them that he didn't want them in the place." Mr. Barrett, "in view of the fact that the department was closed * * * * went behind the counter", introduced himself to petitioners and identified himself as the manager. He then "stood in front of the defendants and showed them the sign reading this department is closed and * * * * asked them if they could read the sign and then * * * * informed them that what the sign said was correct, the department was closed and requested that they leave the department." The petitioners said nothing and remained quietly seated, and were not "loud or boisterous." The police officers witnessed Mr. Barrett's colloquy with petitioners. One of the police officers, Major Reuther, then "* * * * approached these four people sitting at the counter and told them the

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19/ Mr. Graves testified a moment later that he "contacted [his] clerk and let her call the officers."

20/ Captain Cutrera was asked, in connection with his conference with Mr. Barrett, "who decided what law to charge these people under?" The court sustained an objection to this question.

manager had requested that they leave," and he also "told them they were violating the State law and if the manager insisted that they move we would have to put them under arrest." Major Reuther continued:

> I told each one individually. I asked them who was the leader of the group and the white boy said he was. So I again informed him in the presence of the manager that they were violating the City and State laws and if they didn't move we would have to arrest them * * * *."

Major Reuther then gave the petitioners two minutes to leave. After six minutes all four petitioners were placed under arrest.

Mr. Barrett, the store manager, testified that he exercised discretion as to whether Negroes should be served, and that he decides in conformity with "state policy and practice and custom in this area." 21/ The court sustained objections to questions asking if "the state policy or practice would be different you would exercise your discretion in a different manner?", and whether "if there was no custom of segregated lunch counters or no state policy, the general atmosphere would be different, would you allow Negroes to eat at white lunch counters?". Again, Mr. Barrett was not permitted to explain whether he had discussed with others "methods and means to handle these situations," although counsel said "the purpose of this [question] your honor is a question of conformity with state policy." And Mr. Barrett was asked if he had "ever met with members of the New Orleans Police Department and discussed problems of sit-in demonstrations and how you or

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21/ The quoted language is that of counsel for petitioners. Mr. Barrett responded "Yes Sir" to counsel's query on this point.

how they should be handled if they arise in your store," but an objection was sustained. 22/ Similarily, the court ruled out a question to Mr. Graves, the lunch counter manager, in which the latter was asked whether he called the police "on [his] own initiative," although counsel stated that he was trying to determine whether Mr. Graves had "any plans * * * * with the police." And objection was sustained to a question as to "why [Mr. Graves] [was] not allowed to serve them," despite counsel's contention that the question was "material because if Mr. Graves felt there was some state policy that prevented him from serving these defendants this is a clear state action." 23/

On September 10, 1960, one week prior to the demonstration herein involved, a group of Negroes "sat in" at Woolworth's Department Store in New Orleans. On the same day the New Orleans Superintendent of Police issued a statement which received wide publicity, in which the Woolworth sit-in was labelled "regrettable", citizens were cautioned that "the police department intends to maintain peace and order" and informed that "the New Orleans police department is prepared to take prompt and effective action against any person or group who disturbs the peace or creates disorder on public or private property." He "urge[d] the parents of both white and Negro students who participated in today's sit-in demonstration to urge upon these young people that such actions are not in the community interest," and emphasized that the police were "ready and able to enforce the laws of the City of New Orleans and

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22/ Objection was also sustained to a question seeking to learn "the plan or procedure that your store uses here in the city when a sit in demonstration takes place."

23/ Both Mayor DeLesseps Morrison and the Superintendent of Police, who were called as witness, were asked if they knew of any integrated restaurants in New Orleans, but the court refused to permit them to answer.

the State of Louisiana." The Superintendent testified that the "reason" for his statement was that he "was hoping that situations of this kind would not come up in the future to provoke any disorder of any kind in the community."

On September 13, 1960, four days prior to the incident here involved, Mayor Morrison also issued a statement. He said that "I have today directed the Superintendent of Police that no additional sit-in demonstrations or so-called peaceful picketing out-side retail stores by sit-in demonstrators or their sympathizers will be permitted," and that "it is my determination that the community interest, the public safety, and the economic welfare of this city require that such demonstrations cease and that henceforth they be prohibited by the Police Department." The Mayor testified that the Superintendent of Police "serves under [the Mayor's] direction," and that "it is the policy of my office and that of the City Government to set the line or direction of policy to the police department." 24/

Petitioners were thereafter put to trial for violation of L.S.A. - R.S. 14:59, the "criminal mischief" act, convicted, and sentenced to a $350.00 fine and imprisonment for sixty days. The convictions were affirmed by the Supreme Court of Louisiana, State v. Coufingh, et al., 132 So. 2d 860, 241 La. 958 (1961). The state supreme court rejected the contention that "by content, reference

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24/ Petitioners also introduced in evidence a series of bills, some of which were ultimately enacted into law, of the 1960 session of the Louisiana Legislature. The bills ultimately enacted were L.S.A. - R.S. 14:103 ("Disturbing the peace") (see Garner v. Louisiana, 368 U.S. 157 (1961)); 14:103.1 (also "Disturbing the peace"); 14:79.1 (entering into a common law marriage); 14:108 (resisting an officer); 14:63.3 (entry on or remaining in places after being forbidden to do so); 14:63.4 (aiding or abetting a violation of 14:63.3); 14:126.2 (giving false statements concerning denial of constitutional rights to federal agencies); 14:34.1 ("Aggravated battery resulting from breach of the peace"); and 14:126.1 (false swearing for the purpose of violating the public health or safety). L.S.A. - R.S. 14:59, the statute involved in the instant case, was also enacted at the same session..

The record does not contain the bills which failed of enactment.

and position of context [the statute] is designed to apply to, and be enforced in an arbitrary manner against members of the Negro race and those acting in concert with them." The court said:

> In aid of this assertion certain House bills of the Louisiana legislature for 1960, introduced in the same session with the contested statute were offered in evidence. All of these bills did not become law but some did. It is declared that this law and the others enacted during the same session were designed to apply to and be enforced against, in an arbitrary manner, members of the Negro race. We have carefully reviewed the provisions of these bills referred to which were enacted into law and nowhere in their content or context do we find that any of them seek to discriminate against any class, group, or race of persons. We therefore find no merit in this contention and, accordingly, dismiss it as being unsupported.

The court also considered the contention that "the action of the manager of McCrory's was provoked or encouraged by the state, its policy, or officers, and they would have this Court hold that this action of McCrory's was not its own voluntary action, but was influenced by the officers of the state." The court held that (132 So. 2d at 864):

> The conclusion contended for is incompatible with the facts. Rather, the testimony supports a finding that the manager of McCrory's had for the past several years refused service to Negroes, that the policy of the store was established by him, that he had set out the policy and followed it constantly; that Negroes had habitually been granted access to only one counter within the store and

a deliberately provoked mischief and disturbance such as the one he complained of here had not previously occurred.

* * * *

Even under the provision of the questioned statute it is apparent that a prosecution is dependent upon the will of the proprietor, for only after he has ordered the intruder to relinquish possession of his place of business does a violation of the statute occur. The state, therefore, without the exercise of the proprietor's will can find no basis under the statute to prosecute. These facts lead us to the conclusion that the existence of a discriminatory design by the State, its officers or agents, or by its established policy, assuming such could have been shown, would have had no influence upon the actions of McCrory's. The action of bringing about the arrest of the defendants, then, was the independent action of the manager of the privately owned store, uninfluenced by any governmental action, design, or policy -- state or municipal -- and the arrest was accomplished in keeping with McCrory's business practice established and maintained long before the occasion which defendants seek to associate with a discriminatory design by the state.

The court further held that no constitutional provision prevented a proprietor of a restaurant from refusing service on the basis of race. ([illegible] at 865):

The defendants have sought to show through evidence adduced at the trial that there is no integration of the races in eating places in New Orleans, and,

> therefore, the custom of the state is one that supports segregation and hence state action is involved.

But, held the court, "segregation of the races * * * is not required by any * * * law of the State * * * but is the result of the business choice of the individual proprietors, both white and Negro, catering to the desires and wishes of their customers, regardless of what may stimulate and form the basis of the desires."

3. The "Narrow" Grounds

1. Petitioners argue that the manager's decision to order them to leave "was not a private one for the * * * reason that it was not a free will act of a private individual, but rather an act encouraged, fostered and promoted by state authority in support of a custom and policy of enforced segregation at lunch counters," in that "state officers * * * actually aided and abetted the custom of segregation." Petition for Certiorari; pp. 13-14. It is also urged that (Id. at 14):

> The store manager acted not privately, but under the influence of the public policy expressed in the statute, the widespread custom of segregation in the community, and especially the expressed policy of city officials, in ordering the defendants to move * * *.

Similarly, petitioners contend that "the pronouncement of policy by the [Mayor and Superintendent of Police] operated to constructively coerce the proprietors of business establishments not to integrate lunch counters at the risk of suffering municipal censure or punishment." And they argue that "[t]he decision of the trial judge in refusing the petitioners an opportunity to establish actual concert between the store proprietor and the police violated petitioners' right to a fair * * * trial * * *." Id. at 21

The only "public policy" expressed in the statute is one designed to protect a proprietor's property interest in excluding those whom he does not wish to serve. And the "custom" argument raises not a "narrow" but the broadest variety of constitutional question. However, a persuasive argument can be advanced on the theory that the state courts erred in not allowing petitioners to prove that the manager acted in collusion with, at the behest of, or in compliance with orders of, state officers. The trial court refused to allow petitioners to introduce

evidence tending to show (1) that the racial policy of McCrory's would be different if the "state policy and practice and custom" were different; (2) that the store policy would be different if the "general atmosphere" were different; (3) whether the manager had discussed "with others" any "methods and means to handle these situations", although counsel said "the purpose of this [question] is a question of conformity of state policy"; (4) whether the manager had discussed sit-ins with "members of the New Orleans Police Department * * * and how you or how they should be handled if they arise in your store"; (5) whether the counter manager called the police "on [his] own initiative" or whether he had "any plans * * * with the police"; and whether the counter manager "felt there was some state policy that prevented him from serving these defendants * * *." 25/

In addition, the Mayor and the Superintendent of Police had publicly condemned "sit-in" demonstrations, 26/ thus adding the influence of the city's principal law enforcement officers to the sentiment against "sit-ins."

Finally, the manager testified that he excluded Negroes in conformity with "state policy and practice and custom * * *." 27/

25/ The court also excluded a question designed to show whether the police or the manager "decided what law to charge these people under?"

26/ It is true that the speeches of the Mayor and Superintendent may be read as condemning only the act of trespass after warning, and not a mere request for service. Petitioners' contention that these policy statements "operated as a prohibition to all members of the Negro race from seeking to be served at lunch counters whether or not the proprietor was willing to serve them" is perhaps an overly drawn reading of these statements.

27/ Note also that Captain Gutrera asked Mr. Barrett "if he had ordered them away and would he do so in our presence" (emphasis added).

The questions excluded, considered together with the other evidence of the opposition of city officials to "sit-ins" (suggesting that the city may have played an active rather than a neutral role in enforcing private segregation) mean that petitioners were not given fair opportunity to show that the manager's decision was not wholly his own but was coerced by the state, or, in any event, that state officers were so involved in the decision that it became "state action." Compare Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). Surely such evidence would have been material and relevant to the "state action" defense. Refusal to allow development of this point, it could legitimately be argued, deprived petitioners of due process of law under the Fourteenth Amendment.

The Louisiana Supreme Court attempted to meet this objection by stating that McCrory's had traditionally followed a discrimination policy, and that "a prosecution is dependent upon the will of the proprietor * * *." Thus, it held that a discriminatory design by the state, "assuming such could have been shown, would have had no influence upon the actions of McCrory's. * * * * * The action of bringing about the arrest of the defendants, then, was the independent action of the manager * * * uninfluenced by any governmental action, design, or policy * * *."

But the question of whether the manager was influenced or coerced by the state is one of fact; the mere statement that prosecution is based upon the will of the proprietor and that, therefore, it could not have been coerced by the state, is circular -- the free will of the proprietor is exactly the matter at issue. Thus, the reasoning of the Louisiana court in this instance is unpersuasive. The error of law in not permitting evidence to be introduced on these issues could not thus be wished away.

2. Petitioners also raise a "free speech" question, but this argument is no less "broad" than not properly a arguments posited upon Shelley v. Kraemer, supra, and is/ "narrow" contention. 28/

28/ Since the proprietor here clearly demanded that petitioners leave the counter, there is no room for Mr. Justice Harlan's view that "petitioners conduct, occurring with the managements' implied consent, was a form of expression [protected by the Fourteenth Amendment]," Garner v. Louisiana, 368 U.S. 157, 199 (1961).

3. Petitioners also argue that 42 U.S.C. 1981 and 1982 give them a "right to make and enforce contracts" which protects them in this case. Aside from the fact that this is an unwarranted reading of these statutes, this argument is also a "broad" one.

4. Petitioners also raise, in the "question presented" portion of the Petition for Certiorari, "no evidence" and "vagueness" contentions. These points are not discussed in the body of the petition, and there appears to be no support for them in the record.28a/

28a/ The Petition for Certiorari does not argue that the various enactments of the Louisiana legislature cited in note 24 supra, including the statute here involved, demonstrate a purpose to discriminate against Negroes. These statutes do not on their face mention race at all, and absent further evidence of legislate purpose, it is extremely unlikely that an argument on this theory could prevail. Thus the Louisiana Supreme Court's rejection of this argument appears to be correct.

No. 68: Wright et al. v. State of Georgia

1. Statute Involved

This case involves a prosecution under Georgia Code §26-5301, which provides:

> Unlawful assemblies -- any two or more persons who shall assemble for the purpose of disturbing the public peace or committing any unlawful act, and shall not dispense on being commanded to do so by a judge, justice, sheriff, constable, coroner, or other peace officer, shall be guilty of a misdemeanor.

2. The Facts

Having been informed by a "white lady" that "colored people were playing the basketball court * * * at Daffin Park", a municipal park in Savannah, Georgia, Savannah police officer Thompson "immediately went there." His "reason" was "because some colored people were playing in the park." Upon his arrival he "observed the conduct" of petitioners, who were "doing nothing besides playing basketball, they were just normally playing basketball * * *." They were "not necessarily creating any disorder, they were just "shooting at the goal, that's all they were doing, they wasn't disturbing anything." The police requested that petitioners leave the park. A petitioner asked who had ordered the police to the park, to which an officer replied that they needed no orders. No one requested an arrest. Officer Thompson testified that "the children from the schools would have been out there shortly after that. 29/ The purpose of asking [petitioners] to leave was to keep

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29/ The petitioners were arrested at 2:00 p.m.; the nearby schools release students at 2:30, the close of the school day.

down trouble, which looked like to me might start -- there were five or six cars driving around the park at the time, white people." 30/ The cars were driving about 15 yards from the court, but "I wouldn't say that that was unusual traffic for that time of day." Moreover, "it would have been at least 30 minutes before any children would have been in this particular area," and "none of the children from the schools was there at that particular time." The arresting officer testified that "one reason [for the arrests] was because they were Negroes," and it had "been the custom to use the parks separately for the different races."

The Superintendent of Recreation for the City of Savannah testified that there was no objection to older people using the basketball court "if there are no younger people present or if they are not scheduled to be used by the younger people," and there is "no regulation for playing on a court when it is not in use and there is no one around." He did not know "whether or not [there was] a planned program arranged for the day that these arrests were made * * *," but, on the other hand, "normally [the City] would not schedule anything for that time of the day because of the schools using the totals [sic] area there * * *." He did "not know whether we had something scheduled without referring to [his] records." 31/ Moreover,

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30/ One officer also testified that the arrests were made "because we were afraid of what was going to happen."

31/ The testimony at this point is quite ambiguous and difficult to follow. The superintendent proceeded to testify that "if the schools were not using it and we had no program planned we certainly would not have been concerned about other people using it. The schools use the area during school hours. The parochial schools use it during recess and lunch periods and also for sport, as also the Lutheran School, and the various public schools bring their students out there by bus at various times during school hours all day long. We never know when they are coming * * *."

(continued on following page)

the arresting officer testified that "I don't have any knowledge myself if any certain age group is limited to any particular basketball court, I don't know the rules of the city recreational department." 32/

Petitioners were dressed in "nice" street clothing. One policeman had "never seen [people] come out dressed like that to play basketball," and he said that "If I wanted to play basketball I would not go out there dressed up, not the way they were dressed." But, according to the Superintendent of Recreation, the wearing of "usual basketball attire" would not be "expected[ed] * * * if they were playing in an unregulated and unsupervised program and it would be consistent with [the City's] program to allow persons to wear ordinary clothing on the courts if they so chose to do so * * *."

Petitioners were charged with violating Georgia Code §26-5301, in that (as charged in the accusation) they "did assemble at Daffin Park for the purpose of disturbing the public peace and refused to disburse [sic] on being commanded to do so * * *." The case was tried before a jury and a verdict of guilty returned. Five defendants were sentenced to a fine of $100 or five months imprisonment, while defendant Wright received a $125 fine or six months imprisonment.

31/ continued from preceding page

He went on to say that "If it was compatible to our program we would grant a permit for the use of the basketball court in Daffin Park to anyone regardless of race, creed or color however, at that time of day it would not be compatible to our program. If that basketball court was not scheduled it would be compatible with our program for them to use it, and we would not mind them using it if there was a permit issued there would be no objections as to race, creed, or color."

32/ The Superintendent also testified that "There is no minimum or maximum age limit for the use of basketball courts, however, at the present time we have established a minimum -- a maximum age limit of 16 years for any playground area."

On appeal, the judgment of the trial court was affirmed by the Supreme Court of Georgia. Considering the contention that the statute under which the conviction was obtained was unconstitutionally vague and indefinite, the court said:

> The United States Supreme Court has held that a statute is not unconscionably vague where its provisions employ words with a well-settled common-law meaning * * * or is not couched in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. * * * * Here the term "disturbing the public peace" is of generic common-law origin. * * * * "Disturbing the peace" or its synonym "breach of the peace", has long been inherently encompassed in our law and is prevalent in the various jurisdictions. * * * * Further, the crime of unlawful assembly is itself of common-law origin * * * is described in slightly varying forms in the vast majority of jurisdictions * * * and in our own state was codified in the Penal Code of 1816. * * * * The language of the Code section in question is pronounced in terms so lucid and unambiguous that a person of common intelligence would discern its meaning and apprehend with what violation he was charged. 33/

The court also rejected the contention that the statute involved "confers untrammelled and arbitrary authority upon the arresting officer," on the ground that disposition of the vagueness argument demonstrated that the officer's conduct was sufficiently guided by the language of the statute.

33/ The Georgia Supreme Court apparently held that the question of vagueness of the statute as applied (the real issue here) was not properly raised, and it dealt -- in the language quoted supra -- solely with the contention that the statute is vague on its face. The merits of this procedural problem have not been examined.

3. The "Narrow" Grounds [33a/]

a. Petitioners argue that there is "no evidence", to support their convictions within the meaning of Garner v. Louisiana, 368 U.S. 157 (1961) and Thompson v. City of Louisville, 362 U.S. 199 (1960). This argument seems persuasive. [34/]

Two types of "evidence" exist here. First, there is evidence that petitioners were dressed in "nice" street clothes rather than the usual basketball attire, and the police also testified, by implication, that persons with a bona fide interest in playing basketball would not wear street clothes. But this is hardly evidence of a purpose to disturb the peace. [35/]

Second, there is evidence that several cars occupied by white persons were driving on a road within fifteen yards of the basketball court, that the police feared some disturbance; and that students in nearby schools would arrive no sooner than thirty minutes from the time of the arrests. But the police admitted that the automobile traffic was not unusual for that time of day, and there is not a scintilla of evidence that the occupants of the cars intended to do or say anything, had threatened anyone, or were in any manner disturbed by the presence of the petitioners.

The relevance of this second bundle of facts is not precisely clear. Presumably, the state might

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33a/ Because the "sit-in" here involved occurred in a public park, no "broad" grounds, of the type available in each of the other six cases, exist in this case. We have analyzed this case, however, because all seven cases will be argued at about the same time and if the Department decides to participate in the other cases solely on "narrow" grounds we will probably also want to participate in this case on that basis.

34/ The Supreme Court of Georgia did not directly pass upon this argument, and it is not clear whether its avoidance of the issue was based upon its view that the question was not properly presented. A re-examination of the record, which is not presently available, will be necessary to resolve this problem.

35/ The indictment in this case charged only that "said defendants did assemble in Daffin Park for the purpose

urge that the Negroes, seeing the cars driving near by, might have anticipated trouble. But this argument is irrational, and courts may not judicially notice that the mere presence of Negroes in a "white" area will result in a disturbance. Garner v. Louisiana, supra. Moreover, as to the school children, there is not a scintilla of evidence that the petitioners knew they were likely to arrive in thirty minutes. And, of course, the unsubstantiated belief of the police that trouble might occur cannot supply the evidentiary gap. See Garner v. Louisiana, supra, in which the Court said:

> * * *the manager of Kress' Department Store * * * did state that he called the police because "he feared that some disturbance might occur." However, his fear is completely unsubstantiated by the record. * * * *Under these circumstances the manager's general statement gives no support for the convictions within the meaning of Thompson v. City of Louisville, supra.36/

In short, there is no rational connection between the "evidence" upon which the state must rely to support these convictions and the statute's prohibition of assembling "for the purpose of" disturbing the peace.

Moreover, insofar as the nearby automobile traffic and the more-or-less imminent approach of school children is concerned, yet another reason exists why these facts cannot be held to supply the evidence re-

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35/ cont. of disturbing the public peace* * *," and did not mention the statute's other basis for commission of an offense, that the assembly is for the purpose of "* * *committing any unlawful act* * *."

36/ The Court did consider other factors as well in dismissing the manager's fear.

quired to convict. First, it is clear that petitioners could not have been convicted of disturbing the peace (as distinguished from assembling for the purpose of doing so) because they continued to engage in legal activity after others had threatened to forcibly interfere with that activity. Sellers v. Johnson, 163 F.2d 872 (C.A. 8, 1947), cert. denied, 332 U.S. 887 (1948); Rockwell v. Morris, 211 N.Y.S. 2d 25, affirmed, 10 N.Y. 2d 721 (1961); cf. Cooper v. Aaron, 358 U.S. 1 (1958). Indeed, it is the duty of the police to protect those engaged in legal activity and to restrain those who threaten it. See Sellers, Rockwell, and Cooper, supra. If this is so, then the implied threat of others to cause trouble -- assuming there was any proof of it -- by interfering with petitioners' peaceful basketball game cannot be used as evidence that they assembled "for the purpose of" disturbing the peace. In short, as in Thompson v. Louisville, 362 U.S. 199, 206 (1960), this is preeminently a case where doing the acts or having the purpose charged "is not, because it could not be, 'disorderly conduct' as a matter of the substantive law of * * *" Georgia. (emphasis added.) See also Mr. Justice Harlan, concurring in Garner v. Louisiana, supra, at page 190.

The State, however, has apparently urged in its Brief in Opposition to the Petition for Certiorari 37/ that petitioners had violated the rules of the city recreational department. 38/ But this was plainly not the reason for petitioners' arrest, for the arresting officer

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37/ The State's Brief in Opposition was not available at this writing.

38/ The state contended in its Opposition to the Petition for Certiorari that, "The fact that these defendants were adult Negro men on a children's playground in a white residential area and that cars were beginning to assemble all contributed to a fear that there would be a breach of the peace if the defendants continued to use the playground." Brief in Opposition, p. 10, quoted in Petitioners' Reply to Brief in Opposition, p. 2.

did not "know the rules of the recreation department." According to the Reply to the Brief in Opposition, "Respondent [the state] states that the testimony of the superintendent of the recreational department shows that petitioners were arrested because they were 'grown men' on a 'children's playground' and were dressed in street clothes." But the record does not support this view. The arresting officer went to the park upon being informed that Negroes were playing there, and "one reason [for the arrest] was that they were Negroes." School children were not present nor were they expected for thirty minutes, and the Superintendent had no objection to others playing there if children were not using the facilities.39/ Moreover, the arresting officer did not "have any knowledge* * *if any certain age group is limited to any particular basketball court* * *." As to petitioners' attire, the superintendent had no objection to street clothes in unsupervised play.40/ In short, the evidence concerning the rules of the recreation department does not support a finding that the convictions were based thereon, and it is indisputable that the arrests were not effected because of any violation of the park department rules.

Finally, it is doubtful whether a conviction resting upon a violation of the park department rules (even conceding the arrest was made for that purpose) would be consistent with due process. The statute provides that it is a crime for persons to assemble "for the purpose of disturbing the public peace or committing any unlawful act* * * *." However, the "committing any unlawful act" offense denounced by the statute was not included in the charge. As earlier explained (see note

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39/ There is also testimony by the superintendent that there is no age limit for the use of basketball courts, although playground areas are limited to persons under sixteen.

40/ There is some ambiguous testimony by the superintendent about permits to use the court but no specific

35, supra), the written information filed against petitioners charged:

> In that the said defendants did assemble at Daffin Park for the purpose of disturbing the peace, and refused to disburse [sic] when commanded to do so* * *.

It is reasonable to assume that if a violation of the park rules was thought to be the basis for the offense, the appropriate language in which to charge such a violation would have been the very language omitted from the charge. In short, it may well be argued that petitioners were not warned that violating park rules would be the basis for their conviction, and, more to the point, even assuming that they were warned by the park superintendent's trial testimony, nonetheless they were convicted "upon a charge not made," which is, of course, a "sheer denial of due process." De Jonge v. Oregon, 299 U.S. 353, 362 (1937); see also Thompson v. Louisville, 362 U.S. 199 (1960); Cole v. Arkansas, 333 U.S. 196 (1948). As the Court said in Cole, "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge* * *are among the constitutional rights of every accused* * *," 333 U.S. at 201.41/ This is

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40/ (cont.) testimony that a permit was required to use the basketball court or that such a requirement was generally known or could even be ascertained by persons desiring to use the park.

41/ In Cole petitioners' convictions were affirmed on the basis of §1 of a state statute, while their trial was conducted on an information based upon §2. That is essentially the situation in the instant case. The Cole convictions were reversed by the Supreme Court,

true even though the evidence might support conviction under another charge. Thornhill v. Alabama, 310 U.S. 88 (1940).

This assumes, of course, that the statute should be construed to exclude such things as park rule violations from the scope of the "disturbing the peace" provisions. That assumption would be consistent with normal rules of construction and should be followed in this case in the absence of a construction of the statute by the state supreme court. See Garner v. Louisiana, supra, where the Court did not consider itself bound as to the meaning of a statute by the state supreme court's affirmance of a conviction when the state court failed to elucidate explicitly that it had "construed" the statute to encompass the evidence adduced.42/ And, if this is so, the corollary argument of "no evidence" is also available in this case, because evidence of violations of park rules would not constitute evidence of "disturbing the peace."43/

41/ (cont.) which held that "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. De Jonge v. Oregon, 299 U.S. 353, 362." 333 U.S. at 201.

42/ In this case the Georgia Supreme Court did write an opinion, while in Garner the Louisiana Supreme Court merely wrote a two-sentence affirmance. But the Georgia court did not discuss this question, which was apparently not raised below.

43/ Moreover, the statute's condemnation of assembling "for the purpose of disturbing the peace or committing an unlawful act seems to presuppose an element of scienter, and the record is devoid of evidence that petitioners

b. Petitioners also argue that the statute is vague[44] because they "could not possibly have anticipated that as Negroes, peacefully playing basketball in a municipally-owned park is a criminal assembly to disturb the peace, as defined in the statute." Petition for Certiorari, p. 10. This characterization of the application of the statute is supportable if the argument, advanced supra, is correct, i.e., that there is no evidence to support the convictions. Petitioners themselves recognize this interdependence. Petition for Certiorari, p. 12. Absent any evidence to support the convictions, the statute has been construed and applied to reach persons who merely conduct a basketball game in a peaceful manner. Certainly it gives no warning that such conduct is unlawful, and it is therefore unconstitutionally vague as applied. E.g., Connolly v. General Construction Co., 269 U.S. 385; Winters v. New York, 333 U.S. 507; Lanzetta v. New Jersey, 306 U.S. 451 (1939). The fact that "disturbing the peace" may have a relatively settled common-law meaning, which might save the statute's validity in other circumstances (see Nash v. United States, 229 U.S. 373) cannot aid the state here, for its application to a basketball game on a public park certainly has little if any precedent.[45]

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[43] (cont.) ever heard of any park regulation. In addition, there is no evidence that the alleged park regulations are available in a printed document or that they exist except in the day-to-day discretion of the park superintendent. Indeed, it may be asked whether a conviction based upon "regulations" nowhere available and not generally known does not itself, without more, violate due process. It should be noted that the record does not suggest that signs existed in the park or elsewhere indicating that persons wishing to use the parks should seek permission from anyone.

[44] In fact, this is petitioners' principal argument.

[45] The Georgia Supreme Court refused to consider the question of vagueness as applied, limiting its consideration to the validity of the statute on its face. The bona

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41/ (cont.) fides of this refusal to consider a federal question have not been examined, but it seems unlikely that the United States Supreme Court will consider this an insuperable obstacle, especially in the face of contrary pressure to avoid more far-reaching constitutional questions.

No. 71 Peterson et al. v. City of Greenville

1. The Statutes Involved: The petitioners were convicted of violating Section 16-388, Code of Laws of South Carolina, 1952, as amended in 1960 which provides:

+1 [Any person:

(1) Who without legal cause or good excuse enters into the dwelling house, place of business or on the premises of another person, after having been warned within six months preceding, not to do so or

(2) who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative,

Shall, on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days.]A

This case also involves Section 31-8, Code of Greenville, 1953, as amended by 1958 Cumulative Supplement which provides:

B [It shall be unlawful for any person owning, managing or controlling any hotel, restaurant, cafe, eating house, boarding house or similar establishment to furnish meals to white persons and colored persons in the same room, or at the same table, or at the same counter; provided, however, that meals may be served to white persons and colored persons in the same room where separate facilities

are furnished. Separate facilities shall be interpreted to mean:

a) Separate eating utensils and separate dishes for the serving of food, all of which shall be distinctly marked by some appropriate color scheme or otherwise;

b) Separate tables, counters or booths;

c) A distance of at least thirty-five feet shall be maintained between the area where white and colored persons are served;

d) The area referred to in subsection (c) above shall not be vacant but shall be occupied by the usual display counters and merchandise found in a business concern of a similar nature;

e) A separate facility shall be maintained and used for the cleaning of eating utensils and dishes furnished the two races. JB

2. The facts

After informing the S.H. Kress and Company Department Store in Greenville, South Carolina[4/] of their desire to be served at the store's lunch counter and learning that the manager would not press charges

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[4/] The Kress in Greenville has fifteen to twenty departments, sells over 10,000 items and is open to the general public. Negroes and whites are invited to purchase and are served alike with the exception that Negroes are not served at the lunch counter which is reserved for whites. Kress' national policy is "to follow local customs" with regard to serving Negroes and whites at its lunch counters.

against them if they sought service,[47] petitioners -- ten Negro students -- at about 11:00 a.m. on August 9, 1960, seated themselves at the lunch counter and requested service. White persons were seated at the counter at the time. Petitioners were told, "I'm sorry, we don't serve Negroes."

At about 11:00 a.m. Captain Bramlette of the Greenville Police Department received a call to go to the Kress store. He was told that there were colored young boys and girls seated at the lunch counter. Captain Bramlette testified that he did not know where the call came from. However, when store manager G.W. West was asked what he did when the young people sat down, he testified: "The first thing I had one of my employees call the Police Department and turn the lights off and state lunch counter was closed."

When Captain Bramlette arrived at the store with several city policemen, he found two agents of the South Carolina Law Enforcement Division already present at the lunch counter.[48] He noticed the ten petitioners seated at the lunch counter which could accommodate almost fifty-nine persons. The petitioners were orderly and inoffensive in demeanor.

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[47] Petitioner Doris Wright testified that: "[A] . . . I had talked with the manager earlier, during some other demonstrations and he had stated that the pressure that was being put on him by our demonstrations. And I also asked him a question, if he would press charges against us, if we would continue coming and he said, no, and also, I went back to the counter since so much pressure is on him, maybe he will break as he is done, as they were serving us in other parts of the store. Maybe he will be willing to serve us at the lunch counter, too." [JA]

[48] The South Carolina Law Enforcement Division was organized to assist police or sheriff offices that needed assistance. Officer Millyer of the Division, present at the time of the incident, testified that his immediate superior is Chief J.P. Strom who is directly under Governor Hollings.

In the presence of the police officers, the counter lights were turned off and manager West requested ". . . everybody to leave, that the lunch counter was closed." At the trial, petitioners' counsel was denied permission to ascertain whether this request followed arrangement or agreement with the police. Neither Mr. West nor the police officers testified that West identified himself or his authority to the petitioners either before or after making this announcement.[49] After about five minutes,[50] petitioners having made no attempt to leave the lunch counter, Captain Bramlette placed them under arrest.[51]

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[49] There is evidence that one of the petitioners, Doris Wright, had spoken with the store manager prior to the demonstration (see note 47, supra) but the record is without evidence that any of the other petitioners were informed or had reason to know that the person who requested them to leave had authority to do so. Doris Wright, moreover, testified that the request to leave was made by the police and not by manager West. She denied that West asked her or any of the other defendants to leave. When asked, "Of course, you are not in position to say whether or not Mr. West may have made a request to some of the other nine?" She replied, "Yes, I am, Mr. West come from the back of the store, at the time we were being arrested and were told that the lunch counter was closed."

[50] There is some conflict regarding the time lapse between the announcement that the counter was closed and the arrest. Defendant Wright testified that the announcement "the counter is closed, you are under arrest" was made in one breath. She said that the defendants were given no opportunity to leave if they desired to. Mr. Hillyer of the South Carolina Law Enforcement Division testified that West's request to leave was not simultaneous with the order to leave.

[51] Four other Negroes were arrested but their cases were disposed of by the juvenile authorities.

B [Store Manager West at no time requested that ~~defendants~~ petitioners be arrested (A. 24):

> Q. And you at no time requested Captain Bramlette and the other officers to place these defendants under arrest, did you?
>
> A. No, I did not.
>
> Q. That was a matter, I believe, entirely up to the law enforcement officers?
>
> A. Yes sir.

Captain Bramlette agreed with this testimony (P. 16):

> Q. Did the manager of Kress', did he ask you to place these defendants under arrest, Captain Bramlette?
>
> A. He did not.

"White" persons were seated at the counter when the announcement to close was made ~~No white persons were arrested~~. ~~Captain Bramlette~~ testified that when the lights went out, white customers departed. But there is also testimony by a Negro observer that at the time of the arrests some white persons were seated at the counter (A. 30-31). As soon as petitioners were removed by the police, the lunch counter was reopened (P. 23).

but none were arrested (P. 19). Mr. West (P. 19).

Manager West testified that he closed the counter because of the Greenville City Ordinance requiring racial segregation in eating facilities, ~~and local custom~~. He said (A. 23):

not only because of local custom but also

> Q. Mr. West, why did you order your lunch counter closed?
>
> A. It's contrary to local custom and it's also the Ordinance that has been discussed.

J B

C [It is not at all clear from the record whether Captain Bramlette thought he was acting under the Greenville segregation ordinance or the State trespass law. At one point, the Captain testified that

he did not have the City Ordinance in mind when he went to Kress but was thinking of the recently passed State law (the trespass statute involved in this case) (R 11) When asked why he arrested petitioners, he said (R. 15):

> A. Under the State law just passed by the Governor relative to sit-down lunch counters in Greenville, I enforced this order. ✓-over JC

However, the Captain conceded that the State law did not mention sit-ins. He further testified as follows (R 16-17):

> Q. Did the manager of Kress', did he ask you to place these defendants under arrest, Captain Bramlette? ℙ A. He did not.
>
> Q. He did not? ℙ A. No.
>
> Q. Then why did you place them under arrest? ℙ A. Because we have an Ordinance against it.
>
> Q. An Ordinance? ℙ A. That's Right.
>
> Q. But you just now testified that you did not have the Ordinance in mind when you went over there? ℙ A. State law in mind when I went up there.
>
> Q. And that isn't the Ordinance of the City of Greenville, is it? ℙ A. This supersedes the order for the City of Greenville.
>
> Q. In other words, you believe you referred to an ordinance, but I believe you had the State Statute in mind? ℙ A. You asked me have I, did I have knowledge of the City Ordinance in mind when I went up there and I answered I did not have it particularly in my mind, I said I had the State Ordinance in my mind.
>
> Q. I see and so far this City Ordinance which requires ~~segregation~~ of the races in restaurants, you at no time had it in mind, as you went about answering the call to

separation

Kress' and placing these people under arrest?
A. In my opinion the state law was passed ... recently supersedes our City Ordinance.

The trial judge refused to permit the ordinances to be introduced in evidence.

Petitioners were tried and convicted in the Recorder's Court of Greenville before the City Recorder, sitting without a jury, of violation of the South Carolina trespass law and sentenced to pay a fine of one hundred dollars or serve thirty days in the city jail. Petitioners appealed to the Greenville County Court, and their appeal was dismissed on March 17, 1961.

That court noted that the statute was merely a re-enactment of the common law which permits a property owner to order any person from his premises whether they be an invitee or an uninvited person and that the constitutionality of the statute was unquestioned. The court rejected ~~appellants~~' contention that they had a "right" to be served and relied on Williams v. Howard Johnson's Restaurant, 268 F. 2d 845 (C.A. 4) and State v. Nelson, 118 S.E. 2d 47 (N.C.). The Supreme Court of South Carolina entered its judgment affirming the judgment and sentences below on November 10, 1961. The Supreme Court ~~rejected appellants' Fourteenth Amendment argument holding~~ that the operator of a privately owned business may accept some customers and reject others on purely personal grounds, in the absence of a

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The record ~~makes clear~~ also reveals the Recorder's notions of racial equality. In rejecting the request of counsel ~~for defendants~~ for permission to treat Officer Hillyer as a hostile witness, Recorder Jester said: "He is a law enforcement officer, but I'm a judge and I'm not a hostile judge.... I think every darky that's ever been in and sat before me said I done them as fair as anybody else but I can't say that because I'm working for the City that I'm hostile, so I couldn't go along with you."

statute to the contrary. The court also held that there was nothing in the record to substantiate a claim that ~~appellants~~ were actually prosecuted under the Greenville segregation ordinance. The [illegible] petitioners demand a hearing on November 30, [illegible] (P 60)

3. The "Narrow" Grounds

a. Petitioners attack the statute under which they were convicted on the ground that it fails to require the person who orders another to leave to identify his authority. This does not appear to be a sufficient basis for contending that the statute is unconstitutional on its face. The statute here spells out the nature of the offense with sufficient specificity. It is not true, as petitioners claim, that under the statute "one must depart from public places whenever told to do so by anyone; the alternative is to risk fine or imprisonment." Obviously, a person asked to leave a public place can inquire into the authority of the person asking him to leave. If the person refuses to identify himself, this might well be a defense to the charge. Moreover, the statute is only applicable if the order to leave is given "by the person in possession, or his agent or representative." If, in fact, it turns out that the order was given by a person not falling within these categories, the person ordered to leave apparently would have a complete defense to any charge. On its face, therefore, it does not appear that this statute fails to provide reasonable warning. It is not unreasonable to expect that a person given an order by a stranger might seek to inquire into the stranger's authority before complying.

As applied in this case, it does not seem that the statute has been invoked against persons who did not have adequate warning. It is clear that at least one of the defendants -- Doris Wright -- knew who the manager was and it is not unreasonable to suppose that the other defendants also knew him. It was manager West who, after the lights were turned off, requested everyone to leave and announced that the counter was closed. It strains credibility to suppose that under these circumstances petitioners could not have assumed that the person making the arrest was not a mere stranger but had authority to do so.

b. Petitioners rely heavily on Justice Harlan's concurring opinion in Garner. Justice Harlan applied First Amendment principles to the conduct of the demonstrators in that case because he concluded that

the demonstrators were acting with the implied consent of the management. A similar conclusion would be unwarranted in this case. Here, the manager turned the lights off and announced that the counter was closed. Here, too, the manager testified he had one of his employees call the police department.53/ For these reasons, it would appear difficult to justify petitioners' contention that "the stores implicitly consented to the protest and did not seek intervention of the criminal law."

c. The Greenville municipal ordinance requiring restaurant racial segregation does provide a "narrow" ground for urging the reversal of these convictions. Even the Civil Rights Cases, 109 U.S. 3, 17 (1883) made clear that discriminatory acts of individuals are insulated from the Fourteenth Amendment only insofar as they are "unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings," or are "not sanctioned in some way by the State." Here, it is clear beyond doubt that the actions of Kress were sanctioned -- if not required -- by law. In addition, there is enough in the record to permit a conclusion that the law actually being enforced in this case was the segregation law, and not the trespass law.54/

53/ West stated: "The first thing I had one of my employees call the Police Department and turn the lights off and state the lunch counter was closed."

54/ The defendants were actually charged with a violation of the trespass statute. However, this case would seem a suitable one in which to apply the often stated principle that the Constitution forbids "sophisticated as well as simple minded modes of discrimination." Lane v. Wilson, 307 U.S. 268, 275. Moreover, for the Court to ignore the existence, impact and effect of the segregation statute "would be to shut [its] eyes to what all others than we can see and understand." United States v. Butler, 297 U.S. 1, 61. See also Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala., 1949) affirmed, 336 U.S. 933; Hall v. St. Helena Parish School Board, 197 F. Supp. 649 (E.D. La., 1961); Ho Ah Kow v. Nunan, Fed. Cas. No. 6,5465, Sawy. 552, 560; Meredith v. Fair, No. 19475, F. 2d ____ (C.A. 5, 1962).

The record discloses that manager West believed he was acting pursuant to local custom and the ordinance. He did not request that petitioners be arrested, as he might have done if he believed his "property rights" were being infringed by a trespass. The testimony of the arresting officer is not entirely clear, but there is basis for arguing that he believed that, at least in part, the arrests were required by the local ordinance.[55] Moreover, when Captain Bramlette, the arresting officer, arrived at Kress he found two agents of the South Carolina Law Enforcement Division already present. Obviously, members of this organization, which operates directly under the Governor, would not feel that a mere trespass required their attention. Additionally, it was not only the Negroes who were told that the lunch counter was closed and asked to leave; white patrons were given similar instructions. And yet there is evidence that the white patrons who did not leave were not arrested and that the counter was reopened immediately after the Negroes were removed. This factor presents a further basis for arguing that the law being enforced was not the failure "to leave immediately upon being ordered or requested to do so" but was the segregation law.[56]

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[55] Captain Bramlette testified that he went to Kress' after being told that there were colored boys and girls sitting at the lunch counter. These facts alone obviously do not constitute a violation of the trespass statute, but they do represent the elements necessary to violate the segregation ordinance.

[56] Petitioners emphasize that the manager never requested that the arrests be made. This factor does not appear of special significance. The trespass statute does not require that a request to arrest be made. The crime is refusing to leave after being requested to do so. Here that request was made in the presence of the police officer. Police officers may well be justified in arresting for the crime of trespass committed in their presence, even absent a special request to make an arrest.

In similar instances courts have found that the enforcement of a state segregation policy by private persons brings the actions of the private persons within the ambit of the Fourteenth Amendment. In Boman v. Birmingham Transit Company, 280 F. 2nd 531 (C.A. 5,1960) a city ordinance permitted passenger carriers to make rules for the seating of passengers. The refusal to obey such a rule was made a criminal offense.57/ The court of appeals held that the action of the bus company in promulgating and enforcing the rules was "state action" and said (280 F. 2d at 531):

> Of course, the simple company rule that Negro passengers must sit in back and white passengers must sit in front, while an unnecessary affront to a large group of its patrons, would not effect a denial of constitutional rights if not enforced by force or by threat of arrest and criminal action. Where, as here, the city delegated to its franchise holder the power to make rules for seating of passengers and made the violation of such rules criminal, no matter how peaceable, quiet or rightful (as the court here held), such violation was, we conclude that the bus company to that extent became an agent of the State and its actions in promulgating and enforcing the rule constituted a denial of the plaintiff's constitutional rights.

See also Baldwin v. Morgan, 287 F. 2d 750, 755-56 (C.A. 5, 1961).

57/ In the present case, the connection between the two statutes is somewhat more sophisticated. Here the city prohibits restaurateurs from serving Negroes at "white" facilities. A person who refuses to obey such a rule, after the owner demands he leave, may be found guilty of trespass. Here two statutes accomplish what was attained by one statute in Boman.

In Williams v. Hot Shoppes Inc., 293 F. 2d 835 (C.A.D.C. 1961),[58] the dissenting opinion of Judges Bazelon and Edgerton (the majority of the court applied the equitable abstention doctrine) concluded that if a restaurant owner refused to serve a Negro because he felt that he was required to do so by state law, the action of the restaurant was "state action" proscribed by the Fourteenth Amendment. In part, the dissenting opinion stated:

> When otherwise private persons or institutions are required by law to enforce the declared policy of the state against others, then enforcement of that policy is state action no less than would be enforcement of that policy by a uniformed officer. Baldwin v. Morgan, 5 Cir., 1958, 251 F. 2d 780; Flemming v. South Carolina Electric & Gas Co., 4 Cir., 1955, 224 F. 2d 752, appeal dismissed, 1956, 351 U.S. 901, 76 S. Ct. 692, 100 L. Ed. 1439. 'The pith of the matter is simply this, that when [private groups] * * * are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the state itself, the repositories of official power.' Nixon v. Condon, supra at page 88...."

While the record is not as complete as it might be with respect to the connection between the action of the Kress Manager and the segregation statute, this actually helps the argument for reversal. The defect in

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[58] The Supreme Court of South Carolina relied on the Fourth Circuit's decision in Williams v. Howard Johnson's Restaurant, 268 F. 2d 845, 847 (C.A. 4, 1959) but even that decision indicated that racial segregation in a restaurant "in obedience to some positive provision of State law" would be in violation of the Fourteenth Amendment.

the record in this respect results from obviously erroneous rulings by the trial judge. Although vital to defendants' defense was some showing that the action of the Kress manager was actually "state action", nevertheless, the trial judge refused to permit defendants' counsel to ascertain whether West's closing of the counter and his request that the patrons leave followed an arrangement or agreement with the police. In addition, the trial judge refused to accept in evidence the Greenville segregation ordinance. The defendants, therefore, were precluded from proving that, in fact, their arrests were the product of racial discrimination and were made pursuant to the Greenville segregation ordinance. 58A/

In short, an acceptable legal argument can be fashioned in support of the proposition that the convictions in this case should be reversed based upon and related to the existence of the restaurant segregation ordinance.

58A/ And see an additional theory, upon which the case may be reversed because of the mere existence of a segregation ordinance, discussed *intra* pp. 69-71 with respect to the *Gober* case.

No. 66: Gober, et al. v. City of Birmingham

1. The Statutes Involved

The petitioners were convicted of violating Section 1436 (1944) of the City Code of Birmingham, Alabama which provides:

> After warning. Any person who enters into the dwelling house, or goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished as provided in Section 4, provided, that this Section shall not apply to police officers in the discharge of official duties.

This case also involves Section 369 (1944) of the City Code of Birmingham, Alabama which provides:

> Separation of races. It shall be unlawful to conduct a restaurant or other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment.

2. The Facts

These are ten sit-in cases tried in five separate trials. The protests occurred the same day in five department stores in each of which two petitioners were arrested and charged with commission of the same acts; all were sentenced identically in a common sentencing proceeding after trials held seriatim with the same judge, prosecution, and defense counsel.

The complaint against each petitioner charged that he or she ". . . did go or remain on the premises of another, said premises being the area used for eating, drinking and dining purposes and located within the building commonly and customarily known as [the store in question] after being warned not to do so, contrary to and in violation of Section 1436 of the General City Code of Birmingham of 1944." Petitioners were convicted in the Recorder's Court of the City of Birmingham and then received trials de novo in the Circuit Court of Jefferson County. They were again adjudged guilty and sentenced to thirty days hard labor and $100.00 fine. The Alabama Court of Appeals wrote an affirming opinion for the first case, Gober v. State of Alabama and affirmed all others in brief per curiam orders merely citing Gober. The Supreme Court of Alabama denied certiorari in all cases in identical orders.

a. The facts relating to each of these cases are as follows:

(1) Gober and Davis: ~~The Gober and Davis~~ These cases involve sit-ins at Pizitz's Department Store on March 31, 1960. (G.43) Both petitioners attempted to order at the lunch counter, but the waitress ignored them. (G.44) [591] They were approached by a man who did not identify himself and told that Negroes could be served elsewhere in the store. (G 44-45). They were not asked directly to leave the store or the area where they were sitting. (G.45). At the trial, Mr. Gottlinger, controller of the store, testified that the man who approached Gober and Davis was Dick Pizitz, Assistant to the president of the store. Gottlinger described what Pizitz told the petitioners as follows (G. 23-24); (G 23).

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[591] Davis purchased socks, tooth paste and handkerchiefs before going to the lunch counter (G. 43).

A 2. He asked the defendants to leave the tea room area, told them that they could be served in the Negro restaurant in the basement.

* * * *

He told them they couldn't be served there and we had facilities in the basement to serve them. . . . He told them it would be against the law to serve them there . . . . JA

There was no sign at the lunch counter indicating a segregation policy or that the counter was reserved to whites (G. 44, 50).

Police Officer Martin made the arrests (G. 19). He had received a report from a superior that there was a disturbance at Pizitz's (G. 19). He went to the dining area, found it closed to customers and saw two Negro men seated conversing together (G. 18-19). No one spoke to them in Martin's hearing, nor did he speak to any person in the store. 601 Without in any way warning the petitioners, he arrested them.

Controller Gottlinger saw the petitioners seated at the counter (G. 26) but said nothing to them (G. 21). Gottlinger admitted he had heard of the Birmingham segregation statute. When asked "Did you or any official of Pizitz call the police?", he replied "No sir." Gottlinger was first questioned by the police after the arrests were made. No official of Pizitz filed a complaint.

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601 Martin was questioned as follows (G. 19).

Q. Did you talk with any of the personnel of the Pizitz Store there in their presence or hearing that morning?

A. Not in the presence or hearing I did not, no, sir.

At this first trial, petitioners tried to ~~interrogate~~ concerning the segregation ordinance of the City of Birmingham. This exchange occurred (G. 24-25):

> Mr. Hall [counsel for petitioner] . . . . It is our theory of this case it is one based simply on the City's segregation ordinance and Mr. Gottlinger, Mr. Pizitz, the police, and everybody involved acted simply because of the segregation law and not because it was Pizitz policy. . . .
>
> Mr. Hall: As I understand it, it is the theory of the City's case, it is trespass after warning. Our contention is that that is not a fact at all, it is simply an attempt to enforce the segregation ordinance and we are attempting to bring it out.
>
> The Court: Does the complaint cite some statute?
>
> Mr. Hall: Trespass after warning. If we went only on the complaint it would seem that some private property has been abused by these defendants and that the owner of this property has instituted this prosecution. From the witnesses' answers it doesn't seem to be the case. It seems it is predicated on the segregation ordinance of the City of Birmingham rather than on the trespass. So what we are trying to bring out is whether or not the acts of Pizitz were based on the segregation ordinance or something that has to do with trespass on the property.

~~The evidence concerning the segregation statute was excluded.~~ The court refused to permit the official to be interrogated about his knowledge of the law (G. 26).

(2) Hutchinson and King: Police Officer Martin was asked by a motorcycle policeman to accompany him to Loveman's Department Store. At the dining area entrance, Martin found a rope tied from one post to another; a sign stated that the area was closed. He saw two Negro men at a table but had no conversation with them ". . . other than to tell them that they were under arrest." Martin testified that there were no signs indicating that the area was segregated and that no one but the two petitioners were seated. 61/ He believed that someone from Loveman's had informed his superior officer that the petitioners were there.

Martin did not know of his own knowledge that anyone from Loveman's had asked the petitioners to leave. Apparently, at about the time of the arrest Police Lieutenant Purvis approached Mr. Schmid, the dining area concessionnaire, 62/ stating that ". . . someone called us that you had two people in here that were trying to be served. . . ." Schmid pointed to petitioners.

Schmid did not talk to the petitioners. He did hear, however, Mr. Kidd of the protective department of Loveman's ask the petitioners to move. Schmid described this request in these words: "He announced in general terms that the tea room was closed and for everyone to leave." Kidd testified that he did not speak to the petitioners but told the white patrons that the lunch room was closing. He made his announcement three times and put up signs. Kidd did not call police and does not know who did. 63/

61/ Loveman's does not have separate facilities for Negroes.

62/ Schmid is employed by Price Candy Co. but follows Loveman's regulations and policies.

63/ When asked what caused him to close the lunchroom Kidd testified, "The commotion that was on the mezzanine. I did not know what was the cause of the commotion. When I began closing the place down then I noticed after the crowd dispersed that the two colored boys were occupying a table." The commotion Kidd referred to was people standing up and milling around.

The protective department had been notified because, as Mr. Schmid testified, "naturally", in this case, there was a "disturbance of the peace." The only disturbance, however, was that ". . . the waitress left the floor." Petitioners were not boisterous or disorderly. Schmid testified that there were forty or fifty people seated at the time that it was announced that the lunch counter was closed. Some people stayed and finished their lunches. About twenty-five whites were seated when the police arrived and none was arrested. [64]

Schmid did not know who called the police. [65] He was not present at the time the police removed the boys. He explained:

> Q. When the officers came you left, is that right?
>
> A. I left.
>
> Q. In the midst of the disturbance you left?

(3) Parker and West: Police Officer Myers received a radio call from headquarters to proceed to Newberry's. When asked if he found anything "out of the ordinary there at the time," he replied: "Two colored males were sitting at the lunch counter." [66] He did not speak with them nor did they converse with any store employed in his presence, but he arrested them for trespass after warning, it having been his "understanding" that his partner had received a complaint from a Mr. Stallings, whose capacity at the store Myers did not know, nor did Myers know whether he was employee there.

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[64] However, detective Kidd testified that all the white people had left.

[65] He testified that the cashier and secretary had instructions to call the store detective in situations such as this.

[66] The petitioners had met at the store and West had purchased some paper and small comic books.

No sign at the counter indicated that it was reserved for whites. (At a Negro counter elsewhere in the store a sign stated "for colored only.") The officers, upon arrival, ordered the white people to get up but all did not leave.

Mrs. Gibbs, the store detective, ~~when she saw the petitioners did this:~~ and asked anyone. (G 162-63):

> I went ever to the lunch counter when I saw them sitting there and identified myself and told them that they would have to leave, they couldn't be served there, but if they would go to the fourth floor we have a snack bar for colored there and they would be served on the fourth floor.
>
> Q. What did they say, if anything?
>
> A. They said they were not leaving, that they were not violating any law.

Assistant Store Manager Stallings, also spoke with petitioners, testified as follows (G. 164):

> Well I asked them, I said, ' You know you can't do this.' I said, 'We have a lunch counter up on the fourth floor for colored people only. We would appreciate it if you would go up there.'
>
> Q. What was their response to that, Mr. Stallings?
>
> A. Well one of them, well I don't know which one said, 'We have our rights.' JA

Stallings did not call the police but testified that someone did. 67/ Stallings did not make a complaint to the police and did not know whether anybody else did.

67/ When asked "Did any official at Newberry's call the police," Stallings replied: "Some, now I don't

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Petitioner West's testimony conflicts somewhat with that of Officer Myers. West testified that when Myers arrived on the scene he began to motion white people away. "After he started motioning the white people away we started to get up and when we started to get up one got me in the back or somewhere in behind. . . after I saw him motioning other people up, I said, 'Let's go' and we started to get up."

Petitioners' counsel attempted to establish that the lunch counter segregation policy was the City of Birmingham's, not Newberry's but this line of inquiry was held incompetent.

(4) Sanders and Westmoreland: On March 31, Officer Caldwell received a call to go to Kress. When he arrived he went to the basement. He testified:

> The lunchroom was closed. The lights were out. We observed two black males Roosevelt Westmoreland and Robert D. Sanders setting there.

He testified further that Mr. Braswell, the manager of Kress "told us in the presence of the defendants that they couldn't be served and he had turned the lights out and closed the counter." Caldwell stated that he heard Braswell tell the defendants they could not be served but he did not recall whether he told them to leave the counter. No one in Kress' asked him to arrest petitioners, but Caldwell made arrests.

Mr. Pearson, manager of the lunch counter, described what happened when he saw the petitioners at the counter:

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61 continued from preceding page

remember who this person was, but someone said to me that we called the police, I don't know who it was. I don't remember that."

> I approached them from the inside of the bay that they were sitting and informed the boys that the bay was closed and I put up a closed sign and told them we couldn't serve them and they would have to leave.

Pearson turned off the lights in that bay. The petitioners then moved to another bay. Pearson then closed that bay, and turned off its lights as well as the lights in the other three bays at the counter. A woman already seated at the counter, however, remained after "closing" and so far as Pearson knew, was not arrested.

One petitioner told Pearson, "Well, we have our rights." The manager apparently told the petitioners to leave. 68/

68/ The petition for certiorari (p. 11) concedes that on direct examination Pearson testified that the manager asked the petitioners to leave the store. The petition then quotes some language from the record which purports to suggest that on cross-examination Pearson modified his testimony to indicate that the manager only asked the petitioners to leave the counter -- not the store. This quotation appears somewhat out of context. The complete selection (with the parts quoted in the petition in brackets) is as follows:

> Q. (By Mr. Hall): Mr. Braswell is the General Manager of the Kress Store?
>
> A. That is right.
>
> Q. And you had told the boys to leave.
>
> A. Yes, sir.
>
> Q. Did you mean to leave the store?
>
> A. To leave the area. The lunch department is enclosed in a railing, they would have to leave that section.

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When Pearson and the manager left the bays the police entered, asked petitioners to get up, additional police entered, and the first two officers escorted petitioners from the store. [69] Neither Pearson nor the manager called the police, neither asked for the arrest, neither signed the complaint.

Kress's is a general department store, advertising to the general public, but has no food service facilities for Negroes, although they are solicited to and may buy food to carry out. Whites and Negroes, however, purchase from the same counters at other departments.

(5) Walker and Willis: Willis had entered Woolworth's and purchased certain non-food items before he and Walker proceeded to the store's lunch counter. There were no signs indicating that the counter was reserved for whites. A waitress said to them, "I am sorry I can't serve you," but petitioners remained at the counter. The manager of the lunch counter, Mrs. Evans, "told the defendents that the lunch room was closed and they would have to leave." Two police officers arrived at the store at the behest of the Birmingham police radio. Mrs. Evans informed one officer that "she had told the boys to leave, that the place was closed, and the second time she directed her conversation to the defendants and told them it was closed and they would have to leave, she would not serve them." She asked petitioners to leave the lunch counter, not the store. But Mrs. Evans did not, nor did anyone else, "instruct [the police] to place the defendants under

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[68] continued from preceding page

[Q. To leave that section yes. Not the store?

A. The store was not mentioned.]

Thus, it appears that Pearson was speaking about what he told the petitioners, not what Mr. Braswell told them.

[69] Pearson testified: "As I turned around to walk away from the bays, the police came in and asked them

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arrest," or "directly [ask] us to place them under arrest," nor did anyone else in the store other than Mrs. Evans make a complaint to the police. Officer Casey did not know whether "anybody from Woolworth's even made any complaint that these boys were trespassing." In response to the question, " * * * did you take it upon yourself to make these arrests?, " Officer Casey responded, "I did under authority of the City of Birmingham." However, Officer Casey, asked whether he arrested petitioners "under any instructions from the store," said "I took the complaint from Mrs. Evans that she wanted the boys out of the store, that the lunchroom was closed." He "told [persons connected with the store] they would have to come to headquarters or be contacted to sign a warrant," but he did not know if they ever signed such a warrant. Willis, on the other hand, testified that no one connected with the store management had ever asked petitioners to leave. Some white persons were ordered to leave the counter. One white person was forced by the policeman to leave but not arrested. Finally, a police captain "asked [petitioners] to leave" and arrested them when they failed to comply.

6. As indicated, supra, the Alabama Court of Appeals wrote an affirming opinion in Gober v. State of Alabama, affirming all the other cases in brief per curiam orders merely citing Gober. 70/ The Supreme Court of Alabama denied certiorari in all cases in identical orders.

69/ continued from preceding page

to get up and I think the first time they asked them that they still didn't get up and then they told the boys to please get up . . . ."

70/ The Court of Appeals noted that since the appeal was from a conviction for violating a city ordinance, it was but quasi criminal in nature and subject to rules governing civil appeals. Accordingly, the court limited itself to a review of errors assigned and argued in appellant's brief.

The numerous errors raised by appellant Gober -- some quite technical -- were rejected by the Court of Appeals. For example, appellant argued that the complaint in the case was insufficient in not setting forth by whom the appellant was warned to leave the premises. The Court of Appeals held that this point was not raised below but, in any event, if the complaint were defective it could be amended since complaints in prosecutions for violation of city ordinances, unlike indictments, are amendable to the same extent as complaints in a civil action. The Court of Appeals also rejected appellant's constitutional arguments. 71/ The court noted that appellants were licensees and entered the premises by implied invitation. The owner of the premises had the right to limit the premises as he saw fit. In addition, "It is fundamental, and requires no citation of authority, that the grantor of a license, which has not become coupled with an interest, may revoke the license at will." The Court distinguished Boynton v. Virginia, 364 U.S. 454 and Marsh v. Alabama, 326 U.S. 501 and relied on Williams v. Howard Johnson Restaurant, 368 F. 2d 845 (C.A. 4) and Martin v. City of Struthers, 319 U.S. 147. 72/

71/ The Court viewed the case merely as involving trespass. It stated: ". . . there is no question presented in the record before us, by the pleading, of any statute or ordinance requiring the separation of the races in restaurants. The prosecution was for a criminal trespass on private property."

72/ The Court quoted this language from Martin v. City of Struthers, supra, "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off."

3. The "Narrow" Grounds

(a) In each of these five pairs of cases someone connected with the store asked petitioners to leave either the lunch counter area or the store. But petitioners argue that "[i]n none of the ten records before this court did the persons who demanded that petitioners leave, first inform petitioners or demonstrate to them that they had authority to request that the petitioners leave the area in question,"[73] and on the basis of that evidentiary gap they spin an elaborate argument that scienter is constitutionally required. For reasons discussed with respect to the Peterson case, we do not consider this argument tenable.

(b) It is more feasible to argue, however, that because in some of these cases[74] the police did not know at the time the arrests were made that anyone had demanded that petitioners leave the counters in question, the police had acted solely on their own initiative. The arrests could thus be characterized as purely "state action" in violation of the equal protection clause of the Fourteenth Amendment,[75] because there was no reason for the police to believe that a "trespass-after-warning" had occurred and the only logical explanation for the police action is that racial segregation was being enforced. This view is buttressed by the existence

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[73] Petitioners concede, however, that in the Parker-West cases the person making the request "identified" himself.

[74] Gober-Davis and Hutchinson-King. The situation in Sanders-Westmoreland is ambiguous, and in Walker-Willis petitioners were asked to leave in the presence of the police. In the Parker-West case the arresting officer thought a complaint had been received from Mr. Stallings, but he did not know whether Mr. Stallings was connected with the store (which he was).

[75] This is not the same problem discussed by Mr. Justice Harlan in Garner v. Louisiana, 368 U.S. 157 , (1961)

of the segregation ordinance, which provides a reasonable explanation for the actions of the police.76/ But on the other hand, the ordinance here involved merely declares it a crime to "remain[s] on the premises of another, after being warned not to do so," and does not require the police to know that the crime has been committed prior to effecting an arrest. Under the ordinance the crime has been committed whether the police know of the request or not. 77/

75/ (continued from preceding page)

(1961), because in Garner petitioners Garner and Hoston had not in fact been asked to move. Petitioner Briscoe had been, and Mr. Justice Harlan treated her problem separately on another theory. This argument should also be distinguished from a possible contention that, although (as in Walker -- Willis) the police observed and heard a request to leave, the store officials did not ask that petitioners be arrested. The latter argument is unconvincing because the statute does not require such a request and, by hypothesis, the police observed a crime being committed in their presence.

76/ The difficulty with this argument is that the general rule probably is that an arrest made for a wrong reason is no defense to a prosecution based on a valid statute, if a violation of the statute under which the prosecution is brought has infact been committed. Here the trespass ordinance had infact been violated and thus it may be argued that the motives of the policemen or their erroneous view of the offense is irrelevant.

77/ Since this offense is a misdemeanor, however, there might be some question as to whether the arrests were lawful in the absence of personal knowledge on the part of the police that a crime had been committed. This is doubtless purely a question of state law.

(c). An argument similar to that advanced with respect to Peterson v. South Carolina can be made to the effect that the existence of the Birmingham ordinance requiring racial segregation in restaurants demonstrates, at least in some of the Gober cases, that the arrests and convictions of petitioners were "realistically" effected pursuant to the segregation ordinance, rather than the trespass ordinance.

In summary form the evidence relevant to this issue is as follows: In Gober - Davis the assistant to the president of the store "told [petitioners] it would be against the law to serve them there," and Officer Martin arrested petitioners without having spoken to anyone connected with the store or observing a request by any store employee that petitioners should leave the counter or the store. Moreover, the trial court precluded testimony which might have revealed whether "the acts of Pizitz were based on the segregation ordinance or something that has to do with trespass on the property." In Hutchinson - King the arresting officer did not know of his own knowledge prior to the arrests that anyone from the store had asked petitioner to leave, although the dining area concessionaire did point out to him that petitioners were trying to be served. No one knew who called the police. In Parker - West the officer arrested petitioners without speaking to anyone connected with the store, a/ and although the officer ordered the white people seated at the counter to get up, all did not leave. A line of inquiry designed to establish that the lunch counter segregation policy was the city's and not the store's was held incompetent by the Court. In Sanders - Westmoreland the police did not recall if the manager had asked petitioners to leave, and no one asked that arrests be made, although petitioners were told in the presence of the police that they could not be served and that the counter was closed. In Walker - Willis no one requested an arrest but a request to leave was made in the presence of the arresting officers, and one white person was forced to leave the counter but was not arrested.

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a/ The officer believed that his partner had received a complaint from Mr. Stallings, the assistant store manager.

Thus, it is clear that in Gober - Davis, where the manager believed that the law required him to refuse service, the segregation ordinance was the motive force of that refusal. Moreover, the trial judge excluded testimony which might have established this with even greater clarity. In Parker - West the judge also precluded similar testimony. In the other cases it is doubtful whether any evidence exists to support a finding that the proprietors acted pursuant to the segregation ordinance. 79/

Nonetheless, as we have explained in the discussion of Peterson v. South Carolina, for various reasons it might still be argued that the existence of this segregation ordinance invalidates these convictions. In addition, yet another contention seems acceptable, even assuming no proof that the police or the managers acted with the segregation ordinance in mind. It may be urged that a state, consistent with the Equal Protection Clause of the Fourteenth Amendment and the freedom of association guarantee of the First Amendment (as incorporated into the Due Process Clause of the Fourteenth), cannot by legislation place a proprietor in a position where he must either violate state law or refuse service to Negroes. The very existence of such a statute infringes upon the free choice which, the state contends, is exercised by the proprietors. 80/ To place the priprietor upon the horns of this dilemma represents more than a "neutral" role played by the state in enforcing a "private" choice to segregate, for the state itself influences that choice in the most effective manner available to it: by the sanctions embodied in its

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79/ This does not weaken the argument advanced, supra, that because the police did not know that anyone had asked petitioners to leave the police action was purely "state-action".

80/ That the segregation ordinance is plainly invalid on its face cannot, in any practical sense, detract from the force of this argument. Proprietors are ordinarily not inclined to disregard laws even if their lawyers might think them invalid, especially when it is quite likely that state officials will enforce them irrespective of their validity.

penal laws. The situation is analogous to that considered in Thornhill v. Alabama, 310 U.S. 88 (1940), in which the Court said:

> The power of the licensor * * * is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion * * * * * The existence of [an overly broad penal statute] results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be reported as within its purview (emphasis added).

Thus the Thornhill Court held, for this reason among others, that the statute there involved could be challenged on its face without regard to whether the evidence adduced against the defendants might demonstrate a narrower-- and valid-- application of its terms. In short, the court held that a statutory application (which in analogous to an entirely distinct statute) not necessarily involved in the case could be assailed because of the pernicious inhibiting effect of its broad language -- a holding decidedly comparable to the argument here advanced. While the reasoning of Thornhill on this point has been criticized and the decision is explicable on other grounds, the decision and the principle expressed above have been recently approved by the court. See Smith v. California, 361 U.S. 147, 151 (1959). See also Winters v. New York, 333 U.S. 507, 509-510,517-518 (1943), and the exegesis on Winters in the Smith opinion, supra at 151.

Here, as in Thornhill, the mere existence of a segregation ordinance inhibits that freedom of choice of the proprietor which is the very basis of the state's argument that in enforcing that choice the state is acting neutrally and not discriminatorily. Under these circumstances, we might argue that the existence of such a

statute, without more, is grounds for reversal of all the convictions involved in Gober (and in Peterson). 81/ This argument is, of course, distinct from one of the arguments advanced in the Peterson discussion to the effect that the segregation ordinance "sanctions" the proprietor's decision. The latter would depend more upon a theory of consistency with state law rather upon the view, here advanced, that the segregation ordinance coerces the proprietor.

81/ The difficulty with this argument -- and the analogous arguments discussed with respect to the Peterson case -- is that it is somewhat inconsistent with (1) the general rule that one may not challenge a statute not applied to him and not involved in the case, cf., e.g., Electric Bond & Share v. S.E.C., 303 U.S. 419 (1938), and (2) the rule that the Supreme Court will not review a state court decision which rests upon an independent adequate state ground, e.g., Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1875). For example, under the latter principle if a state trial judge expressly finds defendants guilty under two statutes, one valid and the other invalid, and the state supreme court relies only on the valid statute, the United States Supreme Court will not hear a challenge to the invalid statute. In effect, our suggested argument runs counter to this principle because we claim that although one basis for the decision is valid (trespass) the conviction is void because another ground not relied upon below and not even used as a formal basis for the change - is invalid. However such cases are distinguishable because we are arguing that the segregation ordinance is involved in the convictions in these cases.

No. 67: Shuttlesworth v. Birmingham

Billups v. Birmingham

1. Statutes Involved

This case involves Sections 824, 1436, and 369 of the General Code of Birmingham (1944).

Section 824 provides:

> It shall be unlawful for any person to incite, or aid or abet in, the violation of any law or ordinance of the city, or any provision of state law, the violation of which is a misdemeanor.

Section 1436 provides:

> After Warning. Any person who enters into the dwelling house, or goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished as provided in Section 4, provided, that this Section shall not apply to police officers in the discharge of official duties.

Section 369 provides:

> Separation of races. It shall be unlawful to conduct a restaurant or other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment (1930, Section 5288).

2. Statement of Facts

The relevant evidence to sustain the convictions here involved is extremely sketchy. [22] The record shows that Gober (the petitioner in the Gober case) went to Shuttlesworth's home on March 30, 1960. Billups was also present, as were others, and Billups had driven one student -- Davis -- to the meeting. The sit-in problem was discussed, and Shuttlesworth "asked for volunteers to participate in the sit down demonstrations." A "list", not otherwise described, was prepared. One student "volunteered to go to Pizitz [a department store] at 10:30 [a.m.] [the next day] and take part in the sit down demonstrations." Shuttlesworth "didn't say that he would furnish counsel but told him or made the announcement at that time that he would get them out of jail." And the record shows generally that Gober, Davis, and others did participate in sit-ins on March 31, 1960. [23]

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[22] The record in this case is very largely composed of testimony of a city detective as to the evidence adduced at an earlier trial of petitioner Shuttlesworth for this offense in City Recorder's Court on April 1, 1960. Objections were regularly made to this testimony, but overruled, despite the fact that a transcript of the earlier proceedings was present in court and in the possession of the prosecutor during the trial in this case.

[23] The record shows this colloquy: Q: "Do you know it to be a fact that James Gober and James Albert Davis did participate in sit-down or sit-in demonstrations on the day of March 31, 1960?" A: "yes, sir, they did." * * * * Q: "Do you know of your own knowledge that other colored boys on that same date participated in sit-in demonstrations in downtown stores in the City of Birmingham?" * * * * Q: "Let me put it this way. Other boys who attended the meeting at Rev. Shuttlesworth's house,?" * * * * A: "Yes" * * * * * " Q: "Did either Gober or Davis while at that Court hearing and under the conditions we have previously outlined state that other persons were present * * * * did they state that other persons were present who did participate in three demonstrations at Rev. Shuttlesworth's house on March 30, 1960?" A: "Yes sir."

On this record Shuttlesworth and Billups were charged with a violation of Section 824 of the Code of Birmingham, convicted by the court sitting without a jury, and sentenced respectively to 180 days hard labor and a $100.00 fine, and 30 days hard labor and a $25.00 fine. The convictions were duly affirmed by the Court of Appeals of Alabama, the court holding in the Shuttlesworth case that "'everyone who incites any person to commit a crime is guilty of a common law misdemeanor, even though the crime is not committed.'"

The Court of Appeals also held that:

> There is no question of the restriction of any right of free speech or other assimilated right derived from the Fourteenth Amendment, since the appellant counseled the college students not merely to ask service in a restaurant, but urged, convinced and arranged for them to remain on the premise presumably for an indefinite period of time. There is a great deal of analogy to the sit down strikes in the automobile industry referred to in National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U.S. 240.

In the Billups case the Court of Appeals, noting that "this is a companion case to that of F.L. Shuttlesworth v. City of Birmingham," said:

> The facts set out in the Shuttlesworth case are adopted as the facts of this case, with this additional statement: 'On March 30, 1960, Rev. Billups went to Daniel Payne College in a car, where he picked up one James Albert Davis, a student, and carried him to the home of Rev. F.L. Shuttlesworth, where several people had gathered, among them Rev. Shuttlesworth, his wife, and several other students from Daniel Payne College. Rev. Billups was also at said

> meeting.' Under this testimony the jury was fully justified in finding that this defendant was part and parcel of the entire scheme.
>
> On the authority of Shuttlesworth v. City of Birmingham, supra, the judgment is due to be, and hereby is, affirmed.

On September 25, 1961, the Supreme Court of Alabama denied writs of certiorari, and on November 16, 1961, rehearing was denied.

3. The "Narrow" Grounds

For purposesoof analysis it is useful to consider the Shuttlesworth and Billups cases separately, although the two petitioners were tried together.

a. Billups

1. The evidence supporting the judgment of the lower courts that Billups did "incite, or aid or abet in, the violation of any law or ordinance of the city * * *" may be simply stated: Billups drove a student to and himself attended a meeting at Shuttleworth's house at which sit-ins were discussed, someone prepared an otherwise unidentifeed list, Shuttlesworth asked for "volunteers" to "sit-in" at Pizitz department store, Shuttlesworth said "he would get them ou: of jail," and several students present did on the next day participate in a "sit-in", otherwise not described with greater particularity. In sum, what Billups himself did was to transport one student to a meeting and attend it himself. On this record, it could perhaps be argued that his conviction under section 824 (or any other statute) violates both the freedom of association guarantee of the Fourteenth Amendment and the requirement of personal guilt also inherent in the due process clause. Cf. Wieman v. Updegraff, 344 U.S. 183 (1952), where the Court noted that "membership may be innocent. Indiscriminate classification of innocent with knowing activity must fail

as an assertion of arbitrary power." And see generally Garner v. Board of Public Works, 341 U.S. 716 (1951); Adler v. Board of Education, 342 U.S. 485 (1952); Gerende v. Board of Supervisors, 341 U.S. 56 (1951). Similarly, the Court has held that participation in a public meeting lawfully conducted cannot be declared criminal conduct. De Jonge v. Oregon, 299 U.S. 353 (1937). Moreover, in criminal cases the Court has suggested that, with respect to membership in illegal organizations, even "knowledge" of organizational purpose is an insufficient basis to convict in the absence of proof of "active" membership, Scales v. United States, 367 U.S. 203, 222 (1961), and has stated that "[i]n our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause * * * * ." Id. at 224-225. And one cannot be convicted as an "aider and abetter" upon proof of his mere presence at the scene of a crime. United States v. Williams, 341 U.S. 58, 64 n. 4 (1951); United States v. Carengella, 198 F. 2d 3, 7 (C.A. 7, 1952). Cf. Hicks v. United States, 150 U.S. 442, 447-448, 450 (1893). See also United States v. Bufalino, 285 F. 2d 408 (C.A. 2, 1960) (The "Appalachian" conspiracy case).

These cases would appear to establish that, particularly in a criminal proceeding, an accused may not be convicted solely on the basis of evidence showing a close physical proximity to unlawful conduct of others, absent, at a minimum, proof that the accused had knowledge that unlawful activity would be likely to occur. Moreover, in all probability, some overt act on the part of the accused -- other than mere presence at the scene -- is also required.

On the other hand, there is some question whether the First Amendment-type cases are particularly relevant to the instant problem. If it be assumed, arguendo, that the sit-in meeting was akin to a conspiracy to commit a criminal act, then it may well be that the trier of facts might have been justified in drawing such inferences from Billups' activities (his presence at the meeting and his transportation of persons to that meeting) as would connect him with that conspiracy. In short, the "broad" ground may well determine whether there is here a "narrow" ground for reversal.

2. The argument could also be made that there is "no evidence," in the constitutional sense, to sustain Billups' conviction under the Birmingham ordinance. Section 824 makes it "unlawful * * * to incite, or aid or abet in, the violation of any law * * *," and the law which others were allegedly incited [84/] to violate is Section 1436, which prohibits remaining "on the premises of another, after being warned not to do so * * *." But, again the sole evidence against Billups is that he drove a student to the meeting and attended himself. These innocuous acts may not, without more amount to "inciting," or even "aiding or abetting," for that matter. See Garner v. Louisiana, 368 U.S. 157 (1961), and Thompson v. Louisville, 362 U.S. 199 (1960). But here again, assuming the criminality of a sit-in against the wishes of the owner of the premises, the question is whether the trier of facts could not properly have found the circumstantial evidence against Billups sufficient. Even a state appellate court might have difficulty overturning that conclusion of the trier of facts. Even more troublesome would be establishment of the proposition that there was no evidence in the constitutional sense under the Thompson v. Louisville standard.

[84/] The opinion of the Court of Appeals of Alabama appears to rest solely upon the ground that Billups and Shuttlesworth incited a violation, and not upon the aiding and abetting provisions of the statute.

b. Shuttlesworth

1. The argument may be made that Shuttlesworth's conviction cannot stand, consistent with the Fourteenth Amendment's guarantee of freedom of speech, unless the evidence demonstrates that his speech created a "clear and present danger" of a substantial evil within the power of the state to prevent. See Schenck v. United States, 249 U.S. 47; Teminiello v. Chicago, 337 U.S. 1, 4. The connection between the incitement and the event, moreover, must not be overly tenuous (compare Feiner v. New York, 340 U.S. 315), nor may the State suppress speech merely because some persons may be disturbed thereby, Teminiello v. Chicago, supra. 85/

85/ If, of course, the Fourteenth Amendment prohibits the state from enforcing private discrimination by criminal trespass prosecutions, (see Shelley v. Kraemer, 334, U.S. 1 (1948); Marsh v. Alabama, 326 U.S. 501 (1946)) then the law these petitioners allegedly incited others to violate is unconstitutional. If that is so, then no crime has been committed either by Gober and the others who sat in or, a fortiori, by petitioners here who incited the others to do so. One cannot be convicted of inciting to commit a crime when the act incited to is not itself criminal. This argument, however, would require the court to reach the "broad" constitutional issue in Shuttlesworth and Billups, and cannot properly be denominated a "narrow" ground.

The court would have to reach the broad issue on this theory, even if it reversed the conviction in Gober on narrow grounds. This is so because it seems probable that one may be convicted of inciting despite the fact that the person incited did not commit the crime. The Alabama Court of Appeals so held in this case. And see Feiner v. New York, supra; Dennis v. United States, 341 U.S. 494 (1951); Gitlow v. New York, 268 U.S. 652 (1925). Thus the two cases are not necessarily interdependent.

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On that theory, it would be argued that Shuttlesworth's acts and statements did not create a "clear and present danger" of violation of the trespass-after-warning law. He merely asked for volunteers to "sit-in." This raises the question of whether a court may judicially notice -- as the Court of Appeals of Alabama here did -- that a "sit-in" is a demonstration in which persons refuse to leave after having been asked to do so. Shuttlesworth did promise to "get them out of jail", he called for sit-in volunteers, and "sit-ins" (not otherwise described) did occur.

85/ (continued from preceding page)

It also seems clear that we cannot urge in Shuttlesworth (as we might in Gober in the parallel situation) that Shuttlesworth and Billups were, "realistically" speaking, convicted of "inciting" a violation of the segregation ordinance, and not the trespass ordinance. The segregation ordinance merely declares it unlawful "to conduct a restaurant * * * at which white and colored people are served [together]" (emphasis added). In short, the ordinance makes it a crime for the proprietor to serve Negroes on an integrated basis, but does not appear to make it a crime for Negroes to request such service or even to receive it (unless the inciting, aiding and abetting statute were construed to cover Negroes attempting to persuade or incite a proprietor to violate the restaurant law). Therefore, it cannot be reasonably argued that Shuttlesworth was in realistic terms convicted of inciting a violation of the segregation law, since the incitees did not have legal capacity to violate that law.

It may be said that he merely counseled the students to seek service, without more, and on this record nothing more appears. However, arguably the state could properly infer from the promise to "get them out of jail" that Shuttlesworth advised the students to remain after warning. 86/

In any event, the entire argument presupposes that Shuttlesworth's activities were at all in the realm of protected freedom of speech. It is equally arguable that Shuttlesworth simply did what the "boss" of a criminal gang would do -- draw up the plan, communicate the plan to them by "speech," and then expect them to carry it out by robbing the bank. That kind of speech is hardly protected by the First Amendment. Thus, in a way this "narrow" argument is again in a sense dependent upon the view one takes of the legality of the sit-ins themselves.

86/ The petitioners anticipated that the state might argue that the Court could judicially notice the record in Gober, which would demonstrate that the Gober petitioners, who were "incited" by Shuttlesworth, did in fact "sit-in" after warning (petition for certiorari, p. 9) and met this argument by arguing that the Gober acts were not crimes. But we think it unlikely that evidence in another record can be used to supply an evidentiary gap in the Shuttlesworth-Billups cases. See Noto v. United States, 367 U.S. 290, 299 (1961) ("The kind of evidence which we found in Scales [Scales v. United States, 367 U.S. 1 (1961), decided the same day as Noto] to support the jury's verdict of present illegal party advocacy is lacking here in any adequately substantial sense. It need hardly be said that it is upon the particular evidence in a particular record that a particular defendant must be judged, and not upon the evidence in some other record or upon what may be supposed to be the tenets of the Communist party" (emphasis added)).

2. In addition, it can be argued independently of the preceding grounds that there is a simply "no evidence" to support Shuttlesworth's conviction 87/ on the theory that seeking volunteers for a "sit-in", absent a description how that sit-in was to be conducted (i.e., remaining after warning or not), is not evidence of incitement to commit a trespass after warning. 88/ However, once again, there is evidence that Shuttlesworth promised to get the students out of jail, which, it may be inferred, means that he had instructed or incited them to remain after warning. 89/

87/ The "no evidence" argument as to Billups was separately discussed above.

88/ In addition, it might be argued that the state must prove (which it did not) that Shuttlesworth knew of the existence of the trespass law and knew that the acts he counseled would violate it. Unless, however, the presumption that an actor knows the law is inapplicable to incitement offenses, this argument runs afoul of the normal rule that intent to do the prohibited act is sufficient and specific intent to violate the law condemning the act need not be demonstrated by the state. But Cf. Screws v. United States, 325 U.S. 91 (1945).

89/ Another possible argument in Shuttlesworth's case is that there was "no evidence" to support his conviction under the aiding or abetting portion of the ordinance (although there may be evidence of "inciting"). This would be true if a conviction for aiding and abetting required proof that a crime was actually committed by those aided or abetted -- which seems likely. While this case was tried by a judge without a jury, if the judge did not indicate in any way which part of the statute he relied upon and if the indictment included an aiding and abetting charge as well as an "inciting" charge then the conviction would probably be challengeable on "no evidence" grounds even though there was evidence in

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3. Petitioners also argue that the inciting ordinance is too vague because it "does not reasonably apprise anyone that to advocate a sit-in protest is a crime." This argument is not tenable, as the trespass ordinance is drawn in quite specific terms and the clarity of the inciting ordinance depends in this case upon the clarity of the trespass ordinance.

89/ (Continued from preceding page)

support of the "inciting" charges. This is the rule in general verdict jury cases, (Robinson v. California, O.T. 1961, June, 1962; Williams v. North Carolina, 317 U.S. 287 (1942); Cramer v. United States, 325 U.S. 1 (1945)), and it ought to be equally applicable to cases in which it is impossible to determine under which rule of law the judge decided the case. However, a judge may be presumed to be more competent to separate the evidentiary wheat from the chaff than a jury would be. The Alabama Court of Appeals decision apparently limiting the rule of law applied to the "inciting" charge, (in support of which there is arguably some evidence) cannot change this result. Cf. Cole v. Arkansas, 333 U.S. 916 (1948).

The record in this case will have to be reexamined to determine whether the indictment was framed to encompass "aiding and abetting", and whether the trial court expressed an opinion of any kind as to which rule of law he applied.

No. 11: Avent et al. v. State of North Carolina

1. The Statute Involved

The petitioners were convicted of violating §14-134 of the North Carolina General Statutes 90/ which provides:

> Trespass on land after being forbidden. If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor and on conviction, shall be fined not exceeding fifty dollars or imprisoned not more than thirty days.

2. The Facts

On May 6, 1960, petitioners, five Negro students from North Carolina College, Durham, North Carolina, and two white students from Duke University, Durham, were customers at Kress's Department Store, Durham. The store -- two selling floors and three stockroom floors -- has approximately fifty counters (including a "stand-up" lunch counter) which serve Negroes and whites without racial distinction. No sign at the store's entrance barred or conditioned

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90/ This statute is nearly one hundred years old.

Negro patronage. Petitioners made various purchases, as some of them had in the past as regular customers, and eventually went to the basement lunch counter. Here a sign stated "Invited Guests and Employees Only." The meaning of the sign was not further explained, but the manager testified that although no invitations as such were sent out, white persons automatically were considered guests; Negroes, and whites accompanied by Negroes, were not. 9/ The counter was separated from other departments by an iron railing (A. 21) and there were chained entrances. ~~Petitioners entered through these entrances.~~

Some of the petitioners had requested and had been denied service on previous occasions at this counter (A. 37). Some of the petitioners testified that they expected to be served at the basement lunch counter because they had been served upstairs. None of the petitioners had been arrested previously for trespassing and none was arrested for trespassing upon entering the store through its main doors. Various of the petitioners testified that they did not expect to be arrested for trespassing on this occasion.

9/ The manager testified that "the luncheonette was open for the purpose of serving customers food. Customers on that date were invited guests and employees." He testified further that "We had signs all over the luncheonette to the effect that it was open for employees and invited guests. Mr. Pearson, [petitioners' Negro attorney] I do not consider you as an invited guest, under the circumstances right now. I do consider Mr. Murdock [the State Solicitor] an invited guest under the circumstances." He also said: "I would serve this young lady (indicating the white female defendant), but I asked her to leave when she gave her food to a Negro. She was my invited guest at that time, up until the time that I asked her to leave."

Petitioners were participants in an informal student organization which opposed racial segregation and felt they had a right to service at Kress's basement lunch counter after having been customers in other departments. Some had previously picketed the store to protest its policy of welcoming Negroes' business while refusing them lunch counter service.

The manager declined to serve the students and asked them to leave. He stated that if Negroes wanted service they might obtain it ~~at the back of the store, or~~ at a stand-up counter upstairs. ~~The petitioners claimed that at no time did the manager identify himself to them. However, police captain Gennady testified that he heard the manager identify himself to the students, and that he (Gennady) also told the students who the manager was.~~

The manager explained his reasons for refusing to serve the students by stating "it is the policy of our store to wait on customers dependent upon the customs of the community." He also said:

> In the interest of public safety it is our policy to refuse to serve Negroes at the luncheonette downstairs in our seating arrangements. It is also the policy of Kress to refuse the patronage of white people in the company of Negroes at that counter.

When the petitioners ~~remained seated awaiting service,~~ the manager called the police ~~to enforce his demand.~~ An officer promptly arrived and asked petitioners to leave. 92/ Upon refusal, the officer arrested them for trespassing. 93/ Petitioner Phillips described what occurred in these words:

> When I took a seat at the lunch counter, I was approached by Mr. W.E Boger, who said, "you are not an invited guest, and you are not an employee; so I am asking you to leave." Before I could ask him who he was,the police officer directed me to the back of the store.

Phillips also said:

> I didn't get a chance to leave when Mr. Boger asked me to leave because I was directed to the back of the store by Captain Seagroves. Had I been given an opportunity to leave, I don't know whether or not I would have left. If the police officer had directed me to leave the store, I would have left. I would have left at the request of the manager, if he had identified himself, I didn't get a chance to ask him who he was. 94/

92/ Parts of the record leave the impression that the police were already present at the time the manager asked the students to leave.

93/ Captain Cannady testified that "the only crime committed in my presence, as I saw, it was their failure and refusal to leave when they were ordered to do so by the manager."

94/ One defendant -- Streeter -- testified that neither the manager or a police officer asked her to leave. Petitioner Brown testified: "If the manager had requested that we leave, we would have left, if the manager had identified himself. We decided at our meeting if the manager requested us to leave we would leave without being served."

Petitioners were indicted in the Superior Court of Durham County, the indictments stating that each petitioner:

> with force and arms, . . . did unlawfully, willfully, and intentionally after being forbidden to do so, enter upon the land and tenement of S.H. Kress and Co. store. . . said S.H. Kress and Co., owner, being then and there in actual and peacable possession of said premises, under the control of its manager and agent, W.K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered by said W.K. Boger, agent and manager of said owner, S.H. Kress and Co., to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that. . . [petitioner] had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the state. A. 1-10).

Petitioners were tried together on June 30 and July 1, 1960/ They pleaded not guilty and were found guilty by a jury. 95/

95/ Three of the petitioners were sentenced to thirty days imprisonment in the common jail of Durham County to work under the supervision of the State Prison Department; one petitioner was sentenced to fifteen days in the Durham County Jail; prayer for judgment was continued for two years with respect to two of the petitioners.

(A 73)

On January 20, 1961, the Supreme Court of North Carolina affirmed the convictions. In a lengthy opinion, the court ~~relied on the principle~~ emphasized that (A. 74):

> In the absence of a statute forbidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant privately operated in a privately owned building has the right to select the clientele he will serve, and to make such selection based on color, race, or white people in company with Negroes or vice versa, if he so desires. He is not an innkeeper. This is the common law.

The court cited its decision in State v. Clyburn, 247 N.C. 455, 101 S.E. 2d 295 which affirmed earlier "sit-in" convictions under G.S. 14-134. 96/

96/ The court considered in some detail the concept of "state action", discussed various cases applying that principle, but rejected its applicability to this case.

No statute of North Carolina requires the exclusion of Negroes and of white people in company with Negroes from restaurants, and no statute in this State forbids discrimination by the owner of a restaurant of people on account of race or color, or of white people in company with Negroes.

The court held that the word "enter" as used in G.S. 14-134 is synonymous with "trespass" and, therefore, the statute does not merely apply to an original entry but also to a refusal to leave after requested to do so. This holding followed the holding in Clyburn, decided in 1958. Finally the court rejected the contention that G.S. 14-134 was vague and indefinite in that it does not require the person in charge of the premises to identify himself. The court held that the person forbidding another to go or enter upon the lands of another must, in fact, be the owner or occupier of the premises or his agent and that this is an essential element of the offense to be proved by the state. But the statute is not vague and indefinite merely because it does not specifically require the person forbidding entry to identify himself. In any event, in the opinion of the court, the evidence permitted the inference that all the defendants knew that W.K. Boger was the agent of S.H. Kress and in charge of the store.

3. The "Narrow" Grounds:

Three possible "narrow" grounds for reversal exist. In our view, each is extremely tenuous.

a. In the state courts -- but not in their petition for certiorari -- petitioners argued that their arrests and convictions were unlawful since W. K. Boger -- the Kress manager -- did not identify himself to petitioners before asking them to leave.[9/] They also contended that G.S. 14-134 is vague and indefinite since it does not require the person in charge of the premises to identify himself.

First. The record is contradictory in this respect. Police Captain Cannady testified that he heard Mr. Boger identify himself and that he also told petitioners who Mr. Boger was. The jury has resolved this conflict, and a contrary finding by an appellate court -- let alone the Supreme Court -- would not be proper. Second. Even if Mr. Boger had not identified himself, this would not be an adequate reason to justify reversal of the convictions. Petitioners could have asked Mr. Boger what his authority was or could have asked the arresting officers. Moreover, if Mr. Boger actually was without authority to ask petitioners to leave, this would be a matter of defense.

Third. The Supreme Court of North Carolina rejected an argument based on vagueness and its conclusion in that respect appears correct. The court said (253 N. C. at 593):

> G.S. 14-134 necessarily means that the person forbidding a person to go or enter upon the lands of another shall be the owner or occupier of the premises or his agent, and that is an essential element of the offense to be proved by the State beyond a

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9/ One of petitioners testified that if Mr. Boger had identified himself, the petitioners probably would have left the store. In view of what petitioners were attempting to accomplish, this seems highly unlikely.

> reasonable doubt. The statute is not too vague and indefinite to be enforceable as challenged by defendants, because it does not use the specific words that the person forbidding the entry shall identify himself. This is a matter of proof.

b. It is a defense to a charge under G.S. 14-134 that the defendant acted under a "bona-fide" claim of right.[9/] It may be argued, therefore, that defendants' belief that the Fourteenth Amendment required that they be served is a sufficient claim of right to preclude conviction.[9/]

[8/] In State v. Baker, 231 N.C. 136, 56 S.E. 2d 424 (1949), Judge (now Senator) Ervin enumerated the elements required for conviction under G.S. 14-134. He wrote (231 N.C. at 140):

> To constitute trespass on the land of another after notice or warning under this statute, these essential elements must coexist: (1) The land must be the land of the prosecutor in the sense that it is in either his actual or constructive possession; (2) the accused must enter upon the land intentionally; and (3) the accused must do this after being forbidden to do so by the prosecutor. Although the State may prove beyond a reasonable doubt in a prosecution under this statute that the accused intentionally entered upon land in the actual or constructive possession of the prosecutor after being forbidden to do so by the prosecutor and thus establish as an ultimate fact that the accused entered the locus in quo without legal right, the accused may still escape conviction by showing as an affirmative defense that he entered under a bona-fide claim of right. . . [citing cases] when an accused seeks to excuse an entry without legal right as one taking place under a bona fide claim of right, he must prove two things: (1) That he believed he had a right to enter and; (2) that he had reasonable grounds for such belief.

[9/] This argument is not made in the petition for certiorari.

First, the "bona fide claim of right" defense could not reasonably be applied to a situation where a person is relying on some yet untested legal theory or on his moral and philosophical notions. The defense must be rooted in some objective belief. It was obviously intended to cover situations where persons though t they actually had legal title to a piece of land or where a tenant invites a person on property over the landlords objections -- and the North Carolina cases bear this out. Cf. State v. Faggart, 170 N.C. 737, 87 S.E. 31 (1915); State v. Mallard, 143 N.C. 666, 57 S.E. 351 (1907); State v. Lawson, 101 N.C. 717, 7 S.E. 905 (1888). With respect to the facts of this case, it seems clear that the petitioners realized that they had no right to be served at the lunch counter. Some of petitioners previously had requested and had been refused service at the counter. In addition, the counter was posted as being restricted to "Invited Guests and Employees Only". Except for the fact that petitioners may have thought that they had a moral right to service or that the courts would someday hold that the Fourteenth Amendment gave them such a right, it cannot fairly be said that they acted under a bona fide claim of right. Second. The North Carolina Supreme Court indirectly considered this point. It noted that petitioners, in their assignments of errors, had objected to the jury charge although they had not briefed their objections. That charge said, in general terms, that defendants were without criminal responsibility if they acted under a bona fide claim of right. In considering this defense (in reference to the charge) the North Carolina Supreme Court said (253 N.C. 595-96):

> This Court said in S. v. Crawley, 103 N.C. 353, 9 S.E. 409, which was a criminal action for entry upon land after being forbidden: 'A mere belief on his part that he had such claim would not be sufficient -- he was bound to prove that he had reasonable ground for such belief, and that the jury should so find under proper instructions from the court, S. v. Byrnes, 81 N.C. 595.' This Court said in S. v. Wells, 142 N.C. 590, 55 S.E.

> 210: 'True we have held in several well-considered decisions, that when the State proves there has been an entry on anothers' land, after being forbidden, the burden is on the defendant to show that he entered under a license from the owner, or under a bona fide claim of right. And on the question of bona fides of such claim, the defendant must show that he not only believed he had a right to enter, but he had reasonable grounds for such belief. S. v. Glenn, 118 N.C., 1194; S. v. Durham, 121 N.C. 546. But where there is evidence tending to show that the defendant believed and had reasonable ground to believe in his right to enter, then in addition to his right, the question of his bona fide claim of right must be in some proper way considered and passed upon before he can be convicted.,

The court's analysis of the bona fide claim of right defense appears to be entirely correct. Whether or not petitioners have a bona fide claim of right to obtain service at the Kress lunch counter is, actually, the ultimate question in these cases. To argue that they could not be convicted under G.S. 14-134 merely because they thought they had such a right would permit trespasses to private homes and clubs to go unpunished if the trespasser sincerely believed that the Constitution gave him the right to act as he did.

c. It may be argued that G.S. 14-134, as applied in this case, is vague and indefinite in that it gives no fair warning of the conduct that has been charged to be criminal. This argument -- advanced in the petition for certiorari -- rests in the claim that while G.S. 14-134 forbids a person "after being forbidden to do so . . . [to] go or enter upon the lands of another" these petitioners entered before being forbidden to do so and only remained after being forbidden to do so.[10/] This is reminiscent of

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[10/] The petition for certiorari argues (pp. 20, 24):

> Although the statute in terms prohibits only going on the land of another after being

(continued on following page)

the type of arguments with which Alice had to cope at the Mad Tea Party. First. The construction of G.S. 14-134 which petitioner suggests would lead to absurd results. It would mean that the owner of a large tract of land would not invoke the statute unless he encountered the trespasser as he approached the property line. It would mean that the statute would be inapplicable if a home owner failed to discover an unwelcome visitor before he crossed the threshold but only encountered the trespasser as he was "raiding the ice-box". And it would mean that the statute could never be invoked in places of public accomodation in North Carolina to punish persons who lawfully entered but then refused to leave after becoming intoxicated, argumentative, etc. The "vague and indefinite" concept seems entirely inappropriate with respect to the North Carolina statute and its applicability in this case is not supported either by the arguments advanced by the Government in its amicus curiae brief in Garner or by Justice Harlan's concurring opinion in that case which found the Louisiana statute in question to be vague and indefinite. Second. The

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(continued from preceeding page)

10/ forbidden to do so, the Supreme Court of North Carolina has now construed the statute to prohibit also remaining on property when directed to leave following lawful entry. . . Stated another way, the statute now is applied as if 'remain' were substituted for 'enter' . . . . On its face the North Carolina trespass statute warns against a single act, i.e., going or entering upon the land of another after being forbidden to do so. 'After' connotes a sequence of events which by definition excludes going on or entering property 'before' being forbidden. The sense of the statute in normal usage negates its applicability to petitioners' act of going on the premises with permission and later failing to leave when directed.

language of the statute itself seems applicable to the situation in this case. The statute uses the word "go" as well as "enter." The former word is not generally considered to connote a solitary act; it implies a continuous course.[101] Here petitioner's continued "going" i.e., they remained seated waiting for service, even after the manager of Kress had forbidden them from doing so. Third. Petitioners' argument is inconsistent with well settled law. It is established that "trespass may be committed by a wrongful failure or refusal to leave the land after a non-tortious entry . . . refusal to leave land by one whose privilege to be there has been terminated is regarded as a trespass . . . ."[102] Fourth. Prior to the events in this case, the North Carolina Supreme Court held that conduct similar to petitioners' came within G.S. 14-134.[103] The "sit-in" in this case occurred on May 6, 1960 in Durham, North Carolina. On January 10, 1958, the North Carolina Supreme Court

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[101] Among the definitions of "go" in Webster's Third International Dictionary are: "to move on a course: pass from point to point or station to station: proceed by any of several means . . . to take a certain course or follow a certain procedure." We are all familiar with the fact that even after Commander Sheppard and Colonel Glenn "enter[ed]" outer space, they continued to describe their condition as "go."

[102] 1 Harper and James, "The Law of Torts," §1.6, p. 22.

[103] In the Government's amicus brief in Garner it was conceded that (p. 37) "Interpretation of a State statute prior to the defendant's conduct may sometimes clarify otherwise indefinite language sufficiently to satisfy the requirements of fair notice. The opinions of Justice Warren and Harlan in Garner relied heavily on the construction given the statute in question by the Louisiana courts.

decided State v. Clyburn, 247 N.C. 455, 101 S.E. 2d 295 (1958). That case involved a sit-in in an ice cream parlor in Durham, and the circumstances of the case were essentially identical to the instant case. There the appellants also argued that G.S. 14-134 applied only to unlawful entries. The Supreme Court of North Carolina rejected this contention and said (247 N.C. at 461-62):

> "Defendants maintain it [G.S. 14-134] has no application [to this case] since it only makes criminal an entry after being forbidden. The merit, if any in the position taken is determined by ascertaining the wrong condemned. The denomination of the criminal act and the historic interpretation given to the words used to define the act provide the answer to the question. The statute, first enacted in 1866, is entitled 'AN ACT TO PREVENT WILFUL TRESPASSES ON LAND, AND STEALING ANY KIND OF PROPERTY THEREFROM.' It is now grouped with other statutes relating to wrongs done to the owners of real estate in a subchapter of our criminal laws entitled 'TRESPASSES TO LAND AND FIXTURES.' Looking at the titles, it is apparent the Legislature intended to prevent the unwarranted invasion of the property rights of another. S. v. Cooke, supra; S. v. Baker, 231 N.C. 136, 56 S.E. 2d 424. It is not the act of entering or going on the property which is condemned; it is the intent or manner in which the entry is made that makes the conduct criminal. A peaceful entry negatives liability under G.S. 14-126. An entry under a bona fide claim of right avoids criminal responsibility under G.S. 14-134 even though civil liability may remain. S. v. Taggart, 170 N.C. 737, 87 S.E. 197; S. v. Wells, 142 N.C. 590; S. v. Fisher, 109 N.C. 817; S. v. Cronnet, 81 N.C. 579.

What is the meaning of the word 'enter' as used in the statute defining criminal trespass? The word is used in G.S. 14-126 as well as G.S. 14-134. One statute relates to an entry with force; the other to a peaceful entry. We have repeatedly held, in applying G.S. 14-126, that one who remained after being directed to leave is guilty of a wrongful entry even though the original entry was peaceful and authorized. S. v. Goodson, supra; S. v. Fleming, 194 N.C. 42, 138 S.E. 342; S. v. Robbins, 123 N.C. 730; S. v. Webster, 121 N.C. 586; S. v. Gray, 109 N.C. 790; S. v. Talbot, 97 N.C. 494. The word 'entry' as used in each of these statutes is synonymous with the word 'trespass.' It means an occupancy or possession contrary to the wishes and in derogation of the rights of the person having actual or constructive possession. Any other interpretation of the word would improperly restrict clear legislative intent.

Other North Carolina decisions have applied G.S. 14-134 to situations where the initial entry was made without objection. For example, in State v. Cooke, 246 N.C. 518, 98 S.E. 2d 885 (1957) and 248 N.C. 485, 103 S.E. 2d 846 (1958), [1041] appeal dismissed, 364 U.S. 177 (1960) the appellants entered a golf club's shop and

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[1041] On the first appeal to the North Carolina Supreme Court, the lower court decision was reversed because the warrant had been improperly amended.

requested permission to play on the course. Their request was refused. (Obviously, however, the appellants initially had entered the golf club's grounds without being forbidden to do so.) Nevertheless, after placing some money on a table in the golf shop, the appellants proceeded to the course and teed off. After they had played several holes the manager of the golf course ordered them to leave. They refused. The manager summoned a deputy sheriff, and, after the appellants were again ordered to leave, they were arrested and convicted under G.S. 14-134. While the question of whether G.S. 14-134 was appropriately applied was not raised specifically in the Cooke case, nevetheless the decision there demonstrates that the instant decision represents no sudden departure from consistent state practice.

CIVIL RIGHTS DIVISION - APPELLATE DOCKET

AVENT, v. North Carolina, No. 11
Griffin v. Maryland, No. 26
Lombard v. Louisiana, no. 58

Name of Case	D. J. File No.	C. R. Comp. No.	District
Gober v. City of Birmingham, No. 66	A5328	144-35-186	

Nature of Case	Statutes	Circuit
Shuttlesworth v. City of Birmingham, No. 7		

Court Nos. - Trial Peterson v. City of Greenville, No. 71
Appellate
Supreme Court Wright v. Georgia, No. 68

Counsel - Trial
Appellate
Supreme Court Marer, Glickstein

Opposing Counsel - Trial
Appellate
Supreme Court

Victims or other interested parties
Co-defendants
Related cases

Result - Trial
Appeal
Certiorari
Supreme Court see notations in red
31 LW 4475; 4476; 4481; 4482;4483;4487
Citations 373 US 244, 262, 267, 284, 374, 375
Issues

Type of Case: ( ) Govt. ( ) Private
( ) Crim. ( ) Civil ( ) H. C. ( ) 2255
( ) Govt. App. ( ) Amicus
( ) Voting ( ) Due Process ( ) Equal Prot.
( ) Fed. Cust. ( ) Other

DATE	PROCEEDINGS
8/28/62	Memo to Sol Gen fr Marshall attaching draft of proposed amicus brief
10/12/62	our amicus brief filed this date in S Ct (per Sol Gen's office on 10/15/62)
10/15/62	motion to remove case fr summary calendar denied this date (Avent)
10/15/62	amicus brief filed this date (Griffin)
10/16/62	Ltr fr Kaufman, Deputy Atty Gen to S.Ct. requesting lv of St of Md to obtain ext. of time for filing brief to 10/26/62 (see ltr) (Griffin case)
10/23/62	Recd Brief of Resp. St of Md in Griffin case
11/5-7/62	argued by Sol Gen Cox in Sup Ct.
5/21/63	Judgment reversed, case remanded to CA Ala for further proceedings (Shuttlesworth)
5/21/63	Judgment reversed, case remanded to state Sup Ct for further proceedings (Lombard,Wright) (Avent) (Peterson)
5/21/63	judgments reversed, case remanded to CA Ala. (Gober)

Form No. CVR-5
(Ed. 1-31-58)

DATE	PROCEEDINGS
5/27/63	Memo to Greene fr S.G. adv on 5/20/63 S.Ct. restored Griffin case to calendar for reargument (sent to files 6/11/63)
6/14/63	Ltr to Cox fr S.Ct. adv mandate mailed to Clerk S.Ct. of La this date (Lombard)
6/14/63	Ltr to Cox fr S.Ct. adv mandate mailed to Clerk CA in Ala this date (Shuttlesworth)
6/14/63	Ltr to Cox fr S.Ct. adv mandate mailed to Clerk S.Ct. S.C. this date (Peterson)
6/14/63	Ltr to Cox fr S.Ct. adv mandate mailed to Clerk S.Ct. NC this date (Avent)
	(above ltrs sent to files 7/15/63)