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For opinion see 84 S.Ct. 1770, 84 S.Ct. 260, 84 S.Ct. 38

Briefs and Other Related Documents

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Supreme Court of the United States.
William L. GRIFFIN, et al., Petitioners,
v.
MARYLAND, Respondent.
No. 6.
October Term, 1963.
August 23, 1963.
ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

Brief for Petitioners

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TABLE OF CASES

Miscellaneous

***1** Opinions Below

The opinions of the Circuit Court for Montgomery County and of the Court of Appeals of Maryland (225 Md. 422, 171 A. 2d 717) appear at R. 72 and R. 76.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The judgment of the Court of Appeals of the State of Maryland was entered on June 8, 1961. The petition for a writ of certiorari was filed on August 4, 1961 and was granted on June 25, 1962 (R. 84). Oral argument ***2** was had on November 5, 1962, and reargument was ordered by this Court on May 20, 1963 (373 U.S. 920).

Question Presented

Whether at a privately-owned amusement facility licensed to serve and catering to the general public, the State may lend its police authority for enforcement of discrimination against Negroes, and, upon refusal of Negro members of the public to leave the premises, may arrest, accuse, prosecute, and convict them of criminal trespass.

Statutes Involved

This case involves the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and Article 27, Sec. 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."

Statement

The group of "sit-in" cases at the 1962 and 1963 terms of court had their origins in Greensboro, North Carolina, on February 1, 1960 in the attempt of Negro citizens to obtain treatment equal to that afforded to ***3** whites in such public accommodations as food, transportation, entertainment anti recreation. On that day, four young Negro students at the North Carolina A. & T. College, who had grown increasingly impatient with prevailing practices under which Negro students could not obtain food and refreshment served at local stores, refused to leave a local lunch counter in Greensboro when they were denied a cup of coffee. This modest incident marked the beginning of widespread efforts in a number of states, including Maryland, to open service for Negroes in places of public accommodation. See Pollitt, Dime Store Demonstrations, 1960 Duke L.J. 315. One of those efforts, from which this case arose, took place in the summer of 1960 at the amusement park serving the Nation's Capital.

Glen Echo Park, the major amusement facility in the District of Columbia area, is located in Montgomery County, Maryland. The Park is operated by a corporation licensed to do business in the State of Maryland (R. 3; 78, n. 1). In the years up to

1960, Glen Echo Park was frequented by white customers only (R. 46-47), with the exception of Negro maids accompanying white children (as long as they "didn't do anything in the park" (R. 41)). The park offered to the public the usual games and amusement concessions, together with a swimming pool and eating facilities (R. 77).

On June 30, 1960, a number of persons, including petitioners, gathered outside the main entrance of the Park to urge publicly that Negro patrons be permitted to use the Park's facilities and to seek service for Negro patrons by peaceable means (R. 59-71). A picket line protesting racial segregation was set up outside the main entrance to the Park. (R. 62-63). No tickets of admission were required for entry into the Park (R. 17) and petitioners, young Negro students participating in the Glen Echo protest, entered ***4** the Park through the open main gates at about 8:15 p.m. (R. 6-7). While petitioners were generally aware of Glen Echo's long-standing discriminatory policy, they were hopeful that the management would not refuse them service (R. 61-63, 69). Having entered the Park without difficulty, petitioners took seats on the horses and other animals of the carousel and sought to enjoy a merry-go-round ride (R. 7-8), for which they had in their possession valid tickets of admission (R. 17, 59). [FN1]

> FN1. Friends of the petitioners had purchased these tickets and had given them to petitioners (R. 60). There is no suggestion that the management placed any restriction upon the transfer of tickets to friends and relatives; indeed, it was conceded by an agent of the Park that transfers frequently occurred in his presence (R. 17). No offer to refund the purchase price was made to petitioners (R. 17).

Petitioners, as we have said, were hopeful that the Park would not refuse them the service which it advertised and rendered to the general public. Their attempts at service were not unreasonable, considering that no tickets were required for admission to the Park itself (R. 17), that none of the signs around the Park indicated any discrimination against Negro customers (R. 60), and that in its press, radio and television advertising in the District of Columbia area the management invited "the public generally" without distinction of race or color (R. 45-46).

It soon developed, however, that petitioners were not going to be able to ride the carousel on which they were seated. While the carousel remained stationary, petitioners were approached by one Francis J. Collins, who ordered them out of the Park (R. 7-8). Collins was employed by the Glen Echo management as head of the special police force at the Park under arrangement with a private detective service, the National Detective Agency (R. 5, 14-15) and was deputized as a Special Deputy Sheriff of Montgomery County on the request of the Park ***5** management (R. 14). [FN2] Collins was dressed in the uniform of the National Detective Agency and was wearing the Special Deputy Sheriff's badge representing his state authority (R. 16). On the orders of and on behalf of the Glen Echo management (R. 7, 54), but wearing the badge of his State office, Collins "gave them five minutes to get off the property" (R. 7), explaining that it was "the policy of the park not to have colored people on the rides, or in the park" (R. 8). Petitioners declined to obey Collins' order, remaining on the carousel for which they tendered their tickets for the ride (R. 8, 17).

Having unsuccessfully directed petitioners to leave the premises, and still acting pursuant to his employers' instructions (R. 7, 56) but exercising his police authority (R. A), Collins then arrested petitioners (R. 12) for trespass in violation of Art. 27, Sec. 577 of the Code (R. A). There was no suggestion that petitioners were "disorderly in any manner" or were unwelcome for any reason other than their color (R. 77).

> FN2. The private force at the Park included at least two employees deputized as Special Deputy Sheriffs (R. 55) pursuant to Montgomery County Code (1955) Sec. 2-91, which provides that the sheriff "on application of any corporation or individual, may appoint special deputy sheriffs for duty in connection with the property of ... such corporation or individual; ... to be paid wholly by the corporation or person on whose account their appointments are made."

At the Montgomery County Police precinct house where petitioners were taken after their arrest (R. 12), once more acting upon his employers' instructions but exercising his public office, Collins preferred sworn charges for trespass against petitioners by executing an "Application for Warrant by Police Officer" (R. A). Based upon Collins' charge, a "State Warrant" was thereafter issued by the justice of the peace (R. B), leading to petitioners' trial under the Maryland "wanton trespass" statute, Code Art. 27, Sec. 577. Apparently the State had difficulty deciding ***6** whether Collins had been exercising his public or his private powers in enforcing segregation at Glen Echo Park. The State Warrant filed on August 4, 1960 (R. B) alleging that petitioners had refused to leave the Park "after having been told by the Deputy Sheriff for Glen Echo Park" to leave the property, was replaced by an Amended State Warrant of September 12, 1960 (R. C) alleging that they had refused to leave "after having been duly notified by an agent of Kebar, Inc." not to remain on the property. The shift from describing Collins as "Deputy Sheriff" to describing him as "an agent of" the owner of the Park was necessitated by the provision of the trespass statute which made entry or crossing over property a crime only "after having been duly notified by the owner or his agent not to do so ..."

Petitioners' trial in the Circuit Court for Montgomery County on September 12, 1960, elicited the circumstances under which petitioners were warned off Glen Echo premises and arrested and accused of trespass by Collins, acting on the orders of the private management and contemporaneously exercising the powers of his public police office as a Deputy Sheriff. At the trial, Collins, Park co-owner Abram Baker, and Park Manager Woronoff, all elaborated upon the orders given by the management to Collins with respect to his enforcement of racial discrimination. Co-owner Abram Baker admitted that from the first day of Collins' employment, management had instructed him to enforce segregation (R. 37). Baker candidly described the use of his State-deputized private employee to enforce racial discrimination:

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

***7** "A. Yes.

"Q. That was your instructions?

"A. Yes.

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

"A. Yes" (R. 39-40).

Deputy Sheriff Collins equally affirmed that he arrested petitioners "because they were negroes," and explained that "I arrested them on order of Mr. Woronoff, due to the fact that the policy of the park was that they catered just to white people ..." (R. 16). Park Manager Woronoff also testified that Glen Echo's policy was "to maintain the park on a segregated basis" (R. 53) and that when he learned of petitioners' presence in the Park, "I 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, then they were to be arrested for trespass" (R. 54).

Petitioners' constitutional objections to the State's participation in and support of racial discrimination, were repeatedly rejected by the trial court (R. 4, 12, 55, 71, 72-75). Petitioners were convicted and fined (R. F; 72-75). The Maryland Court of Appeals affirmed the convictions (R. 76), holding that, under the wanton trespass statute, petitioners' refusal to leave the premises upon instructions of management agent Collins, constituted unlawful "entry or crossing over" the property "after having been duly notified by the owner or his agent not to do so."

The Court dismissed petitioners' arguments that State support of racial discrimination by a public commercial enterprise violated the Fourteenth Amendment, finding the case to be "one step removed from State enforcement of a ***8** policy of segregation" (R. 82). Concerning the segregation policy of Glen Echo Park itself, the Court assumed that no constitutional objection could be raised, and expressly referred to "the lawful segregation policy of the operator of the park" (R. 82). Because of the importance of the issues thus presented and the impact of this Court's ruling upon those issues, which will necessarily have effect beyond the individual cases now before the Court, we enlarge in the Argument on the various legal considerations involved in racial discrimination at public accommodations and its enforcement by the authority of the state.

Summary of Argument

I

Maryland's active support to the racial discrimination of Glen Echo Park transgresses the equal protection clause of the Fourteenth Amendment. What the State has done here falls well within the area of State action interdicted by this Court's rulings in Shelley v. Kraemer, 334 U.S. 1, Barrows v. Jackson, 346 U.S. 249, and Burton v. Wilmington Parking Authority, 365 U.S. 715.

In Shelley, and later in Barrows, this Court ruled that judicial recognition or enforcement of private undertakings to practice segregation constitutes denial by the state of the equal protection guaranteed by the Fourteenth Amendment. In the instant case it is clear that at least as much as in Shelley and Borrows, the courts of the State of Maryland have become the means for enforcing racial discrimination.

Indeed, the instant case is far stronger than Shelley. For here the State process enforcing discrimination is not merely a civil action for the redress of private wrongs but a criminal action bespeaking a State public policy in ***9** preventing the

proscribed conduct. Moreover, whereas in Shelley the proprietary interest enforced was the homeowner's choice of neighbors, here discrimination has been enforced not in the private domain of home ownership but in a place of public amusement and accommodation.

Actually, there is far more in the instant case than mere judicial enforcement of racial discrimination - for here the closest interplay existed at every stage between the discrimination at Glen Echo Park and the authority of the State, which was loaned to the owners for the enforcement of their discrimination. Not only the judicial and prosecutory power of the State of Maryland has been employed to enforce discrimination, but the State's police authority was leased to the Glen Echo management on a formalized basis for the continuing administration and enforcement of its discriminatory policy. As regards enforcement of segregation, there was absolutely no severance at any time between public and private authority at Glen Echo Park. See Burton v. Wilmington Parking Authority, 365 U.S. 715; Lombard v. Louisiana, 373 U.S. 267.

In the deputizing of the private discriminator and in enforcement of his discrimination through arrest, prosecution and conviction of Negroes seeking service, the State has transgressed the guarantee of equal protection as elaborated in this Court's rulings in Shelley, Barrows, Wilmington Parking and Lombard. Nor is it any answer to this constitutional showing that states must be empowered to secure the privacy of property owners, or that a potential condition of self-help would arise if this Court were to recognize an area where the State neither protects nor proscribes discriminatory conduct. As regards the contention that application of Shelley in the instant cases would leave states helpless to defend the privacy of premises, the answer is that these cases do not involve property which the owner ***10** has reserved for private use. Far from seeking privacy, these establishments are open to and cater to the trade of the public. Where, as here, the proprietor practices no privacy, it is clear that the only interest which the State's action is vindicating is the interest in discrimination, and the Fourteenth Amendment precludes State vindication of such an interest. See Marsh v. Alabama, 326 U.S. 501, Public Utilities Comm'n v. Pollak, 343 U.S. 451, 464; Henkin, Shelley v. Kraemer, Notes for a Revised Opinion, 110 Pa. L. Rev. 473.

To the argument that proprietors would employ forceable self-help in the area where the State neither protects nor forbids discrimination, we submit that the public record of recent years provides an answering demonstration. It is not the habit of proprietors seeking the trade of the public to engage in the dirty business of self-help ousters of Negroes seeking to give their patronage; rather they rely upon police forces to oblige in the enforcement of the "unwritten law." There is every reason to believe that the removal of state support for discrimination will be the occasion not for the advent of forcible self-help but for the demise of segregation in public accommodations. And all apart from the fact that there is no issue of self-help directly involved in this case and from the overwhelming public record that racial discrimination in places of public accommodation will not outlive the withdrawal of state supports, it should be noted that there is at least grave doubt whether a proprietor could legally engage in self-help to remove Negro would-be pat-

rons.

The Fourteenth Amendment does not permit the State of Maryland to utilize its police powers of enforcement, arrest, accusation and prosecution and its judicial power of trial and conviction to administer and enforce discrimination at public accommodations. The quantum of state action ***11** in this case far exceeds that which this Court found adequate in earlier cases to invoke the equal protection guarantee and requires a reversal of the judgment below.

II

Under the equal protection clause, the State can neither recognize, countenance, nor protect, a "right" of discrimination against Negroes at public accommodations The previous argument has proceeded on the assumption that at public accommodations proprietors have a "right" to discriminate and has demonstrated that under Shelley and related precedents the State may not lend its enforcement to such a right. Here we urge that actually the State cannot create nor recognize any right to discriminate in the public domain, and that accordingly there is no right amenable to vindication by the State's criminal law.

This Court's 1883 decision in the Civil Rights Cases, 109 U.S. 3, has given rise to the assumption that the Fourteenth Amendment concerns itself only with the active misfeasance of the State in matters of race rather than with the State's mere tolerance of racial practices, even in areas of intimate public interest. Actually, the majority in the Civil Rights Cases assumed that there was a right to enjoy equal accommodations in public places "which no State can abridge or interfere with", and expressly reserved the question whether discrimination at public establishments "might not be a denial of a right which, if sanctioned by the State law, would be obnoxious to the prohibitions of the Fourteenth Amendment." Nevertheless, the decision did foster the view that the equal protection guarantee does not reach mere State tolerance of racial discrimination. But beginning in the 1940s the "misfeasance" theory began to show its inadequacy in lines of cases (see e.g. Terry v. Adams, 345 U.S. 461) where ***12** this Court found the equal protection clause to apply even in the absence of conscious State support to discrimination as such. Recently in Wilmington Parking (365 U.S. at 725) this Court found that by reason of the relationship between the State and the public accommodation there involved, an affirmative State obligation arose to assure non-discrimination.

Indeed, we submit that this Court's ruling's in Shelley and Barrows, reflect the concept of the Fourteenth Amendment as a guarantee against tolerance by substantive State law of racial discrimination in the public domain, whether practiced by government officials or private persons. Whether by statute or judicial ruling, the application of State law - contract, tort, property, or statutory trespass - so as to deprive a person because of race of privileges enjoyed by others, is "state action" reached by the Fourteenth Amendment. As thus seen, the true significance of Shelley is that the Fourteenth Amendment speaks no less to the state's substantive, law of rights and duties than to affirmative state commandments in favor of segregation. The Constitution precludes the state not only from commanding discrimination, but equally from creating or recognizing a legal "right" to discriminate, with the ex-

ception of those areas of private concern, such as the home, constitutionally precluded from state intrusion.

In any event, when the State in its executive capacities has involved itself with private proprietors as in the case at bar, then equal protection requires the State to assure non-discrimination in the service of the Negro public. Analysis demonstrates that the State of Maryland is intimately involved in such public accommodations as Glen Echo. In its varied licensing and inspection requirements for the protection of the public interest and welfare, the ***13** State of Maryland has manifested its high concern regarding the operation of Glen Echo. In its many regulatory measures relating to the enterprise, the State further demonstrates its concern for the public interest in the operation of the public accommodation involved. But the State's involvement does not end with licensing, inspection and regulation; in a myriad of ways governments provide assistance to public accommodations. These varying measures of governmental assistance once more demonstrate the State's consciousness of the public interest involved - the enterprise may be privately owned but the interest served is public and receives the active supportive energies of government.

The State has obviously "become involved" in the operation of public accommodations licensed, regulated and supported by its agencies. The "private property" concepts which underlay this Court's refusal in the 1883 Civil Rights Cases to give necessary scope to the Fourteenth Amendment's guarantee of equal protection, cannot today remain dispositive of the question whether the State of Maryland may permit public accommodations to discriminate against Negroes. No reason appears why this Court should decline to give controlling significance in equal protection cases to the public interest consideration it finds dispositive in economic due process cases. Cf. Nebbia v. New York, 291 U.S. 502. One hundred years after Emancipation, the effort at true emancipation cannot succeed while great public enterprises, operating with the license, approval, assistance and control of the states, remain beyond the constitutional obligation to afford Negro citizens equal participation in the life of the community.

***14** Argument

This case was argued at the last term of court together with other cases involving State prosecutions against Negroes seeking service at public accommodations and facilities. The reargument permits analysis in somewhat more depth, of some fundamental issues which appeared to concern the Court during the argument of the cases last term. Actually, as we continue to urge in this brief, the convictions herein require reversal under the accepted proposition announced and applied by this Court ill Shelley v. Kraemer, 334 U.S. 1, Burton v. Wilmington Parking Authority, 365 U.S. 715, and most recently, in Lombard v. Louisiana, 373 U.S. 267, that the Fourteenth Amendment precludes a State from involving itself with private discrimination either through its legislative, executive, or judicial authority (see infra, point I). That proposition calls for the reversal of these convictions without necessity of resolving the question whether the discriminatory policy pursued at the public accommodation herein was one which the State could regard as lawful in the absence of active State support. But we urge in addition (see infra, point II), an examination of the proposition espoused by the court below and emanating from the 1883 Civil Riqhts

Cases, that the owners of licensed premises chartered to serve and catering to the general public have a "right" to practice racial discrimination, and that the State's recognition of such a "right" is not a denial of the equal protection of the law Should this Court deem it necessary to reach our second point, we urge that a realistic examination of the Fourteenth Amendment must require the conclusion that it obligates States to assure equal access for Negroes at places of public accommodation, and thus the Fourteenth Amendment ***15** necessarily precludes the State's imposition of sanctions upon Negroes who peaceably seek the same service accorded by the proprietors to the white public.

I.

The State's Active Support to the Racial Discrimination of Glen Echo Park Transgresses the Equal Protection Clause of the Fourteenth Amendment.

The instant case is one of a number of proceedings challenging state prosecutions of Negro patrons and white associates at places of public accommodation. The first premise of the challenge against the criminal proceedings involved in the pending cases is that such exertions of state power in support of racially discriminatory practices by enterprises serving the public, constitute "state action" forbidden by the Fourteenth Amendment. What the States have done in these cases falls well within the area of state action interdicted by this Court's rulings. See Shelley v. Kraemer, 334 U.S. 1, Barrows v. Jackson, 346 U.S. 249, and Burton v. Wilmington Parking Authority, 365 U.S. 715.

(1) Judicial Support to Discrimination. Long before Shelley, this Court emphasized that the Fourteenth Amendment's requirement of equal treatment by the state, reaches "state action of every kind" - legislative, executive and judicial. See Virginia v. Rives, 100 U.S. 313, 318; Ex Porte Virginia, 100 U.S. 339. In Shelley and later in Barrows, the Court ruled that judicial recognition or enforcement of private undertakings to practice segregation constitutes denial by the state of the equal protection guaranteed by the Fourteenth Amendment. In the instant case it is clear that at least as much as in Shelley ***16** and Barrows, the courts of the State of Maryland have become the means for enforcing racial discrimination. No more may the State here enforce "private" discrimination by judicial trespass action than it could do so by judicial ejectment action in Shelley. We submit that Shelley controls the instant case and precludes the affirmance of convictions for "trespass" of persons ordered off premises and arrested and accused "because they were Negroes." [FN3]

> FN3. This was the holding of the Third Circuit under similar factual circumstances, in Valle v. Stengel, 176 F. 2d 697.

Indeed, the instant case is far stronger than Shelley. Here the State process which enforces racial discrimination is not merely civil process as in Shelley, but the substantive criminal law of the State. In contrast to civil process which the State extends to parties for the redress of private wrongs, criminal prohibitions import the existence of a general public interest in the proscription of the conduct prohibited. Even more so than in Shelley, where the State merely opened its courts for private redress, here, in the application of a criminal prohibition, the State is

expressing and applying a public policy favoring discrimination.

Moreover, any supposed private interest worthy of state court protection in this case must fall far below the private and property interests which this Court precluded from judicial enforcement in Shelley. The asserted private and property interest in Shelley was that in the home-owner's choice of his neighbors - an interest which certainly stands high in the traditional respect and protection of the law. By contrast, here the State's process has been made available to enforce discrimination not in the private domain of home ownership, but on a merry-go-round at an amusement park catering to the general public. ***17** If, as this Court's Shelley ruling held, state courts may not lend their powers to the enforcement of discrimination in home ownership, they may do so even less to enforce discrimination at premises licensed for, advertised, and dedicated to the custom of the public.

This is the position espoused before this Court several years ago in a brief amicus for the United States in Boynton v. Virginia, 364 U.S. 454. In the Government's Brief before this Court (at p. 17), it emphasized that "The application of a general, nondiscriminatory, and otherwise valid law to effectuate a racially discriminatory policy of a private agency, and the enforcement of such a discriminatory policy by state governmental organs, has been held repeatedly to be a denial by state action of rights secured by the Fourteenth Amendment." Pertinent judicial rulings, the Solicitor General pointed out, demonstrate that "where the state enforces or supports racial discrimination in a place open for the use of the general public ... it infringes Fourteenth Amendment rights notwithstanding the private origin of the discriminatory conduct" (at p. 20).

The position elaborated in Boynton is, we submit, the only position which this Court can take consistent with its holdings in Shelley and Barrows. If the Constitution precludes judicial vindication through civil remedies for a right of private, discrimination in the selection of neighbors, then it must at least equally preclude judicial enforcement by criminal law of a restriction of premises catering to the public. Without the necessity of considering the state's nonjudicial involvement in this case in the practice of segregation at Glen Echo Park, it is enough for constitutional purposes for this Court to find that Maryland has impermissibly imposed criminal penalties and prohibitions to support discrimination at a public accommodation.

(2) Executive Support to Discrimination, Actually, there ***18** is much more in the instant case than judicial enforcement of racial discrimination - for here the closest interplay existed at every stage between the discrimination at Glen Echo Park and the executive authority of the State, which was loaned to the owners for the enforcement of discrimination. Not only the judicial and prosecutory power of the State of Maryland has been employed to enforce discrimination, but the State's police authority was leaved to the Glen Echo management on a formalized basis for the continuing administration and enforcement of its discriminatory policy. Deputy Sheriff Collins, not upon the mere request but upon the orders of the private management which employed him, and wearing the badge of his public office, informed and instructed petitioners that because they were Negroes they would have to leave the

premises. Collins and his associates were thus administering the Park's policy of racial discrimination on a day to day basis.

Indeed, it was officer Collins who created the crime of which petitioners were convicted. His direction to petitioners to leave the premises was a necessary ingredient of the offense under the statute, which is committed only "after having been duly notified by the owner or his agent ..." Then, to add even further state support, still following the orders of his employers but in his capacity as an officer of the State, Collins arrested petitioners and filed warrants under oath against them, bringing into play the criminal machinery of the State. [FN4] Collins' unassisted ***19** double play is in sharp contrast to the ordinary Tinkers to Evers to Chance initiation of criminal process.

> FN4. Collins, who was under the orders of his private employers to accuse petitioners of trespass, did so in his public capacity. This is reflected in the "Application for Warrant by Police Officer" (R. A), filed by Collins on his tavern allegation "that be is a deputy sheriff ... and aa such ... did observe" the alleged offense, and in the State Warrants (R. B, C) reciting that "complaint hath been made upon the information and oath of Lieutenant Collins, Deputy Sheriff ..."
> While the court below points out (R. 82) that Collins might have filed his accusation in his private capacity, it is significant that he did not. Maryland employs an accusatory system in petty offenses based upon the discretionary authority of justices of the peace to arraign persons for trial upon complaint to them of an offense having been committed. Code Article 52, Sections 13 to 25. One who persuades a justice of the peace "in his discretion" (Art. 52, Sec. 23) to issue a state warrant, has procured the trial of the accused in the absence of further affirmative action to amend or dismiss the warrant, by the justice of the peace (Art. 52, Sec. 22) or the trial court (Art. 52, Sec. 13; in Montgomery County Art. 52, Sections 25 and 99). That the justice of the peace is influenced in the exercise of his discretionary accusatory power by the fact that a police official is the complainant, is indicated by his maintenance of a separate form of "Application for Warrant by Police Officer" which, unlike the form used by private, applicants, requires no listing of other witnesses, is issued in part on the basis of unsworn verbal representations to the justice by the officer of the law, and on his oath that "as a member of the Montgomery County Police Department," he believes the accused guilty (R. A). In these circumstances, it cannot be said that in the exercise of the justice of the peace's discretionary power to accuse petitioners and thus to bring them to trial, it was inconsequential that the complaint made by Collins pursuant to his employers' orders, was in his official capacity as a police officer,

It could hardly be more obvious, we submit, that as regards enforcement of segregation there was absolutely no severance at any time between public and private authority at Glen Echo Park. The Park's policy of racial discrimination was at all times being administered and enforced by the State through Deputy Sheriff Collins and his colleagues. Here the State of Maryland was not merely enforcing racial dis-

crimination through prosecution in the courts, but was itself administering that discrimination on a day to day basis at the premises of the largest public amusement facility in the District of Columbia area. Cf. Pennsylvania v. Board of Trusts, 353 U.S. 230. Indeed, but for the State's ready support, the management might not have discriminated against the Negro patrons. Actually, shortly after that State support was challenged in the instant case and in a Federal suit filed by Negro patrons to bar further arrests at Glen Echo (Griffin v. Collins, Civil ***20** Action No. 12308, D. C. Md. (1960)), the Park abandoned its practice of segregation (see The Washington Post, March 15, 1961, p. 1, col. 2).

As this Court recently phrased the presently relevant principle in Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, (re-affirmed at the last term in Peterson v. Greenville, 373 U.S. 244) the equal protection clause comes into play when "to some significant extent the State in any of its manifestations has been found to have become involved" in private conduct abridging individual rights. The applicability of this rule is clear and direct where the State has loaned its badge of police authority to the private discriminator. Even less can Maryland lease its police badge for discriminatory use here than Delaware could lease its property for discriminatory use in Wilmington Parking.

Only this year, the Court decided Lombard v. Louisiana, 373 U.S. 267, which appears dispositive on the power of the state to lend its police authority to the maintenance of segregation at public premises. There the public assurances by the New Orleans Mayor and Police Chief to businessmen that police authority would assist in maintenance of segregation constituted impermissible state support to segregation. Surely an identical result must follow where, as in the present case, the State has not merely promised its police assistance to continued segregation but has actually deputized the proprietor in the daily enforcement of his segregation practice. [FN5]

> FN5. The court below, found Deputy Sheriff Collins' involvement in administering segregation at Glen Echo no different than that of a regular police officer casually called upon for assistance by management (R. 82). While in our view the Constitution precludes either type of police involvement in administering racial segregation at public accommodations, it must be noted that the two situations are not identical. Unlike the policeman requested to make an arrest for trespass, the police power here was under the pay and control of the private management which ordered Deputy Sheriff Collins to administer its discriminatory policy (R. 16). In this commingling of public and private powers at Glen Echo, there was irretrievably surrendered the integrity ordinarily attaching to the policeman's badge. It seems clear (cf. Steele v. Louisville & Nashville R. Co., 323 U.S. 192; Marsh v. Alabama, 326 U.S. 501) that the loan of the State's police badge is accompanied by a constitutional prohibition on its use for the enforcement of racial practices.

***21** (3) The foregoing considerations, we submit, permit no other resolution of this case than a reversal of the convictions against petitioners. In the deputizing of the private discriminator and in enforcement of discrimination through arrest, prosecution and conviction of Negroes who peaceably sought service, the State has

transgressed the guarantee of equal protection as defined and applied in this Court's decisions in Shelley, Barrows, Wilmington Parking, and Lombard. yet there remain certain questions posed during the oral arguments at the last term about the meaning and effect of the result for which we contend. In particular, it has been suggested, first, that the owner of a business has an inherent proprietary right of "privacy" from Negro customers, which right the State may properly safeguard and preserve; and, second, that if proprietors may continue to discriminate only without the help of the state, then a dangerous condition of forcible self-help would arise in the "no man's land" where the state neither protects nor proscribes discriminatory conduct. We turn to a brief examination of these issues. [FN6]

> FN6. A related point which has been suggested daring the arguments is that the State's action in convicting petitioners of trespass is "neutral" within the contemplation of the Fourteenth Amendment, since the State courts in applying the law of trespass to petitioners were not racially motivated. But in Shelley (334 U.S. 1, 22) this Court rejected the identical argument on the ground that "the power of the State to create and enforce property interest must be exercised within the boundaries defined by the Fourteenth. Amendment." In Point II of the argument, we examine at more length the postulate underlying the "neutrality" contention, that the Fourteenth Amendment reaches only the racial misfeasance of the State and provides no affirmative obligation upon the State to protect the Negro public in its enjoyment of public services and accommodations. We urge there that there is in fact no "right" to discriminate in the public domain amenable to "neutral" protection by the substantive law of the State (see infra, pp. 27 to 32).

***22** (a) Protection of Proprietary Privacy. It is argued that a right of privacy and racial exclusion inheres in the operator of a public business, which "right" the State has a legitimate interest to safeguard and preserve. But this case does not involve the privacy of the home, or of premises at which the owner has sought to bar the presence of the public at large. Far from seeking privacy, Glen Echo Park is open to and caters to the trade of the public. This Court has had occasion to emphasize precisely this distinction. In Marsh v. Alabama, 326 U.S. 501, the Court ruled that the exertion of state criminal authority on behalf of a proprietor's restriction on the liberties of a member of the general public on his premises was precluded by the Fourteenth Amendment. As the Court pointed out (at 505-506): "The State urges in effect that the corporation's right to control the inhabitants of Chickasaw ix coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. 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." And in Public Utilities Com'n v. Pollak, 343 U.S. 451, 464, the Court dismissed the contention that the Constitution secures to a passenger on a public vehicle "a right of privacy substantially equal to the privacy to which he is entitled in his own home." Privacy, said the Court, "is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance."

***23** This Court has long recognized the attenuation of personal and proprietary privacy when asserted in areas of public interest and concern. Thus, the proprietor of an apartment house, but not the proprietor of a town, can exclude leaflet distributors from privately owned premises. Compare Hall v. Commonwealth, 335 U.S. 875 with Marsh v. Alabama, 326 U.S. 501. Similarly, the city can protect the citizen's privacy in his living room, but not on the public street. Compare Breard v. Alexandria, 341 U.S. 622 With Cantwell v. Connecticut, 310 U.S. 296. Private ownership of premises is not dispositive on the right to exclude unwanted and trespassing union organizers. Republic Aviation Corp. v. NLRB, 324 U.S. 793. The right to privacy and association must yield when the association wields quasi-public functions. Compare James v. Marinship Corp., 25 Cal. 2d 721, 155 P. 2d 329, with Ross v. Ebert, 275 Wisc. 523, 82 N.W. 2d 315. See also Terry v. Adams, 345 U.S. 461.

Glen Echo Park is a licensed business enterprise owned and operated by corporations chartered by the State of Maryland. It caters to the general public as the major amusement park in the District of Columbia area and none of its numerous advertisements through various means of public communication reflected any discrimination against Negro members of the public and no signs around the Park proclaimed any restriction upon the custom of Negro patrons. These factors underline the critical consideration in the instant case that the State's power has been invoked to enforce not personal privacy but public discrimination - to assist a business catering to the general public in its refusal of service to Negro members of that public. But he who seeks privacy must practice privacy. To the argument that rights of "privacy" must be given predominant standing here, the simple answer is that there is no privacy to be protected in a place of public accommodation ***24** catering to thousands of amusement-seekers.

Whether and to what extent the state may enforce racial discrimination at premises which the owner has not opened to public use is a question not now necessary for decision. In that situation Constitutional rights of private possession and use might be invoked as the justification for the state's protective activism. See Henkin, Shelley v. Kraemer, Notes for a Revised Opinion, 110 Pa. Law Review 473. But here where the proprietor practices no privacy, it is clear that the only interest which the State's criminal action can be said to vindicate is in maintenance of segregation at public accommodations, and such an interest cannot survive the Fourteenth Amendment's stricture of equal protection. [FN7]

> FN7. Far from dealing with a property-owner seeking privacy, here we have a state-licensed enterprise of public accommodation which has been the beneficiary of state support in its discrimination. Thus it would hardly be argued that a state may license public accommodations expressly to serve the white public. Yet, while the State's license here may in form be neutral, when the State through its courts enforces racial segregation at the licensed premises, then in effect the State has licensed and authorized an enterprise to provide accommodations to the white public alone.
> This the State clearly may not do. As Mr. Justice Douglas stated in his concreting opinion in Garner v. Louisiana, 368 U.S. 157, 184: "I do not believe that a State that licenses a business can license it to serve only whites or

> only blacks or only yellows or only browns. Race is an impermissible classification when it comes to parks or other municipal facilities by reason of the Equal Protection Clause of the Fourteenth Amendment. By the same token, I do not see how a State can constitutionally exercise its licensing power over business either in terms or in effect to segregate the races in the licensed premises. The authority to license a business for public use is derived from the public. Negroes are as much a part of that public as the whites. A municipality granting a license to operate a business for the public represents Negroes as well as all other races who live there. A license to establish a restaurant is a license to establish a public facility and necessarily imports, in law, equality of use for all members of the public."

(b) Segregation By Forcible Self-Help. To the suggestion that the prohibition of state support to segregation at public accommodations would create a dangerous no man's land, where serf-help would replace law and ***25** order, there are at least two answers. Actually, it may Joe that proprietors of public accommodations have no right to discriminate against Negroes, even without the active assistance of the state - this is the issue to which the second point of this brief (infra, pp. 27 to 41) is addressed. Here we would merely note that there is a serious Constitutional question whether the state may either enforce or permit racial segregation at accommodations licensed for or catering to the general public.

In any event, the public record of recent years demonstrates the unlikelihood of self-help as a means for perpetuating the discrimination which proprietors have heretofore practiced with the assurance of the state's ready assistance. It is not the habit of proprietors seeking the trade of the public to engage in the dirty business of self-help ousters of Negroes seeking to give their patronage; rather they rely upon police forces to oblige in the enforcement of the "unwritten law." The recent wholesale abandonment of racial practices of the business community in many Southern localities, demonstrates that these practices are less the product of public attitudes or business necessity than the vestigial remains of former conditions, succored by the willingness of public authorities to enforce segregation. There is every reason to believe that the removal of state support for discrimination will insure the demise of segregation in public accommodations.

Prior to the first sit-in of February, 1960, lunch counters throughout the South denied normal service to Negroes. Six months later, lunch counters in sixty-nine cities had abandoned discriminatory practices (The New York Times, August 11, 1960, p. 14, col. 5); by October of 1960, the number of recently desegregated municipalities had mounted to more than one hundred (The New York Times, Oct. 18, ***26** 1960, p. 47, col. 5). During 1961 and 1962, desegregation steadily continued, [FN8] and in 1963 wholesale abandonment of segregation has been the national pattern. [FN9]

> FN8. See e.g. The New York Times, Feb. 7, 1962, p. 40, col. 5 (Memphis); The Washington Post, April 9, 1962, p. 5, col. 2 (Houston); The Washington Post, Sept. 13, 1962, p. 18, col. 1 (New Orleans).

> FN9. See The Washington Post, July 19, 1963, p. 4.

In the instant case, no possible difficulty could arise from this Court's invalidation of State support for segregation at Glen Echo. [FN10] After these cases were tried, the Park abandoned its prior racial practices in 1961 (see The Washington Post, March 15, 1961, p. 1, col. 2); Montgomery County adopted a public places law (Ordinance 4-120, adopted by County Council, January 16, 1962), and recently so did the Maryland Legislature. See 8 R.R.L.R. 268. Unquestionably, an element in the management's abandonment of discrimination was petitioners' challenge to the State's enforcement of discrimination. The national evidence equally demonstrates that state enforcement alone provides the essential buttress for continued racial discrimination at places of public accommodation.

FN10. As the trial judge himself observed (R. 74):
"If the Court of Appeals of Maryland decides that a negro has the same right to use private property as was decided in the school cases, as to State or Government property, or if the Supreme Court of the United States so decides, you will find that the places of business in this County will accept that decision, in the same manner, and in the same way that public authorities and the people of the County did in the School Board decision ...."

****

The Fourteenth Amendment does not permit the State of Maryland to utilize its police powers of enforcement, arrest, accusation and prosecution and its judicial powers of trial and conviction to administer and effectuate racial discrimination at a facility catering to the general public. The quantum of state action here far exceeds that which this ***27** Court found adequate to bring into play the equal protection clause in earlier cases. We submit that under the Fourteenth Amendment Maryland cannot convict Negro youngsters of criminal trespass merely because they have sought to ride the merry-go-round in a place of public accommodation. [FN11]

FN11. State criminal statutes, particularly where First Amendment rights might be unduly impeded by uncertainty in the ambit of the state's proscription of conduct, must avoid vagueness in the definition of a criminal act. Lanzetta v. New Jersey, 306 U.S. 451; Cantwell v. Connecticut, 310 U.S. 296; Winters v. New York, 333 U.S. 507; Smith v. California, 361 U.S. 147; Edwards v. South Carolina, 372 U.S. 299; Wright v. Georgia, 373 U.S. 284. The enforcement of this Maryland criminal trespass statute against these petitioners runs counter to these precedents, for it subjects petitioners to punishment without adequate prior notice that their conduct transgressed the State's criminal proscription. The statute forbids "entering or crossing over" private property after notification not to do so. The Maryland Court of Appeals found the statute applicable to petitioners, who were warned off the property only when actually sitting on the carousel in making their First Amendment protest. While the court below deemed petitioners' failure to leave the premises synonymous with "entering or crossing over" the premises, its sole authority for such a construction was a recent North Carolina Supreme Court ruling (R. 80). Certainly, in the absence of a prior Maryland construction of this criminal trespass statute, the "entering or crossing over" language was not adequate warning to sustain punishment of persons making peaceable public protest simply by

remaining on an amusement concession for which they had tickets of admission.

II

Under the Equal Protection Clause, the State Can Neither Recognize, Countenance, Nor Protect a "Right" of Discrimination Against Negroes at Public Accommodations.

The argument in the previous section has examined State involvement on the general premise that the equal protection clause is invoked by forms of active State conduct which sanction, compel, or enforce discrimination. Most of the Fourteenth Amendment racial cases which have come before this Court have in fact involved volitional ***28** and active governmental support to discrimination as such; there have been few occasions for resolving the impact of the Fourteenth Amendment where the state does not compel but merely tolerates discrimination. Some have accordingly come to view equal protection as a guarantee only against the racial misfeasance of the state. Thus, the court below assumed that no constitutional question arises merely from the state's acceptance and recognition of a "lawful policy of segregation" at a place of public accommodation - and having postulated a "right" of discrimination, it found no fault with Maryland's vindication of that right through criminal trespass sanctions. In the previous analysis, we have accepted arguendo the premise entertained by the court below that proprietors have a right to discriminate at public accommodations, and have urged that nevertheless the State may lend no enforcement to the exercise of such a right. Here we urge that the premised "right" to discriminate at public accommodations is itself erroneous - that the State cannot create or recognize a right to discriminate against the Negro public, and that accordingly there is no "right" for the State's criminal law to vindicate. [FN12]

FN12. What is relevant here as a constitutional defense to Marland's criminal prosecution is that the owner of a public accommodation has no "right" to discriminate against Negroes and in the absence of such a "right" there is no legitimate predicate for the State's criminal action against Negroes who seek service. It is our view, as we develop herein, that the same considerations which make it a violation of the Constitution for the State to recognize a proprietor's "right" to discriminate, also give the Negro an affirmative "right" to service at public accommodations. The Constitution, we submit, not only permits Negro members of the public to sit on the carousel free of State interference, but also requires the State to assure them equal access and service at such accommodations.

(1) Is it truly the law that equal protection proscribes only state enforcement of racial discrimination? Does the guarantee of "equal protection " import no affirmative obligation of the state to assure non-discriminatory treatment ***29** in any of the areas of public life where the State is otherwise intimately concerned and involved? If proprietors have the "right" to discriminate against Negroes at public accommodations, is it not the substantive state law from which that right is derived, and if so, may a state create and recognize a proprietary right to discriminate in a public calling and in the public domain?

This Court's 1883 decision in the Civil Rights Cases, 109 U.S. 3, first gave rise

to the assumption that the Fourteenth Amendment concerns itself only with the active misfeasance of the state in matters of race, and not with its nonfeasance. The language of this Court's ruling has been taken to mean that persons may engage in racial discrimination in the operation of public accommodations, and that the Fourteenth Amendment does not require the state to Concern itself with such conduct. Aatually, closer reading of the Civil Rights Cases decision indicates that more has been attributed to its holding than it contained. For this Court held only that that Congress had exceeded the ambit of the Fourteenth Amendment in legislation which spoke directly to the proprietors of accommodations, without directing itself in any way to the intermediate Fourteenth Amendment responsibility of the state. Certainly, there was not then before the Court the question whether the Fourteenth Amendment is breached when a state has failed to protect the Negro from discrimination in access to public accommodations. On the contrary, the Court took pains to point out (pp. 19, 21) that the case was resolved "on the assumption that a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement, is one Of the essential rights of the citizen which no State can abridge or interfere with," and that the Court was not presented with the issue whether denial of equal service at such establishments ***30** "might not be a denial of a right which, if sanctioned by the state law, would be obnoxious to the prohibitions of the Fourteenth Amendment."

Notwithstanding the narrow holding of its 1883 ruling, the language of the majority in the Civil Rights Cases, which gave pre-emptive emphasis to the consideration that an accommodation is privately owned, has fostered through succeeding years the assumption that equal protection begins and ends with an active state command in favor of discrimination, and does not, even in areas of public interest and concern, reach mere tolerance of racism by the law of the state. But in the early 1940s the "misfeasance" theory began to show its inadequacy. In the adjudication of a line of racial primary cases culminating in the ruling in Terry v. Adams, 345 U. S. 461, this Court held that the Fourteenth Amendment reaches "private" discrimination by those who exercise authority from the state or in the area of the state's direct concern. As the Court recently explained in its Wilmington Parking decision, there are circumstances where by reason of the confluence of governmental and private authority (cf. Marsh v. Alabama, 326 U. S. 501), the affirmative obligation devolves upon the state to assure equality of treatment regardless of race. Concerning the practice of discrimination at a state-connected public accommodation, this Court referred to the responsibility of the State to assure non-discrimination at the premises, and stated that "no state may effectively abdicate" such responsibilities, either by "ignoring them or by merely failing to discharge them whatever the motive may be" (365 U. S. at 725). These authorities indicate that this Court has already recognized that the State may transgress the obligation of equal protection by its mere countenancing of discrimination in areas of public concern.

***31** (2) Indeed, we submit that this Court's rulings in Shelley and Barrows necessarily reflect the concept of the Fourteenth Amendment as a guarantee against tolerance by state substantive law of racial discrimination, whether practiced by Government or private citizenry. As this Court expressly stated in Shelley, the Fourteenth Amendment inhibits in the area of race "the power of the State to create and enforce

property interests." Under this view, the state may neither create, enforce, recognize, nor tolerate a "right" to discriminate in the public domain. Neither common law nor statute can be constitutionally applied in a manner which would validate racial discrimination. Whether by statute or judicial ruling, the application or enforcement of state law, - contract, tort, property or statutory crime of trespass - in a manner which would deprive a person solely because of race of rights or privileges enjoyed by other persons, is "state action" which violates the Fourteenth Amendment.

As thus seen, the true significance of Shelley is not its proscription on state enforcement of a supposed "right" to discriminate. Rather, it is grounded on the view that the Fourteenth Amendment speaks no less to the state's substantive law of rights and duties than to affirmative state commandments in favor of segregation. With the exception of those areas of private right such as the home, which are constitutionally precluded from government intrusion (see. Henkin, Shelley v. Kraemer, Notes for a Revised Opinion, 110. Pa. Law Review 473), state law which recognizes and gives standing to a "right to discriminate" on the basis of race, offends the equal protection guarantee. This, in our view, is the answer to the question voiced by Mr. Justice Black at the arguments last year, whether if proprietors have a right to discriminate at their establishments the state is precluded from giving ***32** them protection in that right. The Constitution precludes the state not only from enforcing a right to discriminate, but equally from creating or recognizing such a right in the public domain. An individual need not hold himself out to serve the general public, but, if he does, the State under the Fourteenth Amendment may not recognize his "right" to exclude from his offer to serve the public any part thereof solely on grounds of race.

(3) But even in the absence of the suggested assimilation of the state's law of substantive rights to the concept of "state action," we would urge that with respect to the service of Negroes at places of public accommodation the state is so intimately concerned that it can neither compel nor permit racial discrimination. Those who operate accommodations catering to the public must, in our view, be charged by the state with the minimal trust of serving the public without racial discrimination. In Garner v. Louisiana, 368 U.S. 157, 176 (see also Lombard v. Louisiana 373 U.S. 267), Mr. Justice Douglas in a concurring opinion, pointed to the intimate contacts between the state and a restaurant authorized to cater to the general public. He concluded (p. 182) that "those who run a retail establishment under permit from a municipality operate, in my view, a public facility in which there can be no more discrimination based on race than is constitutionally permissible in the more customary types of public facility." We submit that no other conclusion can properly be reached, and that if the Court should review the question, it must rule that Maryland cannot permit Glen Echo to discriminate against petitioners because of their color and refuse them service at its premises.

The constitutional mandate for applying equal protection guarantees to places of public accommodation, was ***33** brilliantly set forth eighty years ago in Justice Harlan's historic dissent in the Civil Rights Cases, 109 U.S. 3. A review of the status of such establishments under law and in the social order led Justice Harlan to the

view that the moving purpose of the Emancipation Amendments would be subverted were their ambit to exclude carriers, inns and similar public accommodations:

"In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and functions, to governmental regulation. It seems to me that, within the principle settled in Ex parte Virginia, a denial, by these instrumentalities of the State, to the citizen, because of his race, of that equality of civil rights secured to him by law, is a denial by the State, within the meaning of the Fourteenth Amendment. If it be not, then that race is left, in respect of the civil rights in question, practically at the mercy of corporations and individuals wielding power under the States" (109 U.S. 3, 58-59).

Justice Harlan's broad concept of the Fourteenth Amendment is. not dissimilar from that evidenced by the more recent decisions of this Court. Beginning with the landmark voter discrimination cases (Nixon v. Herndon, 273 U.S. 536; Nixon v. Condon, 286 U.S. 73; Smith v. Allwright, 321 U.S. 649) and going on through Steele v. Louisville & Nashville R. Co., 323 U.S. 192, and a series of subsequent rulings, this Court has applied the rule that When government has its "thumb on the scales," private conduct ***34** may become infused with the requirement of equal treatment. Such infusion has been found by the Court in areas of contracts (Steele, supra; Shelley, supra), transportation (Henderson v. United States, 339 U.S. 816), education (Pennsylvania v. Board of Trusts, 353 U.S. 230; and see Cooper v. Aaron, 358 U.S. 1, 19) and most recently in the case of a state-assisted public accommodation (Burton v. Wilmington Parking Authority, 365 U.S. 715). In the case last named, the Court warned that the equal protection requirement would apply when "the State in any of its manifestations has been found to have become, involved" with a private enterprise engaging in racial practices.

(4) In the present more refined formulation of the degree of state action necessary to bring "private action" within the reach of the Fourteenth Amendment, we respectfully submit that the State in many of its manifestations is indeed involved in public accommodations. Current analysis likewise demonstrates that the State is intimately involved in public accommodations, which are licensed to perform valued public services upon a showing of capacity to serve the public interest, and are governmentally regulated and supported to further the serious public concern in the availability of the services provided. This is illustrated by a brief review of the applicable statutes of Maryland respecting the operation of an establishment such as Glen Echo Park:

(i) License. Under Section 15-7 of the Montgomery County Code (1960), it is made "unlawful for any person to hold in the county any picnic, dance, soiree or other entertainment for gain or profit to which the general public are admitted," without first having obtained a permit or license. By Section 15-8, the County Council is empowered to issue such permit or license upon payment of a reasonable fee, and to adopt "such rules and regulations in connection with such permit, license and fee as ***35** are necessary to protect the public health, safety and welfare." By Section

15-11, the Council is empowered to "inspect, license, regulate or limit as to location within the limits of the county any place of public amusement, or recreation ... and in order to safeguard the public health, safety, morals and welfare, to pass rules, regulations or ordinances ..."

In Chapter 75 of the Montgomery County Code the Council has promulgated specific regulations (in addition to general rules applicable to matters such as health, fire and sanitation) relative to the licensing and operation of amusement parks, theatres, dance halls, restaurants, cafes, inns, taverns, public swimming pools, etc. These rules prescribe the hours of operation (Section 75-1, 75-2) and other detailed matters. Operation without a license of "amusement parks operated for profit" (Section 75-9) is forbidden (Section 75-5, 75-16). Licenses are issuable by the Director of the Department of Inspection and Licenses (Section 75-6) two weeks after a copy of the application has been published in a newspaper of general circulation (Section 75-7). But no amusement park license may be granted until the park submits proof "of sufficient financial responsibility or adequate liability insurance coverage, to protect the public using the park" (Section 75-9). Payment of the license fee "entitles the operator of the amusement park" to operate all amusement devices not prohibited by law (Section 75-9). In these licensing and inspection requirements for the protection of the public interest and welfare, the State has manifested its high concern regarding the operation of the amusement accommodations involved. But even after the issuance of the State's approval for the operation of the establishment, continuing State concern is reflected in the system of regulation in the public interest.

***36** (ii) Regulation. Licenses issued expire within one year (Section 75- 10). They may be denied, revoked or suspended if the enterprise "constitutes a detriment, is injurious to, or is against the interests of, the public health, safety, morals or welfare" (Section 75-11). While hearings are provided in cases of revocation and suspension, there is specific authority for the summary closing of the premises to prevent manifest nuisance or danger (Section 75-13). The Counts reserves its rights of visitation and inspection at the premises (Section 75-15). In these ways, by continual vigilance and inspection, the State further demonstrates its concern for the public interest in the operation of the public accommodation involved.

(iii) Support. In the creation and operation of its enterprise, the amusement facility also receives a variety of significant governmental supports. The State first gives it corporate existence and recognition, permitting it to exercise the attributes of a natural person with the privilege of limited liability. Then, with the grant of a permit to operate a public business, the State authorizes the facility to cater and advertise to the general public.

But the State's support does not end with the issuance of corporate charters and public licenses. In a myriad of ways governments provide assistance to public accommodations. Special supports are made available through urban renewal, fair trade protections, anti-trust laws, tax benefits and the like. And assistance is given by outright subsidies and supportive services of Departments of Commerce and Labor. Then, too, there is the vast area of local government assistance - the special zon-

ing and license dispensations, the police protections, and the many daily manifestations of local concern for adequate public facilities. Thus, Glen Echo Park is reached by two public highways paved and repaved from public funds; large numbers ***37** of private cars in and out of the Park create traffic congestion which must be handled by State, local, and Park Police; the Park's thrill rides and attendant noises exist only by relaxation of State laws relating to public nuisances; and, of course, this entire case arises from the action of a State-deputized private employee of the Park. These varying measures of governmental assistance once more demonstrate the State's consciousness of the public interest involved - the enterprise may be privately owned but the interest served is public and receives the active supportive energies of government.

(5) In view of these manifold contacts just reviewed, can it possibly be said that the State has not "become involved" in the operation of public accommodations licensed, regulated, and supported by its agencies? We submit that the points of State involvement are too many and too intimate to allow an affirmative answer in the light of twentieth century relationships between government and public enterprise. Cf. Public Utilities Com'n v. Pollak, 343 U.S. 451, 462. [FN13] But as important as their "state involvement" aspect, these contacts also express the State's recognition of the constitutionally relevant fact that public accommodations are clothed with a vital public interest. Once that fact be recognized, as urged by Justice Harlan in 1883, ***38** then vital constitutional principles come into play - those which this Court emphasized in a line of adjudications foreshadowed in Munn v. Illinois, 94 U.S. 113, and brought to full standing in Nebbia v. New York, 291 U.S. 502, and succeeding due process rulings. In the resulting test of government controls against the guarantees of due process, this Court's inquiry no longer ends with the discovery that the enterprise is private, but proceeds on to the question whether the public interest warrants the restraint imposed. This Court has thus definitively accepted Mr. Justice Holmes' view (Lochner v. New York, 198 U.S. 45, 75) that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." The "laissez faire" concept which underlay this Court's 1883 refusal to give necessary scope to the Fourteenth Amendment's guarantee of equal protection, cannot today remain dispositive of the pending question.

> FN13. That the community interest is intimately involved in the service of the citizens at public accommodations is evidenced by the common law of inkeepers, more particularly defined today in the laws of some thirty states which prohibit racial discrimination at public places. Moreover, Southern states have also evidenced their concern with access to service at public accommodations, through the variety of segregation laws in force since the latter part of the last century, which defined the basis for serving the Negro and white public at such establishments. Recently, Maryland enacted a public accommodations law which reverses the former legislative commandments of segregation. See 8 R.R.L.R. 268. Both in the former code of segregation and in the present law of integration, Maryland confesses the State's intimate concern with public access to services and accommodations catering to the custom of the public.

No reason appears why this Court should decline to give controlling significance in

equal protection cases to the public interest consideration it finds dispositive in economic due process cases. [FN14] Considerations of the highest order of public interest are involved in the availability of public services and accommodatios without discrimination or segregation - their magnitude is measured by the cataclysmic struggle in which they were forged and the great Emancipation Amendments in which they are enshrined. Yet as long as these guarantees are thought to permit the wholesale denial to Negroes of public accommodations and the amenities of daily life which they provide, the Amendments remain, in Justice Harlan's prophetic words, merely "splendid baubles." One hundred years after Emancipation ***39** there is presented in America the spectacle of apartheid communities where Negro citizens are neither truly free nor nearly equal. True, commendable progress is being made to render them free and equal "before the law"; but the effort at true emancipation cannot succeed while great public enterprises operating with the license, approval, assistance and control of the state, remain beyond the constitutional obligation to afford Negro citizens equal participation in the life of the community.

FN14. Cf. St. Antoine, Private Racial Discrimination, 59 Mich. L. Rev. 993, 1008-1016.

(6) Plessy and the Civil Rights Cases are twin rulings born in an era of retreat from the guarantees of the Emancipation Amendments following the famous Hayes-Tilden political compromise of 1877. [FN15] After decades of damage to the moving purpose of those guarantees, this Court was induced to abandon the "separate but equal" doctrine, to restore the integrity of governmental involvement in public schooling and to remove a major obstacle to the achievement of a desegregated society. As history has proved Justice Harlan correct in Plessy, it has also corroborated his forebodings in the Civil Rights Cases about a ruling ***40** which, under the guise of "proprietors' rights", bad the effect of carving from the promise of equal protection the area of public life dominated by "corporations and individuals wielding power under the States" to supply public services and accommodations.

FN15. A leading scholar of the post-Civil War history, Professor C. Vann Woodward, has noted the relationship of the 1883 ruling in the Civil Rights Cases to the 1877 compromise:
"So far as the historical Negro question was concerned, the Compromise of 1877 proved to be a more lasting settlement that had the Compromise of 1850 and those that preceded it. The earlier settlements had bee-n superseded or repudiated in relatively short order. There were no serious infringements of the basic agreements of 1877 - those regarding intervention by force, respect for state rights, and the renunciation of Federal responsibility for the protection of the Negro. In 1883 the Supreme Court pronounced the Civil Rights Act unconstitutional. The decision constituted a sort of validation of the Compromise of 1877, and it was appropriate that it should have been written by Justice Joseph P. Bradley, the Fifth Judge' of the Electoral Commission."
Woodward, Reunion and Reaction, The Compromise of 1877 and the End of Reconstruction (1951), 245.

Public segregation in the United States is the stepchild of the pre-Civil War

slavery and the post-Civil War segregation laws. It has been fostered and maintained through a consistent and total interplay between those in the real community who hold commercial and economic power and elements of the political community of the states (legislatures, courts, executive officials and particularly the police). As Mr. Justice Douglas pointed out in his concurrence in Lombard v. Louisiana, 373 U.S. 267, a society which permits exclusion of Negroes at its establishments of public accommodation, and indeed lends its legal sanctions to such exclusion, is practicing apartheid no less than the State which directly decrees and compels segregation in public life. Certainly, the framers of the Emancipation Amendments did not anticipate a century of segregation of Negroes from equal participation in community life. [FN16] Yet that has been the history following this ***41** Court's 1883 ruling exempting from the reach of the 14th Amendment the private proprietor trading in the public domain.

> FN16. This point was aptly put by Senator Sumner during the debate on an 1871 Civil Rights Act amendment. Senator Sumner stated:
> "Each person, whether Senator or citizen, is always free to choose who shall he his friend, his associate, his guest. And does not the ancient proverb declare that a man is known by the company he keeps? But this assumes that he may choose for himself. His house is his 'castle'; and this very designation, borrowed from the common law, shows his absolute independence within its walls; nor is there any difference, whether it be palace or hovel; but when he leaves his 'castle' and goes abroad, this independence is at an end. He walks the streets; but he is subject to the prevailing law of Equality; nor can he appropriate the sidewalk to his own exclusive use, driving into the gutter all whose skin is less white than his own. But nobody pretends that Equality on the highway, whether on pavement or sidewalk, is a question of society. And, permit me to say, that Equality in all institutions created or regulated by law, is as little a question of society." Cong. Globe. 42nd Cong., 2d Sess., 382.

Today the moving purposes of the Emancipation Amendments are yet to be fulfilled, while Negro Americans remain social outcasts in the economic and public life of their localities, relegated to the back of the bus in their ride to work and the back alley in their search for lunch hour refreshment. The default on a profound constitutional promise which these realities expose to view, compels a reappraisal of concepts which define equal protection so narrowly as to rob it of its vitality. Such a reappraisal points inexorably to the conclusion that state law cannot tolerate and accordingly cannot enforce racial segregation at places of public accommodation.

***42** Conclusion

For the reasons herein set forth, the judgment below should be reversed with instructions to dismiss the proceedings against petitioners.

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Briefs and Other Related Documents **(Back to top)**

• 1963 WL 105774 (Appellate Brief) Brief for the United States as Amicus Curiae (Oct. Term 1963)

• 1963 WL 105775 (Appellate Brief) Brief of Respondent (Sep. 25, 1963)

• 1962 WL 115281 (Appellate Brief) Brief of Respondent (Oct. 22, 1962)

• 1962 WL 115637 (Appellate Brief) Brief for the United States as Amicus Curiae (Oct. 15, 1962)

• 1962 WL 115280 (Appellate Brief) Brief for Petitioners (Sep. 19, 1962)

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